

## Changes to AIA Contract Documents: What Construction Lawyers Need to Know

New Insurance and Bonds Exhibit, Owner-Contractor Documents,  
Owner-Architect Agreements, and More

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Today's faculty features:

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# **2017 CHANGES TO AIA CONTRACT DOCUMENTS: WHAT CONSTRUCTION LAWYERS NEED TO KNOW**

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# GENERAL COMMENTS

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- Rearrangements to the text of the AIA Contract Documents.
- Clarification and re-wording.
- Grammar and cleanup.
- “Selection” rather than “specification.”
- More detailed outline style.
- All references herein are to 2017 versions unless otherwise noted.

# A101-2017

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- Agreement between Owner and Contractor utilizing stipulated sum as basis for payment.
- Article 3: Date of Commencement and Substantial Completion
  - § 3.3.2 potentially provides greater clarity as to the use of differing substantial completion dates for separate portions of work.
- Article 4: Contract Sum
  - § 4.6 contemplates potential provisions for bonuses and incentives.
- Article 5: Payments
  - § 5.1.4 deletes language contemplating potential Architect objection to use of schedule of values for purposes of reviewing Contractor Applications for Payment.
  - In general, § 5.1.6 contains clearer breakdown of how the amount of each progress payment is to be calculated.
  - § 5.1.6.2.3: Reducing each progress payment by “[a]ny amount for which the Contractor does not intend to pay a Subcontractor or material supplier, unless the Work has been performed by others the Contractor intends to pay.”
  - § 5.1.7: Specification of retainage rate and items not subject to retainage.

# A101-2017 (CONT.)

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- Article 7: Termination or Suspension
  - § 7.1.1 establishes the termination fee in the event of termination for convenience by the Owner, which is governed by Article 14 of A201-2017 (General Conditions).
- Article 8: Miscellaneous
  - § 8.5 provides for insurance and bonding requirements by reference to A101-2017 Exhibit A, rather than by reference to the General Conditions of the contract.
  - Article 10 of the A101-2007 (“Insurance and Bonds”) has been deleted in its entirety.
  - § 8.6 contemplates the possibility of the use of electronic notice in accordance with E203-2013 (or as otherwise agreed to by the parties). Note that Article 9 (“Enumeration of Contract Documents”) integrates a completed E203-2013.

# A102-2017

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- Agreement between Owner and Contractor Utilizing “Cost Plus” with a GMP.
- Article 4: Date of Commencement and Substantial Completion
  - § 4.3.2 potentially provides greater clarity as to the use of differing substantial completion dates for separate portions of work.
- Article 5: Contract Sum
  - § 5.1.7 contemplates potential provisions for bonuses, cost savings, and other incentives.
  - § 5.2.2.2 allows the parties to include conditional alternates in calculating the GMP.
  - § 5.2.6 requires the Owner to authorize preparation of revisions to the Contract Documents that incorporate specified alternates, and imposes a duty upon the Contractor to advise of any inconsistencies.

# A102-2017 (CONT.)

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- Article 7: Costs to be Reimbursed
  - § 7.2.2.1 makes it more clear that wages of supervisory and administrative personnel are reimbursable to the Contractor even when located off-site, but reimbursable activities / percentage of time devoted to the project must still be listed.
  - § 7.2.5: agreed-upon labor costs are to remain unchanged for the duration of the Agreement, absent a written modification.
  - § 7.4.1: clarifies that reimbursable storage costs are specifically for storage on site.
  - § 7.5.2: transporting, installing, dismantling, performing minor repairs to, and removing certain rentals.
  - § 7.6.1.2: obtaining *captive* insurance, with Owner's approval.
  - § 7.6.5.1 requires that in order to recoup costs of defending suits and paying legal judgments for infringement of patent rights arising from the requirements of the Contract Documents, the Contractor must not have had "reason to believe that the required design, process or product was an infringement of a copyright or a patent" and must not have "failed to promptly furnish such information to the Architect as required by Article 3 of AIA Document A201-2017."

# A102-2017 (CONT.)

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- Article 10: Subcontracts and Other Agreements
  - §10.1 now specifically provides that in no event is the Contractor relieved of its responsibilities under the Contract Documents by virtue of Architect advice under this Article or Owner approval or objections under this Article.
- Article 12: Payments
  - § 12.1.5.2: Recognizes that allocating the GMP across line items in the schedule of values does not result in a separate GMP for each line item.
  - § 12.1.5.3: Memorializes the Contractor's obligation to provide documentary support for allocating contingency costs to a particular line item.

# A102-2017 (CONT.)

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- Article 12 (Cont.)
  - § 12.1.7 contains a restructured breakdown of the manner of computing progress payments .
    - § 12.7.1.3: Increase amount of each progress payment by the “portion of Construction Change Directives that the Architect determines, in the Architect’s professional judgment, to be reasonably justified.”
    - § 12.1.7.2: Reduce amount of each progress payment by “[a]ny amount for which the Contractor does not intend to pay a Subcontractor or material supplier, unless the Work has been performed by others the Contractor intends to pay.”
  - § 12.1.8: Expanded retainage provision that breaks out what is and is not subject to retainage (§ 12.1.8.1) and provides for the potential reduction or limitation of retainage at a point prior to Substantial Completion (§ 12.1.8.2).
  - § 12.1.10: Limits Contractor’s ability to make advance payments for materials or equipment not delivered to site, unless Owner approves.
  - The section governing Final Payment, §12.2, has been reshuffled slightly but is substantively similar to the analogous section of A102-2007, except that §12.2 no longer presumes that an Owner audit of the Cost of the Work will take place.

# A102-2017 (CONT.)

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- Article 14: Termination or Suspension

- § 14.1.2, which sets forth the breakdown of the amount the Owner will pay the Contractor if the Contract is terminated for cause, has added to the calculus: “Subtract the costs and damages incurred, or to be incurred, by the Owner under Article 14 of AIA Document A201-2017.”
- § 14.1.3 contains a new clause addressing termination for convenience by the Owner, but leaves it to the parties to determine the fee to be paid to the Contractor.

- Article 15: Miscellaneous

- Refers to A102-2017 Exhibit A for insurance and bonding requirements.
- Provides the opportunity to incorporate E203-2013 in order to govern the giving of notices electronically.

- Article 16: Enumeration of Contract Documents

- More elaborate; lists AIA documents and provides blank sections for specifying drawings, specifications, addenda, etc.

# A103 -2017

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- Agreement between Owner and Contractor Utilizing Cost Plus Method Without a GMP.
- Article 4: Date of Commencement and Substantial Completion
  - § 4.3 potentially provides greater clarity as to the use of different substantial completion dates for separate portions of work.
- Article 5: Contract Sum
  - Similar to the A102-2017, § 5.2.6 requires the Owner to authorize preparations of revisions to the Contract Documents that incorporate the agreed-upon assumptions of the Cost Estimate, with the Contractor being responsible for advising of any inconsistencies.
- Article 7: Costs to be Reimbursed
  - Similar to the A102-2017, addresses:
    - Wages of off-site supervisory and administrative personnel (§ 7.2.2.1).
    - Labor costs over the duration of the Contract (§ 7.2.5).
    - Costs of transporting, installing, dismantling, performing minor repairs to, and removing certain facilities (§ 7.5.2).

# A103-2017 (CONT.)

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- Article 7 (Cont.)
  - Reimbursement of captive insurance costs (§ 7.6.1.2).
  - Provision against the reimbursement of costs related to patent infringement claims, where Contractor fails to exercise a certain level of due diligence (§ 7.6.5.1).
- Article 8: Costs Not to be Reimbursed
  - Certain discretionary payments now require Owner approval prior to reimbursement (§ 8.1.2)
- Article 10: Subcontracts and Other Agreements
  - Like the other A100 Series Agreements, now provides explicitly that any exercise by Owner or Architect of their rights under this Article will not relieve the Contractor of its duties.
  - § 10.3 requires the Contractor to prepare a procurement schedule for the Architect's review and the Owner's acceptance.
    - Contractor to expedite purchase of all materials that are necessary to have in hand before construction.
    - Contracts for materials procured by the Owner prior to the approval of the Cost Estimate are assigned to Contractor once the Cost Estimate is approved.

# A103-2017 (CONT.)

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- Article 12: Payments

- § 12.1.6: Similar changes to the provisions governing the calculation of each progress payment – including noteworthy substantive changes such as increase of payment by portion of CCDs deemed justified by the Architect, and reduction by amount that the Contractor does not intend to pay subcontractors.
- § 12.1.7: New retainage provisions: what is and is not subject to retainage, and when retainage can be reduced or limited.
- § 12.1.9: Limitation upon Contractor’s ability to make advances for materials or equipment that have not been delivered to and secured on site.
- § 12.2: Similar to other agreements, reshuffled but substantially-similar final payment procedure that no longer presumes the Owner will audit the Contractor’s accounting for the Cost of the Work.

- Article 14: Termination

- § 14.1.2, which sets forth the breakdown of the amount that the Owner will pay the Contractor if the Contract is terminated for cause, has added to the calculus: “Subtract the costs and damages incurred, or to be incurred, by the Owner under Article 14 of AIA Document A201-2017.”
- § 14.1.3: Parties to determine the termination for convenience fee.

# A104-2017

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- Abbreviated Agreement Between Owner and Contractor (formerly A107-2007).
- Article 2: Date of Commencement and Substantial Completion
  - Same changes to allow breaking out substantial completion dates by portion of work.
- Article 3: Contract Sum
  - § 3.4.3.6: GMP may include certain costs attributable to the development of the Contract Documents.
  - § 3.4.3.7: Owner is to authorize the preparation of revisions to Contract Documents incorporating agreed-upon assumptions in the GMP; Contractor is to advise of any inconsistencies (duplicated in § 15.2.5).
- Article 7: General Provisions
  - §§ 7.6 and 7.7 anticipate the use of E203-2013 to govern the use and transmission of digital data and the use of building information models.

# A104-2017 (CONT.)

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- Article 7 (Cont.)

- § 7.8: Severability clause.
- § 7.10: Provision establishing a relationship of “trust and confidence” in the event a “cost plus” method is used (with or without a GMP).

- Article 8: Owner

- § 8.1: Owner to supply reasonable evidence that it has made the financial arrangements that will allow it to perform its obligations.
- § 8.3: Architect approval necessary in order for Owner to take over the work and charge the Contractor for same.

- Article 9: Contractor

- § 9.9.3: When and under what conditions the Contractor is to perform architectural or engineering services – and the scaled-back role of the Architect where the Contractor takes on that role.

# A104-2017 (CONT.)

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- Article 13: Changes in the Work

- § 13.1: Added directive that Contractor proceed promptly with changes in the work.
- § 13.3: New language providing that when Contractor believes “minor changes” will affect Contract Sum or Contract Time, it shall notify the Architect and shall not proceed with the work.

- Article 15: Payments and Completion

- § 15.1.2: Stipulated sum or GMP not to constitute separate sum or GMP for each line item on the SOV.
- § 15.3: Specifically prohibits Contractor from requisitioning payment for portions of work for which Contractor does not intend to pay its subcontractors or suppliers.
- § 15.4.4: Authorizes claims where either party disputes Architect’s decision regarding a Certificate for Payment.
- § 15.5.4: Imposes D&I obligations upon the Contractor relative to lien claims and payment claims of lower tiers.

# A104-2017 (CONT.)

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- Article 17: Insurance and Bonds

- Overhauled section with expanded requirements for Contractor-procured coverages under §17.1, such as Workers Compensation, Employer's Liability, and, potentially, Professional Liability and Pollution Liability. In some cases coverage can be obtained through a combination of primary and excess/umbrella.
  - § 17.1.13 provides the Owner with the right to stop work due to a lapse in Contractor-provided coverage under certain circumstances.
- § 17.2 contains revised requirements for Owner-procured insurance.
  - Examples:
    - Property insurance on a replacement cost basis until substantial completion is achieved, then replaced with property insurance on a total value basis (versus keeping replacement cost basis through final payment).
    - All-risks property insurance, on a replacement cost basis, protecting existing structures that are being remodeled.
  - § 17.2.2.6: Under certain circumstances the Contractor may stop work due to a lapse in Owner-provided coverage.
- § 17.2.2.7.1: Revised waiver of subrogation provision. Policies procured by the parties need not contain a waiver clause; enough that the policies do not expressly prohibit waiving subrogation.

# A104-2017 (CONT.)

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- Article 21: Claims and Disputes

- § 21.2: Notices of Claims must be given in 21 days if the conditions giving rise to the Claim are discovered before the expiration of the period of work; no such restriction exists where said conditions are discovered after the work is completed.
- § 21.10: Contractor is expected to continue performance while claim is pending.

# A104 EXHIBIT A-2017

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- “Determination of the Cost of the Work.”
- Previously A107 Exhibit A-2007.
- Former Article A.1 (Control Estimate) moved to A104-2017.
- Article A.1: Costs to be Reimbursed
  - Off-site administrative and supervisory personnel (§ A.1.2.2.1).
  - Automatic freeze on agreed-upon labor rates (§ A.1.2.5).
  - Captive insurance costs (§ A.1.6.1.2).
  - Exception regarding costs of defending patent infringement claims, where Contractor failed to exercise certain due diligence (§ A.1.6.5.1).
- Article A.2: Costs Not to be Reimbursed
  - Discretionary payments of Contractor to subcontractors (§ A.2.1.2).
- Article A.4: Subcontracts and Other Agreements
  - Advice of Architect or approval/objection by Owner not to relieve Contractor of its contractual obligations (§ A.4.1).

# A105-2017

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- Short Form of Agreement Between Owner and Contractor.
- Article 3: Contract Sum
  - § 3.1: Contract Sum to include all items and services necessary for the proper execution and completion of work.
- Article 5: Insurance
  - § A.2.1.2 sets forth expanded requirements for Contractor-provided insurance, similar to A104-2017.
- Article 6: General Provisions
  - § 6.5 provides for notice by e-mail.
- Article 7: Owner
  - §7.1.13 requires Owner to furnish, at Contractor's request, reasonable evidence of financial arrangements that will allow it to fulfill its obligations.

# A105-2017 (CONT.)

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- Article 12: Payments and Completion

- § 12.3 has broken out more clearly the Architect's potential responses to the Contractor's request for payment.
  - Now includes, specifically, withholding a Certificate for Payment.
  - Contractor can, on seven days' notice, stop Work if the Architect does not respond to its Application for Payment after seven days (and, pursuant to § 16.1, the Contractor can terminate the Contract if work remains stopped for 14 days).

- Article 15: Miscellaneous Provisions

- § 15.2.3: Owner arranges and pays for tests, inspections, and approvals where codes or law required by code or by law.

- Article 16: Termination of Contract

- § 16.1: If Contractor stops work under § 12.3, and the work remains stopped for 14 days, it can proceed to terminate the Contract upon seven days' additional notice.

# A401-2017

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- Standard Contractor/Subcontractor Agreement.
- Article 1: The Subcontract Documents
  - Per § 1.1, modifications to the Prime Contract that are integrated into the Subcontract are subject to the terms of the Subcontract governing changes.
- Article 3: Contractor
  - § 3.1.1: Contractor's authorized representative.
  - § 3.1.2: Contractor to render timely decisions.
  - § 3.3.4: Notice required regarding hazardous materials or substances required prior to delivery, not simply exposure.
  - § 3.3.5: Requires Contractor to promptly notify Subcontractor of faults/defects in work.
  - § 3.4.1: Liquidated damages provision is now a "flow down" clause.

# A401-2017 (CONT.)

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- Article 3 (Cont.)

- § 3.5: Costs of correcting Subcontractor's work no longer deducted by Modification; can be withheld from payments as provided for in Article 11. Memorializes Subcontractor's obligation to reimburse any delta between balance of Subcontract and costs of corrections.

- Article 4: Subcontractor

- § 4.1: Subcontractor to be lawfully licensed, to designate an authorized representative.
- § 4.2.3.2: Implicit warranties given by Subcontractor relative to its submittals.
- § 4.4.2: Ostensibly earlier notice required regarding hazardous materials or substances.
- § 4.6.2: Warranties to be given in the name of the Owner or transferable to Owner.
- § 4.9: New provision regarding Subcontractor's professional services:
  - When and under what conditions professional services can be required of Subcontractor;
  - Contractor's obligations to Subcontractor relative to Subcontractor's provision of professional services;
  - Subcontractor's rights of reliance upon Contractor's design information; and
  - Who is to perform the professional services.

# A401-2017 (CONT.)

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- Article 6: Claims and Disputes

- § 6.3.1: Arbitration to be held in place where Project located, unless otherwise agreed.
- § 6.3.3: Finality of arbitration award; entry of judgment thereupon in accordance with local law.
- § 6.3.4: Enforceability of agreement to arbitrate.
- § 6.5: The waiver of consequential damages excludes liquidated damages.

- Article 7: Termination, Suspension, or Assignment of the Contract

- § 7.1: In the event of termination by the Subcontractor, Subcontractor entitled to “profit on work executed and costs incurred by reason of such termination,” not “profit and damages.”

- Article 9: Date of Commencement and Substantial Completion

- § 9.1: Absent selection of one of the provided options, date of agreement is date of commencement.
- Struck requirement (former § 9.2) that Subcontractor notify Contractor of commencement of its work under certain circumstances.

# A401-2017 (CONT.)

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- Article 10: Subcontract Sum
  - § 10.2.2: New section providing for conditional alternates similar to what may be found in the A100 Series documents.
- Article 11: Payments
  - In general, overhauled look that breaks down progress payments in better detail – similar to progress payment provisions in the A100 Series documents.
  - § 11.1.10: Subcontractor's D&I obligations relative to lien claims and payment claims by lower tiers.
- Article 12: Insurance and Bonds
  - § 12.1: Even with revisions, requirements for Subcontractor-provided insurance must still be manually inserted.
  - § 12.1.3: Professional liability insurance required Subcontractor provides professional services pursuant to § 4.9.
  - § 12.1.5: Disclosure of deductibles.
  - § 12.1.6: Additional insured coverage.

# A401-2017 (CONT.)

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- Article 12 (Cont.)
  - § 12.1.7: Rights and obligations of parties in the event that coverage under Subcontractor-procured insurance is changed or cancelled, including Contractor's right to stop work.
  - § 12.2.1: Subcontractor's bonds: A312 Performance and Payment Bonds or their equivalent.
  - § 12.2.2: Subcontractor's obligation to furnish bonds to anyone "appearing to be a potential beneficiary."
  - § 12.5: Procured policies no longer must contain a waiver of subrogation clause; sufficient that they not prohibit subrogation.
- Article 14: Miscellaneous Provisions
  - § 14.4.3: Electronic notice.
  - § 14.6: "Severability" clause.
  - § 14.7: Use of E203-2013.

# A100 SERIES 2017 EXHIBIT A: INSURANCE AND BONDS

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- Identical exhibit for use in connection with A101-2017, A102-2017, and A103-2017 forms, in lieu of specifying insurance and bonding requirements in the agreements.
- Article A.2: Owner's Insurance
  - § A.2.3: Property Insurance:
    - Builder's risk, "all risk", completed value form or its equivalent.
    - Policy to be fore: amount of Contract Sum + Modifications + materials/equipment supplied by others.
    - Specifically disallows certain exclusions.
    - Covers falsework/temporary structures and building systems.
    - Replaced with similar policy written for total Project value upon Substantial Completion.
    - Occupancy is contingent upon obtaining a continuance of coverage.
    - Various optional extended coverages.

# A100 SERIES 2017 EXHIBIT A (CONT.)

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- Article A.2 (Cont.)
  - § A.2.5: Parties can elect to require additional Owner-provided insurance coverage; sole specific suggestion is Cyber-Security coverage.
- Article A.3: Contractor's Insurance and Bonds
  - Provisions that are similar to Contractor-provided insurance requirements under the A201.
  - § A.2.1.1: Obligation of the Contractor to disclose deductibles, self-insured retentions.
  - § A.3.1.3: Additional insureds.
  - § A.3.2: Insurance Required of the Contractor:
    - Mandatory CGL, Auto, Worker's Compensation, and Employer's Liability coverages.
    - Numerous potential coverages, such as Professional Liability Coverage, Pollution Liability Insurance, etc., depending on the nature of the work (not party selection).
    - Ability to meet certain coverage requirements through combined policies. Example: Combined Professional Liability and Pollution Liability policies meeting defined limits (both per claim and in the aggregate).
  - § A.3.3.2: Option for parties to select various other coverages. Includes ability to shift responsibility for property insurance coverage to the Contractor.
  - § A.4: Performance and Payment Bonds on the A312 forms or their equivalent.

# B100 SERIES – THE OWNER AND ARCHITECT

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- B101
  - Section 1 provides “prompts” for information and puts key information front and center – rather leaving the information to an exhibit.
    - While parties can expand upon the information with the exhibit, the inclusion of the sections here encourages parties to focus on key players, the project, the budget, milestones and sustainability.
  - Section 1.3 also brings to the forefront the use of BIM (building information modeling), while reminding parties of the need to address protocols associated with the use of BIM.
  - Section 1.3 also prompts the parties to establish means to exchange and transmit documents (e.g. whether by email, in pdf or other format)
    - Depending upon the nature of the project, we encourage parties to use secure portals for transmission of drawings.
  - Section 1.6 highlights and brings to focus sustainability initiatives and/or design objectives, encouraging parties to think about and address these issues. And the language used in the updated documents focus on “sustainability” rather than “environmentally responsible”, broadening the discussion.
    - See also the incorporation of AIA E204 – 2017 – Sustainable Project Exhibits

# B100 – LICENSED PROFESSIONALS

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- While it would seem to be a given that the architect was licensed in the jurisdiction where the project is located, in fact we have seen projects where this is not the case. And given the impact on a project were an architect unable to seal plans for submission to authorities having jurisdiction, this seemingly innocuous representation is an important protection for an owner.

# B100 – INSURANCE

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- Section 2.5 “fleshes out” the insurance prompts, to include limits, types of vehicles covered (for automobile coverage), etc.
- The section also specifically calls for the owner to be named as an additional insured. While most sophisticated practitioners would include this in any event, the prompt is helpful for those not familiar with such concerns.
- Notably, the AIA has “protected” its own by calling now for Owners to pay up front (rather than reimburse) for insurance premiums associated with coverage not normally carried by the architect.
- Note also that the “additional insured” provision speaks to coverage for Architect’s negligent acts or omissions. Absent such negligence (and without modifying the clause) the coverage is not available to the Owner where the Architect was not negligent.
- We would note notable omissions from the latest draft:
  - While 2.5.8 requires the architect to provide a certificate of insurance, the latest version does not include the requirement that the architect provide updated certificates prior to expiration of the then current coverage terms.
  - Section 2.5 does not include a requirement for the architect to maintain cyber insurance and/or crime coverage. If the project at issue is critical infrastructure, the requirement for this type of insurance is of particular importance, and we are disappointed that this has not been added to the “prompts” in the form [the only prompt for cyber insurance relates to Owner’s insurance]
  - The latest draft does not provide for notice of any non-renewal, cancellation or reduction of coverage. Given that most carriers will not agree to provide such notice to additional insureds, at a minimum, we would recommend including the notice obligation here.

# B100 – FURTHER PROTECTION FOR THE ARCHITECT

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- Section 3.1.2 already provided that the Architect was entitled to rely upon the accuracy of the services and information provided by Owner and its other consultants.
  - The Section has now stated in so many words that the Architect “shall not be responsible for” that information, and shall not be liable for delays associated with the Owner’s delay in providing such information.
  - See also Section 3.6.4.3.
- Similarly, in Section 3.1.4, provides that the Architect is not responsible for the Owner’s acceptance of non-conforming work.
  - However, we believe the clause here is awkwardly written and potentially has an unintended effect:
    - “...Architect is not responsible... for Owner’s acceptance of non-conforming Work...given without the Architect’s written approval...”

We think the AIA authors would better have served the architect had this instead been broken into separate clauses – and instead, as written could be construed as the Architect BEING responsible for non-conforming work UNLESS the Architect, too, approved the non-conforming work. This may not have been the intent, but we would suggest that in the next revision by the AIA, this clause be reviewed once more.
- The Architect is no longer charged with the task of procuring reproductions, or distribution, of bid documents. (3.5.2.2)
- Substitutions, if permitted by the Owner, will be provided only as an “Additional Service” (see 3.5.3.2)
- Section 7.5 provides for the license (and limitations and indemnities) to survive termination of the Agreement.
- See also Section 10.7 which provides for survival of the Architect’s right to include the project in its portfolio, but carves out this right were the owner to terminate the agreement for cause.
- Section 10.3 requires a lender to assume the payments due to the Architect prior to an assignment of the Agreement

# B100 – FOR THE CONTRACTOR

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- In 3.6.3, now the Architect's certification is also to affirmatively state that the Contractor is entitled to payment of the amount certified by the Architect.
  - Note that the certification had previously been based on the Architect's "best knowledge" (in 3.6.3.1), but this language (best knowledge) has now been carried through to 3.6.6.1.4 to eliminate any inconsistency.

# B100 - SUPPLEMENTAL VS. ADDITIONAL SERVICES

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- The AIA forms have now distinguished between “Supplemental” and “Additional” Services:
  - We refer you to Section 4.1.1 for those “services” categorized by the AIA as “supplemental” services.
    - Included in this category are services related to sustainable designs and goals.
  - Additional Services are addressed in Section 4.2.
  - We see the distinction as being the following:
    - Supplemental Services being distinct and “new” from the “Basic” Services, while Additional Services flow from (but expand upon) the Basic Services
  - We also call your attention to the definitive statement in Section 4.2.4 which now provides, in so many words, that any Construction Phase Services provided for more than 60 days after Substantial Completion will be deemed and compensated as Additional Services. This is a more affirmative statement than in the prior clause, Section 4.3.2.6.
  - See also 6.7 as to “Additional Services” where the Architect is called upon to modify the construction documents where the lowest bid exceed the Cost of the Work due to market conditions that the Architect could not reasonably anticipate.

# B100 - COMMUNICATIONS

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- The agreement no longer mandates that the Owner communicate with the Contractor only through the Architect. Now, the agreement recognizes that these communications can – and often are – direct discussions between the Owner and the Contractor. And, appropriately, the agreement now provides that the Owner is to keep the Architect “in the loop” where such communications impact the Architect and its services (see 5.12). The Agreement does specifically mandate for communications with the Architect’s consultants to be through the Architect.
  - We would note, however, that the AIA documents do not contemplate the ability for the Owner to assume the Architect’s contract with its consultants were the Architect to be terminated for any reason.

# B100 - COST OF THE WORK, BUDGET

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- Note that the “Cost of the Work” is defined in Article 6 to include the value of labor, materials and equipment furnished by the Owner.
- The Agreement now mandates that the budget “shall” be adjusted (previously the language was permissive (see 6.2)).

# B100 – TERMINATION, FEES

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- Previously, the Architect’s agreement contemplated “Termination Fees” – expressly defined to include anticipated profits on work not performed.
  - It is notable that the new form now provides for “Termination Fees” but does NOT predefine them to include lost profits.
  - Termination without cause (for convenience by Owner) or for cause by Architect, does expressly entitle the Architect to recover costs associated with the termination of consultants.
- The Agreement now provides for an “end date” if the parties do not otherwise state a definitive completion date – that being one year after Substantial Completion (See Section 9.8)

# B100 - CONFIDENTIALITY

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- The agreement now recognizes and includes a “carve out” for disclosures mandated by law or other legal process (See 10.8.1).

# B100 - COMPENSATION

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- In Article 11, rather than leaving the “prompts” vague (insert basis for compensation) the agreement now provides specific payment options –
  - Stipulated sum, percentage basis (and here is where the addition to the definition of Cost of the Work comes into play), or other agreed means.
  - See also 11.6 which provides how percentage based payments should be made

# B101 vs. B102

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- In large part, the revisions to B101 are consistent with those to the B102. Notable are the following:
  - B102 now provides in 3.3.1 that if the Owner were to terminate the agreement for cause, it would not be obligated to hold harmless and indemnify the architect in relation to the Owner's continued use of the plans. While this carve out was already in the B101, it was previously missing from the B102.
  - "Termination" in the B101 is prescribed (if not otherwise provided) to occur one year after Substantial Completion. The B102 instead also allows for the parties to elect "one year from the date of commencement of..." (compare 9.8 of the B101 to 5.8 of the B102).
  - Mark up on reimbursable expenses is no longer noted as an "administrative fee" (this change had already been made to the B101, and now the B102 is consistent in this regard).

# B104, B105 – WHAT'S IN A NAME

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- B104: Note the change in the title: from “project of a limited scope” to “abbreviated form of agreement”
- B105: The title was changed to “short form” (not to be confused with abbreviated...) (and not for a residential or small commercial project)
  - Of substantive note, the B105 form does NOT contain the carve out for the Owner’s indemnity obligation associated with the use of the instruments of service (see Article 3).

# B100 - OTHER CHANGES

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- A “savings” (or severability) clause has been added to the B100 series (see, e.g. 7.10 in the B102 and 10.9 in the B101)

# C401

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## Architect and Consultant

- While the changes in this agreement are largely consistent with the changes to the B100 documents, we call your attention to the expanded (and reorganized) claims and disputes provision.
- NOTE: The Agreement provides that it is subject to the Prime Contract except in certain circumstances
- Indemnification does not include the duty to defend.

# A201

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- General Contract Clauses:
  - Savings (survival) clause - 1.2.1.1
  - Expanded notice clause – and moved to Section 1 (see 1.6) – mandated written notices and to whom for specified purposes (c.f. prior clause 13.3)
  - Addresses electronic protocols for data/document sharing
  - Addresses the use of BIM
  - Communications directive similar to that seen in the B100 documents (4.2.4)
  - “Separate Contractor” defined (see 6.1)

# PROTECTION FOR CONTRACTOR

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- Section 2.2: mandates that the Owner provide evidence of financing, barring which Contractor has no obligation to commence work.
- See also 2.2.2 which provides greater protection for Contractor if contract scope changes materially increasing costs.
  - Note contractor does have to keep financing information confidential – but only if designated by Owner as confidential. (2.2.4)

# FURTHER PROTECTIONS

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- Reiterates obligation regarding Architect's license status (2.3.2)
- While Section 2.5 provides for Owner the right to undertake corrective work where Contractor has been negligent, Contractor's right to challenge the valuation (and deduction) for that work is preserved (see 2.5)
- Affirmative reliance on design criteria in the Contract Documents (rather than absence of liability) – 3.12.10.1

# FURTHER CONTRACTOR PROTECTIONS

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- Contractor not responsible for construction operations of Owner or Separate Contractors (6.2.2)

# ALTERNATIVE MEANS TO UNDERTAKE WORK

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- See 3.3.1 – different approach – rather than contemplating Contractor proceeding at its own risk, approach speaks “positively” to Contractor’s right to proceed with alternative methods approved by Architect.
- See also new approach to “minor changes” (7.4) recognizing that even minor changes may impact the cost of the work and/or the time of completion.
  - Must be consistent with the intent of the Contract Documents
  - IF Contractor performs work without prior notice as to additional fees or time, the Contractor waives the right to seek such relief.

# WARRANTIES

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- States what otherwise one would expect would be appropriate: Warranties to be issued in the name of the Owner (3.5.2)

# SCHEDULE

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- Section 3.10 amplifies as to what the proposed schedule should include:
  - Commencement date
  - Milestones
  - Apportionment of Work by activity
  - Time require to complete each task

# SCHEDULE OF VALUES

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- Updates to be submitted with supporting documentation to Architect (see 9.2)

# LIENS

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- Provided the Owner has met its payment obligations, the Contractor must indemnify Owner from losses associated with liens filed by any subcontractor. See 9.6.8
  - Note that the AIA form does not prescribe timing for the Contractor to remove or bond around a lien.
- But note added protection for Owner where a lien is filed after final payment has been made (see 9.10.2)

# PROTECTIONS FOR OWNER

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- Preservation of claims pursuant to a post completion audit (9.10.4 – A201)
- Most notable change: 14.4.3 (A201) no longer contractually mandates payment for overhead and profit for work not performed in the event of termination for convenience. BUT see Section 7 of the A101 (and related contracts) which allows for the concept to be captured as a termination fee.

# INSURANCE

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- Unlike the B100 series which expanded insurance provisions in the confines of the contract document, the A201 has moved the requirements to an exhibit to allow for more flexibility (per AIA representatives) and also provides prompt for specific policies (e.g. pollution coverage, professional liability coverage, use of manned or unmanned aircraft, etc.)
- See new 11.2.3 which affords the Contractor protection (stop work rights) if Owner fails to maintain required insurance.

# EXHIBIT E204-2017

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Sustainability is now given specific attention – and consideration is not merely for LEED Certification

- Defines Roles
- Develops and assigns responsibility
- Defines “success”

# SUSTAINABILITY – THE SPECIFICS

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- Contemplates a sustainability plan for the project (Section 1.2.3)
- Certification – goal for project (e.g. LEED certification)
- Architectural review of work in progress to identify not only deviations from construction documents, but also how deviations could impact desired sustainability objectives (Section 2.6.1)
- NOTE: The Architect’s “certification” as to satisfaction of stated (contractually) sustainability objectives is NOT a guarantee to the Owner (see Section 2.7.7 and Article 6).
- If a project does not achieve sustainability objectives, Owner may lose significant incentives and/or cost savings – but see waiver of consequential damages (Article 5)

# ADDITIONAL SERVICES; OWNERSHIP

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- While the Exhibit contemplates “sustainability” activities as part of “basic services”, the Exhibit calls out a specific category of “Additional Services” that may be rendered by the Architect in relation to sustainability activities.
- As with “traditional” Instruments of Service, those aspects of the design and construction documents that are specific to a “sustainable” design **remain the property of the Architect**, but are licensed to the Owner for limited purposes, provided that “Owner substantially performs its obligations under the Owner-Architect Agreement, including prompt payment of all sums when due.” (see Section 2.8.1)

# SUMMARY

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- The documents are better organized
- Old errors have been (largely) addressed
- Greater attention to sustainability
- Recognition that the Architect is not the central hub of a construction project
- Greater attention to insurance
  - Notable missing: cyber security considerations for the Architect and/or the Contractor other than a nod to protocols for exchange of documents electronically

# THANK YOU!

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Michelle Schaap practices primarily in two key areas: construction law and cybersecurity law, earning certifications in each field. She represents a varied client base that ranges from Fortune 500 companies to smaller, closely held businesses. Within the construction industry, Michelle negotiates complex agreements, including construction management, architect and design-build agreements. Her extensive experience includes multimillion-dollar biotech research facilities, design-build agreements for amusement rides, and working with various clients to develop form agreements for planned expansion. Complementary to Michelle's construction work is her experience in negotiating solar facility agreements, including power purchase agreements, and engineer, procure and construction agreements.



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