2017

AGC's Commentary on the AIA A201 General Terms and Conditions Document, 2017

July 24, 2017

The intent of this document is not to provide legal advice. Rather, members are encouraged to consult with competent legal counsel, as well as insurance and surety professionals, to make informed decisions to evaluate their risk exposure when considering any project.

Article 1

Overview of AGC's Commentary[1]:

The 10-year effort to update the American Institute of Architects (AIA) documents is not what we consider a major re-write or update from the 2007 edition, which AGC unanimously voted not to endorse for the first time in memory. For this development cycle, the AIA chose not to seek any direct feedback from AGC. Significantly, AGC's concerns with the 2007 edition were not eliminated in the 2017 edition.[2]

Overall, the basic premise that the Architect serves as the Owner's watchdog over the Contractor remains. The Architect continues to possess significant authority and rights over others, but without the corresponding responsibility. The Owner's main responsibility is to pay, and otherwise is largely deferential to the Architect. The Architect plays a quasi-judicial role to protect design intent and to act on behalf of a passive Owner. Also intact are the hard deadlines and requirements that a Contractor must strictly comply with or face dire consequences, which starkly contrasts to the often subjective requirements given to the Architect, which carry less direct significance to the Architect's bottom-line.

Upon its release at the AIA convention in late April, AGC put together a dedicated and talented working group of volunteers from the AGC Contract Documents Forum to provide commentary to equip AGC members with information regarding the new AIA A201. This Commentary attempts to highlight the most important changes made in the 2017 edition with some attempt to consider alterations that Contractors might seek. It is the intention of the AGC working group on the AIA A201 to provide a further analysis and commentary regarding more fundamental issues that a Contractor might seek in modifying the AIA contracts regarding language that is not new in 2017, but remains a deep concern for the AGC membership.

One of the first things you will notice that is new in reviewing the AIA A201 2017 edition is that the AIA has, in dozens of insertions, adopted use of the Oxford comma. This change follows from other standard contracts adopting such an approach and is positive in that there was a well-reported case last year that hinged on the placement of the comma.[3]

§1.1.8. Initial Decision Maker

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[1] This publication is designed to provide information in regard to the subject matter covered. It is published with the understanding that AGC and contributors to this document are not engaged in rendering legal, accounting, or other professional services. If legal advice or other professional advice is required, the services of a competent professional person should be sought.

—From the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations

[2] AGC's concerns were articulated in AGC Commentary on the AIA A201 (2007 edition). This is attached as an appendix for convenience.

[3] See https://www.nytimes.com/2017/03/16/us/oxford-comma-lawsuit.html.

AIA has added language stating that the initial decision maker (IDM) "shall not show partiality to the Owner or the Contractor."

Concern: AIA introduced the concept of an IDM in 2007, which was widely criticized. The 2017 edition does not address these criticisms, and thus, the IDM concept remains a major concern. The new language is rather telling in that the AIA feels the need to state that the IDM should not show partiality and glaringly omits avoiding showing partiality to the Architect, especially when an IDM's decision implicates design intent. Choosing the Architect as the IDM remains the default, and the vast majority of projects have the Architect serve as IDM. However, Architects are not specifically trained to perform in this quasi-judicial function.

§1.2.1.1. Severability

This new provision clarifies that it is the intent of the Parties that if one provision is invalidated, the rest of the contract will still be enforceable. This language does not raise a concern.

Concern: AIA misses an opportunity in the 2017 edition to include an order of precedence clause, which would be critical in an interpretation of contract documents. Wasted time and money is spent on litigating over conflicting terms contained in various contract documents and which document should take precedence. AGC endorses ConsensusDocs standard construction contract documents, which include an order of precedence. The ConsensusDocs order of precedence clause gives a higher weight to documents that are created more recently, thereby representing the Parties' latest and most refined thinking.

§1.6. Notice in General and Notice of Claims

AIA added new notice provisions in §1.6 which create two separate standards for giving notice – notice for claims, and notice for things other than claims.

Concern: The definition of notice in §15.1 is extremely broad. For claims, notice is effective only if given in writing and delivered by certified or registered mail or by courier providing proof of delivery. Contractors who are used to providing notice by hand delivery at the project site will no longer be able to continue that practice without modifying the language of this article. Notice by hand at the project site will no longer be considered effective under the new AIA requirements, because no proof of delivery is evidenced (see §1.6.2).

Delivery of written notice for issues other than claims may be served by regular mail, certified or registered mail, or courier. It is important to note that the notice may also be served via electronic transmission only if the Agreement sets forth a method for electronic transmission. It is likely that the claim notice provision will be interpreted as a condition precedent for the Contractor to maintain its claim rights. Therefore, if the Contractor does not use the correct notice procedure, a Contractor's otherwise legitimate claim may go uncompensated.

§1.7. Transmission of Information Digitally

AIA now requires parties to use other AIA contract documents, specifically AIA E203 and AIA G202, for transmission of information in digital form and Building Information Modeling; otherwise, all such sharing of information is at the using party's sole risk.

Concern: The 2017 edition marks the first time AIA has impacted substantive risk allocation on construction parties based upon the branding of AIA contract documents. There are other options for creating digital transmission protocols as well as using BIM models. A simple change would be to strike out specific reference to the AIA copyrighted and branded contract document titles or, alternatively, add the term "or equivalent" to the provision's current language.

Article 2

§2.2. Owner's Financial Information

In §2.2.1, the 2017 edition clarifies that the Contractor has no obligation to commence the Work until the Owner provides evidence of financial arrangements. This revision also allows the Contractor to receive a schedule extension for delay caused by the Owner's failure to provide financial information.

Concern: This provision is problematic as it is vague as to what is required to be provided. A recommended option is to have the parties agree on what will be provided and then revise this provision by specifically reflecting the parties' agreement.

The new §2.2.2 sets forth the conditions for which the Owner must provide reasonable evidence of financial arrangements once the project commences.

Concern: Receiving timely financial information is critical for General Contractors. If a Contractor requests financial information, they should be able to receive such information. Prior to the 2007 edition, the General Contractor had a clear right to receive such information in a straightforward fashion. AIA restrictions to this previously clear right were one of the main drivers in AGC's unanimous decision not to endorse the A201 for the first time in at least 50 years. The 2017 edition does not adequately address AGC's concerns, and invites party disputes over financial information.

AIA has added beneficial language that makes it clear that a Contractor can stop work if the evidence of financial arrangements is not provided within 14 days of the request. However, the Contractor can only stop work on the area affected by the material change giving rise to the need to show the evidence of financial arrangements. This may sound reasonable on paper, but, if a material change to the contract sum requires the Owner to provide evidence of the financial arrangements, it may not be clear what work is affected by the material change, and thus, what work can be stopped.

Concern: There is a concern about how the new AIA A201 integrates with other AIA agreements in regard to the establishment of the Date of Commencement that impacts

requesting financial arrangements. For instance, the AIA A101 creates a default in which the agreement's signature date triggers commencement of the Work unless the parties state otherwise (such as the notice to proceed). Consequently, a Contractor will have diminished rights and access to request financial information once the contract is signed unless the AIA documents are modified.

In the new §2.2.4, the AIA added a provision whereby the Contractor cannot disclose the financial information received from the Owner to its own lenders.

Concern: The new language may be a new trap that leads a General Contractor to unwittingly fall into litigation for disclosing confidential information by sharing relevant information to its own lender.

Article 3

§3.2.4. Claims Subject to a Waiver of Consequential Damages

Contractor claims are expressly subject to the mutual waiver of consequential damages in §15.1.7. This 2017 change clarifies what is a probable contract interpretation under the 2007 language.

§3.3.1. Supervision and Construction Procedures

The Contractor has a duty both to spot unsafe procedures, *AND* to specify a safe alternative:

- Contractor is solely responsible for construction means, methods, techniques, sequences, and procedures and for job site safety of such;
- Contractor is obligated to propose alternative means, methods, techniques, sequences, or procedures if it determines those specified may not be safe;
- Architect is required to evaluate the proposed alternatives for conformance with design intent for the completed construction; and,
- Unless the Architect objects, the Contractor shall perform its Work using its alternatives.

MAJOR CONCERN: The 2017 revisions represent a major risk shift from the Architect to the Contractor. Does the Architect now have any risk if it specifies a procedure that is unsafe? Another concern is what if the Contractor's alternatives are contrary to the Contract Documents. The language in the new §3.3.1 should be strongly opposed. The 2007 AIA A201 edition's language on this topic was also problematic and unclear.

§3.5.2. Warranty

Warranty must be issued in the name of the Owner (or transferable) and start when substantial completion is issued for that work, which will be determined by the Architect's preparation of the Certificate of Substantial Completion for the "Work or designated portion thereof" under §9.8.4.

Concern: This language may lead to different warranty periods for different portions of the work, which is consistent with the prior version of §12.2.2.1, governing the post-completion warranty obligations of Contractor. This may require a modification to the subcontract, purchase order, and warranty forms received.

§3.7.4. Differing Site Conditions

The time requirements for a Contractor to give notice has now been shortened from 21 days to 14 days.

Concern: The Contractor has 1/3 less time to notify the Owner of a differing site condition.

§3.10. Project Schedules

The new language recognizes that the Contractor may not be the one to prepare the schedule. The new language requires increased detail, but is more of an outline of minimal requirements, and is not really a scheduling specification. Also note that §3.10.3 requires the Contractor to work "in general accordance" with the most recent schedule. This language recognizes that schedules are forecasts that should not prevent Contractor work optimization.

Concern: §3.10 should be revised in order to clarify that the Contractor may revise the schedule "in its discretion and without prior notice."

§3.10.2. Submittal Schedules

Again, this section recognizes that Contractor may not be the entity preparing the schedule. The Contractor must provide submittals per the schedule.

Concern: The AIA language gives the Architect a free pass on submittal response delay if the Contractor misses a submittal by even one day. Note, in your subcontracts, a General Contractor should incorporate submittal obligations to the Subcontractor (and share the risks if submittals are late from the Subcontractor).

§3.12.10. Contractor Submitted Design Elements

In §3.12.10.1, an Owner and Architect can rely upon the adequacy and accuracy of delegated design, but the term "completeness" for services performed by a Contractor's design professional has been eliminated (the AIA B101 Owner/Architect Agreement has never required the Architect to provide a complete design).

Concern: While the 2017 language is a small step in the right direct, the AIA contract documents do not recognize that delegated design is often performed by different subcontractors. The “in-responsible Architect” should have clearer design coordination responsibilities to help facilitate better project results.

In §3.12.10.2, the Architect now determines the form of certification of the Contractor’s submitted design elements. Previously, form of certification was to be identified in the contract documents.

Concern: What if the Architect requires unreasonable certification requirements?

Note, it is prudent to flow this provision’s responsibilities down to subcontractors performing design-assist work. Require design-assist subcontractors to maintain adequate professional liability coverage.

§3.17. Royalties/Patent

The 2007 edition’s language, stating that the Contractor had a "reason to believe" has thankfully been stricken. The requirement of actual knowledge, or now, "made known to" is required of Contractor in regard to respecting royalties and patents of the Architect’s design.

Concern: This language is an improvement, but Contractors should not be intellectual property (IP) specialists. Overall, the language still subjective. How is "made known to" different from "actual knowledge"? This suggests actual knowledge. One is objective, while "made known to" is subjective, and it can argued that it is not significantly different from "reason to believe."

Article 4

§4.2.1. Contract Administration

The reference to §3.1.1 was deleted from the exceptions to the Contractor’s responsibility for means and methods in recognition of the modifications to §3.1.1 and the Contractor’s absolute liability for means and methods.

Concern: This change and the change to 3.1.1 are problematic.

§4.2.3.

The change to the first sentence requires the Architect to act promptly, while reporting the progress of the Work to the Owner.

Concern: While it is an improvement to require the Architect to act promptly, the responsiveness of the Architect remains subject to a subjective standard, rather than to an objective standard.

The second change to this section is a clarification of the language and does not result in a substantive change.

§4.2.4. Communications

This clause was significantly rewritten in recognition of the fact that the industry is heading toward a more collaborate delivery model and that it is now commonplace for the Owner and Contractor to regularly communicate with each other during the progress of the Work. The clause no longer mandates that all communication between the Owner and Contractor be through the Architect. The revised clause only requires participation of the Architect in communications between the Owner and Contractor when the communications relate to the Architect's services or professional responsibilities. It is the Owner's obligation to notify the Architect of direct communications it has had with the General Contractor.

Concern: While overall this is a positive change, it may be difficult to determine what does and does not relate to the Architect's services or professional responsibilities, because under AIA contract documents, the Architect's presence and authority is relevant to almost everything from start to finish in a project, including payment, claims, and completion.

§4.2.7.

The revisions to this clause correspond to the revisions made to the Contractor's liability for means and methods in §3.3.1. The deletion of "…unless otherwise specifically stated by the Architect…" removes language that made the Architect responsible for means and methods that the Architect specifically approved.

Concern: These concerns reference back to comments at §3.3.1.

§4.2.10.

The Owner no longer identifies the duties, responsibilities, and limitation of authority of project representatives, and is only held to notifying the Contractor of any changes in the duties, responsibilities, or limitations of authority.

Concern: This change leads to ambiguity in project and contract administration.

Article 5

No substantive changes of significance in regard to revisions.

§5.2. Award of Subcontracts

Concern: Although no substantive changes were made to this section, it continues to be a concern. If the Owner/lender/Architect will have input on subcontractor selection (or limits such input as to objectionable subcontractors), it would be better for all if the pre-qualification took place prior to a bid. All contracting parties should agree to the list of subcontractors before they spend money providing bids.

Article 6: Construction by Owner or Separate Contractors

§6.1.1

AIA allows an Owner to award a portion of the overall Work to a separate Contractor. The separate Contractor previously had to have contract general conditions that were identical or substantially similar. This edition has removed "identical" from the requirement.

Concern: It is unclear what substantially similar means? It would seem that the referenced insurance provisions at the least should be identical. Issues relating to supervision and cooperation as well as indemnification should be identical. Absent guarantee of identical clauses, at the least, contractors should be provided copies of the separate contracts.

§6.1.1. Third Sentence

The 2017 version of §6.1.1 also eliminates the Contractor's ability to make a Claim pursuant to Article 15 for delays and additional costs resulting from the Owner's action in performing work with its own forces or with Separate Contractors.

Concern: Obviously, this revision could cause substantial impacts to the Contractor concerning both cost and schedule, and should be rejected or otherwise modified.

Concern: §6.1.4 – "Substantially similar" in §6.1.1 seems contradictory to this clause.

§6.2.2. Mutual Responsibility

The requirement to "promptly notify" must now be written based on §1.6.1.

Concern: Does this create an obligation to observe the operations of the other contractors? It is unclear what the "operations" of the other contractors have to do with it? Had such observation been performed, would there be an expectation that latent problems of the other contractor's work would have been detected?

§6.2.2.

This provision was revised to make the Contractor responsible for reporting deficiencies in work performed by the Owner's separate contractors prior to proceeding with its own related work. Failure to do so is now an acknowledgement that the work of the Owner's separate contractors was proper.

Concern: This new language should be modified so that the failure to report is not an acknowledgement of proper work. Alternatively, the Contractor could use this new language as leverage to modify the document so that an Architect's failure to report the Contractor's Work in a timely matter upon approval of an application for payment or certainly by Substantial Completion is an affirmative acknowledgement that the Contractor's Work is in conformance with the contract documents.

Also, the AIA adds that the Contractor is only responsible for notifying the Architect of "apparent" defects. Although this is a reduced standard as compared to the previous "reasonably discoverable," the term "patent" would be more clearly defined by case law, and should be used instead.

Article 7

§7.3.4 - §7.3.6. Contract Adjustment for Construction Change Directives

A Contractor is now required to "advise the Architect" if there is a disagreement regarding the method used in a Construction Change Directive. The Architect remains the prime authority to determine adjustments based upon the Architect's belief in costs/savings pertaining to what AIA terms a construction change directive.

Concern: The Architect should be required to provide documents and receipts to evidence the Architect's belief in reasonable costs and potential savings. This is another example of the strict procedures a Contractor must follow contractually as prescribed by the Architect, but yet there are no clear standards for which the Architect must or should operate.

§7.4. Minor Changes

This section now requires the Contractor to notify the Architect if any change in the Work will affect the Contract Time or Contract Sum BEFORE any Work begins or the Contractor explicitly waives its claim.

Concern: This new language presents an unfair trap. The new language should be stricken. Consider modifying language that affirmatively states that an Architect may not make minor changes without the written consent of the Owner. Alternatively, if the standard language is not modified, Contractors should consider raising the potential impact on time or sum as a preventative matter now on minor changes to the Work, unless they are 100% sure that such change will not impact time or cost in the future.

Article 8: Time

§8.1.3. Substantial Completion

§8.1.3 defines Substantial Completion as "the date certified by the Architect in accordance with §9.8."

Concern: This appears to conflict with §9.8.1, which defines Substantial Completion as "the stage in the progress of the Work when the Work or a designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use."

Substantial Completion is an important event for various issues such as Owner delay claims (including liquidated damages), Owner payment obligations, and commencement of periods for recording liens or filing lawsuits before statutory deadlines expire. It should be determined by the actual progress of the Work rather than the certification of

the Architect, which may or may not be timely. At least one Court has used the language in §8.1.3 to find that Substantial Completion is determined by the Architect's certification without regard to the stage of construction. See *Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.*, 325 P.3d 730, 733-34 (Or. 2014).

Contractors should replace "certified by the Architect in accordance with §9.8." with "established in §9.8.1."

§8.2.1 Progress and Completion: In the first sentence, the 2007 version prohibited a Contractor from knowingly commencing "operations on the site or elsewhere" before the effective date of insurance furnished by the Contractor and Owner. The 2017 version substitutes the term Work for "operations on the site or elsewhere" and is more consistent with the insurance requirements in Document A101.

The second sentence of §8.2.1 states, "By executing the Agreement, the Contractor confirms that the Contract Time is a reasonable period for performing the Work." The AIA 2007 commentary interprets the second sentence as follows: "By executing the agreement, the contractor is precluded from contending that the contract documents were defective because the time allowed for construction was not sufficient to perform the work." AIA Document A201-2007, Commentary at 30-31.

Concern: This is one of several provisions in the A201 intended to diminish the Owner's implied warranty obligations under the *Spearin Doctrine*. The *Spearin Doctrine* protects Contractors as it provides an implied warranty to design requirements. Consequently, Contractors may seek reimbursement for changes to the Work that stem from design plans that don't meet the warranty of being fit to build. This provision raises an important concern, and therefore, Contractors should delete the second sentence of §8.2.1.

In the second sentence, the 2007 version provided that the Date of Commencement would not be changed by the effective date of insurance. AIA deletes this sentence in 2017. This entitles the Contractor to submit a Claim under Article 15 if the effective date of Owner-furnished insurance delays commencement of the Work.

§8.3.1. Delays and Extensions of Time

The 2017 edition adds "adverse weather conditions documented in accordance with §15.1.6.2" as an event that entitles the Contractor to a "reasonable" time extension of the Contract Time determined by the Architect.

Concern: Some have suggested that the documentation of adverse weather conditions is now changed in the A201 because of this new language and climate change. AGC disagrees with this interpretation, but if that is the intended change, then the new language would be a major concern.

Also, for any cause of delay that is not enumerated in §8.3.1(5), the 2017 edition adds a requirement that the "Contractor asserts" that it is delayed and the Architect determines

the delay is justified. Under §15.1.1, any assertion seeking extra Contract Time is defined as a Claim and requires proper and timely notice under §1.6.1 and §15.1.3.

Concern: The remedy and procedure for an assertion of delay in §8.3.1(5) appears to conflict with the claims procedure in Article 15. This new language appears to distinguish a mandatory extension of "reasonable time as the Architect may determine" for the delay causes listed in §8.3.1 from the requirement that the Contractor pursue a claim for any other delay asserted unless the Architect determines that the delay asserted is justified. The relationship between §8.3.1 and Articles 7 and 15 is confusing, but this change highlights the Contractor's entitlement to a time extension for certain delays without the need to file a claim.

Finally, the 2017 version deletes the 2007 requirement that time extensions under §8.3.1 be made by "Change Order." This makes sense because the extension is unilaterally determined by the Architect as opposed to an agreement between the parties as described in §7.1.2 and §7.2.1. It also reduces the risk that Contractors inadvertently waive claims for delay cost impacts by executing a Change Order limited to time. It is unclear if there is any language in the 2017 edition describing how to document the time extension determined by the Architect.

According to the AIA commentary, §8.3.1 is intended to define excusable delays for which the Contractor is entitled to additional time (based on the Architect's determination), leaving state law to determine whether the Contractor is entitled to additional compensation. AIA Document A201-2007, Commentary at 31. The events described in subsections (1) and (2) are compensable delays for which the Contractor should be entitled to additional time and compensation. These should be addressed as changes in the Work under Article 7 or Claims under Article 15. The remaining events in subsections (3), (4), and (5) are excusable delays which generally result in additional time or additional compensation to maintain the schedule.

Concern: The Contractor should be entitled to an equitable time extension for the events in subsections (3), (4) and (5) without any determination by the Architect as to reasonableness.

Contractors should delete the words "by (1) an act or neglect of the Owner or Architect, or of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; or (3)" and renumber the remaining subsections accordingly. Contractors should also replace "then the Contract Time shall be extended for such reasonable time as the Architect may determine" with "Contractors shall be entitled to an equitable adjustment in the Contract Time."

Article 9: Payment

§9.3.1. Applications for Payment

The second sentence says, "…all data substantiating the Contractor's right to payment that the Owner or Architect require…."

Concern: This gives the Owner/Architect unfettered rights to make whatever demands for backup it desires whether reasonable or not. This also would allow the Owner to audit the costs during construction even under a lump sum agreement. A possible modification is,"…all data substantiating the Contractor's right to payment ~~that the Owner or Architect require~~ as required in the Contract Documents…." This change would give more predictability as to what supporting documentation the Contractor will be required to submit with each payment application, and the required supporting documentation would be agreed to at the time of contract as opposed to leaving it open ended.

§9.3.1.

Second sentence: "…and release and waivers of liens from Subcontractors and suppliers…."

Concern: This provision is not limited to the subcontractors and suppliers which have contracts with the Contractor. It is unreasonable and unrealistic to expect Contractor to obtain releases and waivers of liens from all subcontractors and suppliers of every tier along with its payment application. Suggested modification: "…and release and waivers of liens from first-tier Subcontractors and suppliers…."

§9.5.2. Withholding Certification

This change makes it clear that a Contractor can submit a Claim.

Concern: If the IDM is the Architect, which is the default and AIA reports the Architect serves as IDM more than 95% of the time, it is a waste of time for the Architect to render an "initial" decision with respect to the merits behind its decision to withhold certification by the Architect. Suggested modification: When the Architect is acting as the IDM, Contractor may bypass the IDM if the primary basis of the Claim is an act or omission by the Architect, *e.g.*, withholding certification, thereby allowing the Contractor to file for mediation.

§9.10.2. Final Payment

Regarding subsection (1), it is unreasonable to require the Contractor to make all payments to downstream subcontractors/suppliers prior to receipt of the final payment from Owner. Suggested modification: "…or otherwise satisfied or will be promptly made upon receipt of final payment from Owner." To eliminate confusion, disputes, and delays during the project closeout, the Contract Documents should clearly state what special and subcontractor warranties are required, and thus, subsection (5) should state "…Subcontractor warranties as required in the Contract Documents, and…." With respect to subsection (6), some states such as Texas have four statutorily prescribed lien waivers and releases, and therefore, this subsection should be modified to state "…as may be designated by the Owner or by law." As for the last sentence, this gives the Owner the unfettered right to pay any amount to discharge a lien and then demand a refund for that amount from the Contractor. This should be modified to state "…the

Contractor shall refund to the Owner all ~~money~~ reasonable payments that the Owner ~~may be compelled to pay~~ has made in discharging the lien…."

Article 11: Insurance

For the first time, AIA has generated an Exhibit to the Owner-Contractor Agreements that provides in great detail the insurance requirements between those two contracting parties.

Concern: The new General Conditions document complements the new Insurance Exhibit, and in one section interferes significantly in the claims handling procedures between the insurer and the Contractor-Insured.

A Contractor cannot be expected to procure insurance that is not readily available in the market place. The new AIA A201 and the AIA's new Insurance Exhibit mandate certain coverages from the Contractor or prohibit the use of certain exclusions. Unfortunately, the failure to procure such coverage is the Contractor's problem.

With respect to the Owner's required coverage, the new Exhibit describes the Builder's Risk Insurance ("BRI") policy written on an "all risk" basis, and a completed value or equivalent policy form. The limits of coverage shall be sufficient to cover the total value of the entire Project on a replacement cost basis—plus the value of subsequent modifications, materials supplied or installed by others, and furnishings, fixtures, and materials located at, near or in transit to the Project site. In a new requirement, the Owner's BRI shall be maintained until Substantial Completion, and upon Substantial Completion, the Owner shall continue the BRI or purchase other property insurance for the project until expiration of the period for correction of the work. The Insurance Exhibit offers the following optional property coverages:

- ✓ Expedited cost insurance
- ✓ Extra expense insurance
- ✓ Civil authority insurance
- ✓ Ingress/Egress insurance
- ✓ Soft costs insurance

Another new requirement is that the Owner's property insurance must extend to the existing structure if the work involves remodeling or construction of an addition. Also, the new Exhibit encourages the Owner to consider procuring first party cyber security insurance, Boiler and Machinery insurance, and testing and start up insurance coverage. If the Owner cannot procure the required BRI, the Owner is given the option to require the Contractor to procure it, making it the Contractor's problem.

In the new 2017 A201 General Condition document, only the Owner is vested with authority to adjust the loss with the BRI Insurer. And if the Owner only takes care of

itself in the adjustment process, the Contractor can make a claim—assuming it complies with the Notice and Claim provisions in the new document.

With respect to the Contractor's required coverage, the new insurance provisions describe the coverages broadly, and without regard to current insurance market trends and conditions. In addition, certain of the new insurance procurement obligations run counter to state statutory and decisional laws. The duration of the Contractor's required insurance coincides with the extension of its risk post "completed operations" plus one or more years. The scope of coverages required stretches to fit the following risks—regardless of whether the Contractor can find such coverage in the market:

- ✓ Additional Insured Coverage for Owner, Architect & Consultants
- ✓ Professional Liability Coverage
- ✓ Pollution Coverage
- ✓ Maritime Coverage
- ✓ Contractor Procured Property Coverage
- ✓ The following typical CGL Exclusions **are prohibited:**
  - ➢ "insured v. insured" exclusions
  - ➢ Deletion of the Subcontractor exception for Your Work
  - ➢ Broad "workers' compensation" exclusions
  - ➢ Broad Contractual Liability exclusions
  - ➢ Prior Work Endorsements
  - ➢ Prior Injury Endorsements
  - ➢ Residential Work exclusions where the work involves residential
  - ➢ Roofing exclusions where the work involves roofing
  - ➢ EIFS exclusions where the work involves EIFS
  - ➢ Earth movement/subsidence exclusions where the work involves such hazards
  - ➢ Explosion and collapse exclusions where the work involves such hazards

And while the new Insurance provision allows the Contractor to spread the risk over primary and excess policies, the new Exhibit describes an excess form that may very

likely be impossible to obtain because the excess policy must not include the typical "exhaustion" requirement of actual payment by the underlying insurer.

Article 13

§13.1. Governing Law

While maintaining the contract shall be governed by the law of the place where the Project is located, it excludes that jurisdiction's choice of law rules. This revision does not raise a concern and merely clarifies that the choice of law rules in the jurisdiction of the Project cannot change the choice of law (place where the project is located) made in the contract.

§13.5.1 (Now 13.4.1). Tests and Inspections

AIA has now clarified that, "the Owner shall directly arrange" as well as pay for tests, inspections, or approvals where building codes or applicable laws or regulations so require. In the 2007 version, the Owner only had the obligation to pay for such tests, inspections, or approvals. In most cases, this revision is merely clarifying what the law or regulations already required.

Article 14

§14.1. Termination by the Contractor

In §14.1.1.4, the language was modified to clarify that the Contractor may terminate the Contract if the Work has been stopped for 30 days because the Owner failed to provide reasonable evidence of the Owner's financial arrangements as required in §2.2 (14 days). The prior version allowed the Contractor to terminate the contract if the Owner failed to provide reasonable evidence "promptly upon the Contractor's request." Essentially this modification corrected a misstatement in the paragraph which could have been interpreted to expand the Owner's obligation to provide financial information to the Contractor.

§14.1.3.

The Contractor's recovery from the Owner has been modified to include reasonable overhead and profit on work not executed. However, the Contractor's entitlement to "other damages" has been deleted. On balance this is probably a net improvement for contractors, considering lost anticipated overhead and profit, loss of bonding capacity, and similar damages would have been waived by the waiver of consequential damages clause anyway.

§14.2. Termination by the Owner for Cause

In §14.2.2, the requirement that the Initial Decision Maker certify a termination for cause has been changed to require the Architect to certify the termination.

§14.4. Termination by the Owner for Convenience

Concern: One of the most substantive and troubling changes in the 2017 edition is the radical change to the Contractor's compensation rights for an Owner's termination for convenience. Previously, the Contractor received payment for Work performed (including overhead and profit), termination costs, and overhead and profit on unperformed work. Significantly, the 2017 edition removed the Contractor's right to recover for lost anticipated overhead and profit and substituted a termination fee to be negotiated in a fill-in-the-blank section. If the Contractor does not negotiate such a termination fee at the time of contract execution, the Contractor will receive nothing to compensate it for being terminated without cause. Surprisingly, AIA did NOT flow down the language in the prime agreement to the AIA A401 standard subcontract.

It is unclear what the new AIA termination for convenience scheme intends or how courts will interpret this new language (leading a General Contractor to potentially get entangled in litigation). One ambiguity stems from AIA's addition of "costs attributed to termination of subcontracts" to the amount the Owner must pay the Contractor. However, it is unclear if that includes payments for lost anticipated overhead and profit a General Contractor would be obligated to pay a subcontractor under an unmodified AIA A401 Subcontract. This is especially important since AIA treats lost overhead and profit inconsistently in the AIA A201 and the AIA A401. An Owner might have to pay for lost anticipated overhead and profit for Subcontractors' termination for convenience, but not for the General Contractor. Obviously General Contractors should take great pains in contract negotiations to avoid such a situation. Moreover, would such a scheme force Subcontractors and General Contractors to disclose highly confidential pricing information in a termination situation? It is also unclear what "costs attributable to termination" includes. Does this include attorney fees? Interpreting such language may differ by state.

It is also noteworthy that in Article 14, when the Contractor is terminated in the Termination by the Owner for Convenience section (§14.4.3), payment is only for "Work, *properly* executed," whereas, in the Termination by the Contractor section (§14.1.3), it is defined simply as "Work executed." In fact, AIA changed the description in the Termination by the Owner for Convenience section to "Work properly executed" from "Work executed" in this new edition. It is unclear if these two descriptions are intended to be interpreted differently or not.

Similarly, in the Termination by the Owner for Convenience section, the Contractor is entitled to payment for "costs incurred by reason of the termination, including costs attributable to termination of Subcontracts," while in the Termination by the Contractor section, the Contractor is entitled to payment for "costs incurred by reason of such termination" without mention as to whether costs attributable to termination of subcontracts is included or not. Once again, it is unclear as to whether these two descriptions are intended to be interpreted differently or not.

Table 1 AIA A201-2017 Termination compensation

Contractor entitled to payment for:	Termination for Convenience	Termination by Contractor
Work executed		x
Work properly executed	X	
Reasonable overhead and profit on work not executed		x
Costs incurred because of termination	X	x
Costs incurred because of termination, including costs attributable to termination of subcontracts	X	
Termination Fee	X	

Throughout the A201, the "written notice" requirement has been changed to simply "notice" to signify the new process. Therefore, it is critical that the Contractor recognize whether it is giving notice of a Claim, which must be made by registered or certified mail or courier, versus any other written notice. In §15.1.1, a Claim is defined as "a demand or assertion by one of the parties seeking, as a matter of right, payment of money, a change in the Contract Time, other relief with respect to the terms of the Contract . . . and other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract." This is an extremely broad definition.

There are 4 locations in Article 14 where "written notice" was changed to "notice." However, it is unclear if the notices required to be given in those 4 situations are notices of a Claim or just any other notice. The 4 instances are §14.1.3, Contractor providing notice to Owner to terminate the contract; §14.1.4, Contractor providing notice to Owner to terminate the contract; §14.2.2, Owner providing notice to Contractor to terminate the contract for cause; and §14.4.2, Owner providing notice to Contractor to terminate the contract for convenience. Perhaps with the exception of a termination for convenience, the other three situations would seem to fall under "a demand or assertion by one of the parties seeking . . . relief with respect to the terms of the Contract." In fact, it is hard to believe that any matter where the issue of whether something is a Claim or not a Claim is heard by a court wouldn't be considered a Claim. The bottom line is that if there is any chance of a dispute, the Contractor should follow the process required for notice of a Claim.

Unfortunately, the revisions to the notice provisions in the 2017 A201 contradict the purpose of providing notice in the first place. As long as the Owner has actual notice of a Claim and is able to make decisions in an effort to manage the effects of that Claim, the Contractor should be entitled to its contractual remedy. In this version of the A201, a Contractor could waive a completely legitimate claim by not precisely complying with a

hyper technical process which is outdated by a generation. Perhaps with the exception of giving notice for termination, the reality is that no business anywhere, particularly in the construction industry, communicates by registered or certified mail anymore. Really, there is no reason to have to send a physical piece of paper at all. Almost all communications are done electronically now, and our industry's standard form contracts should reflect that.

Article 15: Claims and Disputes

§15.1.1.

A Claim is defined as "a demand or assertion by one of the parties seeking, as a matter of right, payment of money, a change in the Contract Time, other relief with respect to the terms of the Contract . . . and other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract."

Concern: This is a very broad definition.

§15.1.1.

Adds that a Claim is also a change in the contract time, thus including extensions of the contract time within the time limits and notice provisions for Claims. §15.1.1 clarifies that the Owner need not file a claim to impose liquidated damages.

Concern: Without notice, the Contractor can be surprised by a claim. The Contractor should insist on notice of claims for Liquidated Damages.

§15.1.2.

Requires that all claims must be asserted no later than 10 years after Substantial Completion of the Work or as required by law or the requirements of the binding dispute resolution procedure selected. There is a provision waiving all claims and causes of action not commenced within the 10 year period.

Concern: Some states, such as Florida, have adopted a Statute of Repose (providing that suits must be commenced within a certain period). In Florida, it is questionable whether this provision would be enforceable, as case law has held that you cannot extend or limit a statutory time to file a lawsuit, i.e., it is void against public policy. This provision would arguably be beneficial to the Contractor as it is typically the Owner that would be asserting a claim (for defective work) well after Substantial Completion. For example Florida's Statute of Repose states: "In any event, the action must be commenced within 10 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest." Thus, Substantial Completion would likely be the earliest of the dates, not the latest as contemplated by the Statute of Repose.

§15.1.3.2.

No IDM decision is required if the claim is first discovered after the period for correction of work as provided for by §12.2.2 (one year following Substantial Completion).

§15.1.5 and 15.1.6. Notice and Service of Claims

Concern: As previously noted, Notice of Claim (including Claims for Additional Cost (§15.1.5) and Claims for Additional Time (§15.1.6.2) must be served via registered, certified mail or courier. The Contractor must reject this provision as it places a trap on the Contractor as all claims that would be made by a Contractor require this service, while the Owner's claims for Liquidated Damages do not require this service as they are exempted from the definition of "Claims."

15.2. Initial Decision

Key Revisions/Observations:

- The Architect is still the default IDM.
- The IDM's Decision is a condition precedent to Mediation and Arbitration or Litigation (unless 30 days expires without receiving the IDM's decision).
- Reduced the 60 day time period to 30 days to demand mediation after the IDM's decision.
- Per §15.2.6.1, if a party fails to demand mediation within 30 days after receipt of a decision from the Initial Decision Maker, then mediation and an ability to challenge the decision is waived.
- There is a new timing mechanism at §15.3.3 that may act to bar a party's ability to file a Claim in arbitration or litigation. After the IDM's initial decision and mediation, either party may demand that the other party file its claim in either arbitration or litigation. If the other party does not file for binding dispute resolution within 60 days after receipt of the demand, then both parties waive their rights to binding dispute resolution (i.e., arbitration or litigation) with respect to the initial decision.

Concern: Contractors need to continue to be vigilant with the timing of contesting IDM's decisions if they want to maintain their right to challenge a decision. The IDM process, and the wording on deadlines, continues to be confusing and non-intuitive.

§15.4 Arbitration.

Unchanged except:

- Arbitration shall be located where the project is located.

§15.4.4. Consolidation

Consolidation or joinder is now subject to AAA Rules or other applicable arbitration rules.

EXHIBIT A Insurance and Bonds to AIA A101 2017

AIA took some but not all of the insurance requirements out of the AIA A201 article 11 and put them into this Exhibit A. Since this section states only that the Contractor shall purchase and maintain insurance of the types and limits as described in the Agreement or elsewhere, the use of the new Exhibit A is optional. As indicated in the concerns below, some of this new optional language should be avoided or be procured by the Owner and not the Contractor.

A.2.3.1.1. Required Property Insurance, Causes of Loss

This paragraph references coverage "for ensuing loss…from error, omission, or deficiency in construction methods, design or specifications…". The inclusion of damage as a result of design deficiencies is very broad and specialized.

Concern: If this subsection is used, Contractors should push very hard for the Owner to obtain and oversee the coverage. This required coverage goes beyond what Builders Risk policy is intended to cover. Such requirements should not be considered standard nor included in a standard contract document. While the coverage is available from a limited number of insurance carriers, the cost of the coverage or associated deductibles may be prohibitive depending on the type of work being performed. In addition, this is a coverage that is not written on a standardized basis. Consequently, the actually procured policy coverage may appear to afford coverage but the Owner and Contractor may not be knowledgeable enough to tell if the policy wording matches the contractual requirements, potentially leaving everyone in a state of confusion at the time of a loss.

Also, on multi-prime projects, the ability for each individual Prime Contractor to have differently worded policies would only serve to complicate matters even more. The coordination of the claims process would be impossible not to mention prolonged. As noted above, this policy should be obtained and overseen by the Project Owner.

A.2.4. Optional Extended Property Insurance

Concern: All seven of these subsections need to be evaluated on a case by case basis and a specific limit of coverage referenced. Depending on the project there may be a limited amount of coverage available and could significantly add to the cost of the project. If this language is used, as noted above this policy should be obtained and overseen by the Project Owner.

A.3.1.3. Additional Insureds

The forms listed - CG 20 10, CG 20 37, and the CG 20 32, are readily available in the insurance marketplace.

Concern: The 2004 editions may not be available (last two sets of numbers - 07 04 - stands for July 2004). The “edition date” should not be included in the requirement wording.

A.3.2.2.2. Commercial General Liability

Concern: All but one of the**[exclusions included in?]** subsection 9 are non-standardized exclusions that carriers have added to avoid coverage and rightfully should be avoided by all Contractors.

ACKNOWLEDGEMENT

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APPENDIX 1

AGC'S COMMENTARY TO THE 2007 AIA A201 GENERAL TERMS AND CONDITIONS DOCUMENT. Dated November 12, 2007; Revised July 28, 2010.

AGC's Preliminary Commentary to the

2007 Edition of the AIA A201

General Terms and Conditions Document

The new edition of the AIA A201 2007 edition was published on November 5th. The 600-member AGC Board of Directors unanimously voted not to endorse the new A201 on October 6, 2007. AGC's decision was based upon the substantial shift of risk to Contractors and other parties outside the design profession as well as a fundamental disagreement with the authoritative role of architect and mandated linear process. This preliminary commentary is intended to provide AGC members a resource to assist them when choosing to bid projects requiring the new A201. A more comprehensive AGC commentary will be published in the future.

The intent of this document is not to provide legal advice. Rather, members are encouraged to consult with competent legal counsel, as well as insurance and surety professionals, to make informed decisions to evaluate their risk exposure when considering any project.

Note: Unless otherwise indicated, underlined text indicates new language which should be considered for inclusion. Text in strikeout mode is language that is currently in the new Standard A201 which may be considered for deletion.

AGC of America is deeply appreciative of the many contributions of the AGC A201 Taskforce of the AGC Contract Documents Committee, the more than 20 AGC chapters, and other individual members for providing invaluable comments and feedback regarding the AIA A201. Additional inquiries regarding the A201 may be directed to Brian Perlberg, AGC of America's Senior Counsel of Contract Documents and Construction Law, at perlbergb@agc.org

Article 1

NEW PROVISION RECOMMENDED FOR CONSIDERATION—Mutual Beneficial Relationship Between the Parties

More than any contractual provisions that can be drafted, successful projects stem from positive working relationships and direct communications. A positive statement to help facilitate such interactions is recommended for inclusion in contractual agreements.

Section 1.5 may be added as follows:

Section 1.5 PARTY RELATIONS

"Owner, Architect, Engineer, Contractor, and Subcontractors agree to proceed with the Work on the basis of mutual trust, good faith and fair dealing."

NEW PROVISION RECOMMENDED FOR CONSIDERATION—Active Participation by the Owner

An Owner, more than any other party in a construction project, has the most to gain and lose. An Owner should be in a position to take an active role in the contractual relationship between and Owner and a Contractor. Fundamentally, the A201 discourages an Owner from directly communicating and collaborating with a Contractor, but rather directs that all requests and submissions be funneled through an Architect.

Consider inserting the following at a new Section 1.6:

"Section 1.6 SUBMISSIONS, REPORTS, and REQUESTS

All Contractor submissions, reports, and requests shall be directed to the Owner. Such submissions, reports, and requests shall be directed to the Architect/Engineer only if the Contractor is specifically directed to do so by the Owner."

Section 1.1.2 Performance of the Contract

Requirements and obligations should be consistent. This provision protects Architects, but conspicuously omits Contractors.

Section 1.1.2 may be amended beginning in the seventh line after as follows:

"The Architect and Contractor shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of their respective ~~the Architect's~~ duties."

Section 1.2.1 Drafting Clarification

General Terms and Conditions should require measurable results and specific indications, so that no party will have to decipher intent.

Section 1.2.1 may be amended as follows:

In the first line, strike "~~The intent of the Contract Documents is to~~", and substitute "The Contract Documents shall".

Section 1.6 Drafting Clarification

Contract documents should provide clear and concise requirements.

Section 1.6 may be amended as follows:

In the second line after "shall", strike "~~endeavor to~~".

NEW PROVISION RECOMMENDED FOR CONSIDERATION—Order of Precedence

The A201 does not include an order of precedence for interpreting contract documents. Failure to include such a provision leads to needless uncertainty and litigation costs.

Section 1.7 may be added as follows:

"Section 1.7 Order of Precedence

1.7.1 In case of conflicts between the drawings and specifications, the specifications shall govern. In any case of omissions or errors in figures, drawings or specifications, the Contractor shall immediately submit the matter to the Owner for clarification. The Owner's clarifications are final and binding on all Parties, subject to an equitable adjustment in Contract Time or Price pursuant to Articles 7 and 8 or dispute resolution in accordance with Article 15.

1.7.2 Where figures are given, they shall be preferred to scaled dimensions.

1.7.3 Any terms that have well-known technical or trade meanings, unless otherwise specifically defined in the Contract Documents, shall be interpreted in accordance with their well-known meanings.

1.7.4 In case of any inconsistency, conflict or ambiguity among the Contract Documents, the documents shall govern in the following order: (a) Change Orders and written modifications to this Agreement; (b) this Agreement; (c) drawings (large scale governing over small scale), specifications and addenda issued prior to the execution of this Agreement; (d) approved submittals; (e) information furnished by the Owner; (f) other documents listed in the Agreement. Among categories of documents having the same order of precedence, the term or provision that includes the latest date shall control. Information identified in one Contract Document and not identified in another shall not be considered a conflict or inconsistency."

Article 2

Section 2.2.1 Owner Financial Information

Receiving Owner financial information is absolutely critical in order that Contractors may receive timely payment and retain financial viability. Contractors should be able to receive Owner financial information as provided for in the 1997 edition of the A201.

Section 2.2.1 may be amended as follows:

In the first line, after "Work", add "and thereafter". In the third line after "Contract", strike in its entirety as follows: ~~"Thereafter, the Contractor may only request such evidence if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) a change in the Work materially changes the Contract Sum; or (3) the Contractor identifies in writing a reasonable concern regarding the Owner's ability to make payment when due. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor."~~

Section 2.4 Owner Takeover of the Work

Both Owners and Contractors benefit from a second notice prior to the Owner having authority to take over the Contractor's Work. A shorter initial period of notice coupled with a second opportunity helps avoid time-consuming disruptions and expensive legal actions.

Section 2.4 may be amended in the first through fourth lines, as follows:

"If the Contractor defaults . . . and fails within a five ~~ten~~ Day period after receipt of written notice from the Owner to commence and continue correction or such default or neglect with diligence and promptness, the Owner may after such five Day period give the Contractor a second five Day notice to correct such deficiencies. If the Contractor within such five Day period after receipt of the second notice fails to commence and continue to correct any deficiencies, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies."

Article 3

Section 3.2.2 Design Delegation

This section contains an unclear reference to “portion of the work,” and importantly, potentially exposes the Contractor for its review of the Architect/Engineer’s design. In addition, new language adds additional Contractor liability exposure for reporting design errors not just discovered, but also “made known to” the Contractor.

Section 3.2.2 may be modified as follows:

“~~Because the Contract Documents are complementary, the Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Section 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work, and shall observe any conditions at the site affecting it.~~ Before starting construction, the Contractor shall make a good faith effort to review the drawings and specifications and existing site conditions in order to identify potential problems impacting expeditious and economic construction.”

In the seventh line, after “the”, strike “~~to the Architect any errors, inconsistencies or omissions discovered by or made known to the Contractor as a request for information in such form as the Architect may require~~”, and substitute: “to the Owner and Architect any errors, inconsistencies or omissions discovered by the Contractor.”

Section 3.2.3 Design Delegation

It is recommended that errors and inconsistencies in the contract documents are reported to the Owner, rather than as a request for information to the Architect.

Section 3.2.3 may be amended as follows:

In the third line, after “the”, strike “~~Architect any nonconformity discovered by or made known to the Contractors as a request for information~~” and substitute “Owner any discovered nonconformity”.

Section 3.3.1 Owner-Mandated Means and Techniques

Typically, a Contractor is solely responsible for construction means, methods, and techniques. It is unusual that there is specific language in this standard agreement which encourages Owners to mandate such means and methods. Regardless, the new language in the 2007 A201 creates an inappropriate standard of care which requires the Contractor to perform perfectly to avoid liability when operating under such Owner-mandated means and methods.

Section 3.3.1 beginning in the 10th line after "Architect." may be amended as follows:

" If the Contractor is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any loss or damage arising ~~solely~~ from those Owner-required means, methods, techniques, sequences or procedures, unless Contractor is grossly negligent."

Section 3.7.5 Differing Site Conditions

As drafted, this provision may increase a Contractor's liability exposure when encountering differing site conditions.

Section 3.7.5 may be modified as follows:

In the first line, after Contractor, strike "~~encounters~~", and substitute "knowingly encounters and recognizes".

In the seventh line, after "existence", add "or good faith belief of such existence".

Section 3.9.2 Superintendent's Approval

Requirements and consequences for meeting deadlines should be consistent for both the Architect and Contractors. Contractor requirements typically carry hard deadlines accompanied with serious consequences if the deadlines are not met. Some Architects' deadlines are written as targets.

Section 3.9.2 may be amended as follows:

In the third line, after "Owner", strike "~~or the Architect~~".

In the fourth line, after "superintendent", strike "~~or (2) that the Architect requires additional time to review.~~"

In the fifth line, after "Failure of the", strike "~~Architect~~" and substitute "Owner".

Section 3.9.3 Approval of Superintendents

An Owner should be notified and have the opportunity to provide reasonable objection to a new Superintendent. However, approval should not delay a Contractor's ability to expeditiously continue progress on the work when a personnel change is needed, especially on an interim basis.

Section 3.9.3 may be amended as follows:

In the second line, after "without", strike "~~the Owner's consent, which shall not be unreasonably be withheld or delayed~~" and substitute "notification to the Owner."

Section 3.10.2 Submittal Schedule

The consequences for a Contractor's failure to submit a submittal schedule is disproportionate to the potential infraction.

Section 3.10.2 may be amended as follows:

"The Contractor shall prepare a submittal schedule, promptly after being awarded the Contract and thereafter as necessary to maintain a current submittal schedule, and shall submit the schedule(s) for the ~~Architect's~~ Owner's approval. The Owner's ~~Architect's~~ approval shall not unreasonably be delayed or withheld. The submittal schedule shall (1) be coordinated with the Contractor's construction schedule, and (2) allow the Owner, and if directed the Architect reasonable time to review submittals. ~~If the Contractor fails to submit a submittal schedule, the Contractor shall not be entitled to any increase in Contract sum or extension of Contract Time based on the time required for review of submittals.~~"

Article 4

Section 4.2.4 Communications for Contract Administration

Direct communications advance better project results. The industry has moved rapidly in the last 10 years toward more collaboration and increased use of alternative project delivery methods. The A201 is referenced as General Terms in these alternative methods, but continues to isolate Parties' communications. During the 10-year life expectancy of the new A201, the industry's move towards collaboration is only expected to increase, especially in light of Building Information Modeling (BIM) as well as the increasing use of alternative delivery methods, as exemplified in the ConsensusDOCS 300 Tri-Party Collaborative Agreement, which some reference as "Alliancing" or "Relational Contracting." This provision is not consistent with industry best practices.

Section 4.2.4 may be amended as follows:

"~~Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized, t~~The Owner and Contractor are encouraged ~~shall endeavor~~ to communicate with each other ~~through the Architect~~ directly about matters arising out of or relating to the Contract.

Article 9

Section 9.5.3 Joint Checks

Payments between a General Contractor and Subcontractor are governed by a separate contractual relationship between the Owner and Contractor. Issuance of joint checks is intrusive and not a favored practice.

Strike Paragraph 9.5.3 in its entirety:

"~~If the Architect withholds certification for payment under Section 9.5.1.3, the Owner may, at its sole option, issue joint checks to the Contractor and to any Subcontractor or material or equipment suppliers to whom the Contractor failed to make payment for Work properly performed or material or equipment suitably delivered.~~"

Section 9.6.4 Inquiries into Subcontractor Payment

Payments between a General Contractor and Subcontractor are governed by the business relationship and contract between these two parties. An Owner's inquiries regarding a Contractor's payment is intrusive and not a favored practice.

In the third line, after "Work.", strike **"**~~If the Contractor fails to furnish such evidence within seven days, the Owner shall have the right to contact Subcontractors to ascertain whether they have been properly paid.~~"

Article 10

New Provisions—Hazardous Waste

Section 10.3 adds significantly to the Contractor's liability exposure in regard to hazardous waste and materials. This section does provide adequate protections to Contractors, who unless specifically contracted to do so, are not expecting to address hazardous waste.

Section 10.3.4 may be amended as follows:

After “substances” in the fourth line, add: “Unless required by the Contract Documents, the Contractor shall not be required to perform without its consent any Work relating to a hazardous material or substance, provided that such Contractor consent shall not be unreasonably withheld.”

Section 10.3.6 may be amended as follows:

“~~If, without negligence on the part of the Contractor, the Contractor is held liable by a government agency for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, the Owner shall indemnify the Contractor for all cost and expense thereby incurred.~~ To the extent not caused by the negligent acts or omissions of the Contractor, its Subcontractors and Sub-subcontractors, and the agents, officers, directors and employees of each of them, the Owner shall indemnify and hold harmless the Contractor, its Subcontractors and Sub-subcontractors, and the agents, officers, directors and employees of each of them, from and against all claims, damages, losses, costs and expenses, including but not limited to reasonable attorneys’ fees, costs and expenses incurred in connection with any dispute resolution process arising out of or relating to the performance of the Work in any area affected by hazardous materials or substances.”

Art 11

Section 11.1.1 Completed Operations Insurance Coverage

The new requirement to procure property damage coverage through completed operations is typically excluded in insurance policies. Considering the uncertainty surrounding availability of such insurance coverage, this requirement is not appropriate today or during the expected 10-year lifespan of this document.

Section 11.1.1 in the third line may be amended as follows:

"The Contractor shall purchase from and maintain . . . insurance as will protect the Contractor from claims . . . which may arise out of or result from the Contractor's operations ~~and completed operations~~ . . . .".

Section 11.1.4 Additional Insured

The new document now requires Contractors to provide additional insured protection to not only owners, but also to architect's and architect's consultants. It is unclear if this new requirements obligates Contractors to procure professional liability coverage for designers. **The second line of section 11.1.4 requiring a Contractor to name "the Architect and the Architect's Consultant's" is recommended for deletion.**

Additional insured coverage is one of the most difficult and important issues involved in construction contracts today. Since there is no clear consensus best practice to address this issue, the parties themselves should negotiate among the best available options. Below is language for which parties should choose.

Section 11.1.4 is recommended for deletion in its entirety, and substituted with designated options as follows:

"11.1.4 ADDITIONAL LIABILITY COVERAGE

The Owner _____ shall/_____ shall not (indicate one) require Contractor to purchase and maintain liability coverage, primary to Owner's coverage under Subparagraph 11.2

11.1.4.1 If required above, the additional liability coverage required of the Contractor shall be

(Designate required coverage(s)):

_____ .1 Additional Insured. Owner shall be named as an additional insured on Contractor's Commercial General Liability Insurance specified for operations and completed operations, but only with respect to liability for bodily injury, property damage or personal and advertising injury to the extent caused by the negligent acts or omissions of Contractor, or those acting on Contractor's behalf, in the performance of Contractor's Work for Owner at the Worksite.

_____ .2 OCP. Contractor shall provide an Owners' and Contractors' Protective Liability Insurance ("OCP") policy with limits equal to the limits on Commercial General Liability Insurance specified, or limits as otherwise required by Owner.

Any documented additional cost in the form of a surcharge associated with procuring the additional liability coverage in accordance with this paragraph shall be paid by the Owner directly or the costs may be reimbursed by Owner to Contractor by increasing the Contract Price to correspond to the actual cost required to purchase and maintain the additional liability coverage. Prior to commencement of the Work, Contractor shall obtain and furnish to the Owner a certificate evidencing that the additional liability coverages have been procured.".

Section 11.3.1 Property Insurance

Additional language is recommended to clarify that a Contractor and lower tier Subcontractors are fully covered by the Owner's property insurance policy, and they are not responsible if an Owner fails to pay the required insurance premiums. Also, the recommended language helps prevent against insurance companies pursuing subrogation claims against a Contractor and Subcontractors when a loss is covered by the Owner's property insurance.

Section 11.3.1 may be amended in the ninth line as follows:

This insurance shall include interests as “named insureds,” but not as “first-named insureds” of the Owner, the Contractor, Subcontractors, and Sub-subcontractors in the Project.

Article 15

Section 15.1.6 Mutual Waiver of Consequential Damages

The elimination of the term “direct” from liquidated damages in the new A201 may take away the protection parties gain from the mutual waiver of consequential damages. Without the word “direct,” indirect liquidated damages may invite attempts to insert punitive liquidated damages elsewhere in the contract.

Section 15.1.6 may be amended as follows:

In the beginning of the tenth and last line, strike “~~liquidated damages~~”, and insert “liquidated direct damages.”

Section 15.2 Direct Discussions

Direct discussion between parties is the most effective mechanism by which to avoid and eliminate disputes and claims.

Section 15.2 may be amended as follows:

Strike section 15.2 in its entirety and insert the following:

DIRECT DISCUSSIONS If the Parties cannot reach resolution on a matter relating to or arising out of the Agreement, the Parties shall endeavor to reach resolution through good faith direct discussions between the Parties’ representatives, who shall possess the necessary authority to resolve such matter and who shall record the date of first

discussions. If the Parties' representatives are not able to resolve such matter within five (5) business Days of the date of first discussion, the Parties' representatives shall immediately inform senior executives of the Parties in writing that resolution was not effected. Upon receipt of such notice, senior executives of the Parties shall meet within five (5) business Days to endeavor to reach resolution. If the dispute remains unresolved after fifteen (15) Days from the date of first discussion, the Parties shall submit such matter to the dispute mitigation and dispute resolution procedures selected herein.

Section 15.2.6.1 New Deadline for Initial Decisions

New language creates a deadline by which parties must respond. This new technical deadline will encourage parties to mediate each and every individual initial decision, thereby escalating disputes, rather than resolving them.

Section 15.2.6.1 maybe amended as follows (this modification is only applicable if 15.2 is not stricken in its entirety, as recommended above):

Strike 15.2.6.1 in its entirety.

"~~Either party may, within 30 days from the date of an initial decision, demand in writing that the other party file for mediation within 60 days of the initial decision. If such a demand is made and the party receiving the demand fails to file for mediation within the time required, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision~~."

Section 15.4 Arbitration

New language in the A201 prevents the use of revised Construction Industry Arbitration Rules, which are procedural rules that are improved upon periodically.

Section 15.4 may be amended in the second line, after "subject to" as follows:

". . . arbitration, which, . . . shall be administered by the American Arbitration Association in accordance with ~~its~~ current Construction Industry Arbitration Rules ~~in effect on the date of the Agreement~~. . . .".

END OF DOCUMENT.