

AIA Document A201™-1997: Refinement of an Important Contract Document

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SUMMARY

Victor O. Schinnerer & Company Inc. outlines the differences between the 1987 and 1997 versions of AIA Contract Document A201™—1997, General Conditions of the Contract for Construction.

AIA Document A201™—1997 includes significant changes from the 1987 edition that reflect the changing realities of construction industry practices and risk-management concerns. A201™—1997 also includes minor changes in language that affect the contractual relationships between contractors and owners and the role of architects as agents of the owners.

OPPORTUNITIES FOR IMPROVED RELATIONSHIPS

Owners are unlikely to object to the changes in contractual requirements, and contractors are likely to perceive A201™—1997 as beneficial because the document provides greater protection from inordinate risk and unidentified responsibilities while fostering a less legalistic and adversarial business environment.

On the whole, A201™ —1997 incorporates equitable provisions and takes into account practical considerations of the construction process, resulting in fair and reasonable general conditions for construction contracts.

THE NEW LANGUAGE AT A GLANCE

A comparison of A201™ —1997 with A201™—1987 reveals the following changes, among others:

- Clarification of the contractor's rights and responsibilities
- A broader definition of "hazardous materials" and clarification of the owner's responsibility for

rendering such materials harmless, including explicit indemnification of the architect and the contractor with respect to hazardous materials

- A narrowing of the contractor's indemnification obligation and, as an alternative to indemnification, the inclusion of a project management protective liability insurance policy
- Clarification of the contractor's right to perform or contract for design services at the request of the owner and the architect without assuming responsibility for the adequacy of the architect's performance or original design criteria
- Clarification of the contractor's responsibility to produce results "indicated" rather than "intended" by the contract documents
- Greater assurance for the contractor of the owner's financial means by requiring the owner to furnish evidence of financial arrangements for the project
- Clarification that the contractor may rely on information furnished by the owner
- A requirement that the parties use mediation and arbitration to resolve disputes
- A requirement that before exercising its right to correct defective work, the owner must notify the contractor and give the contractor an opportunity to correct the work in order to preserve the contractor's warranty obligation
- Clarification that the contractor's review of submittals is only "for compliance with contract documents"
- A requirement for the contractor to perform in "general accordance" with the project schedule
- A new provision allowing the owner to assign the contract to a lender without the consent of the contractor—but only if the lender assumes all rights and obligations of the owner

MAJOR PROVISIONS

Among the major changes to A201™ that should be reviewed carefully are the following:

Mutual Waiver of Consequential Damages [4.3.10]

This new paragraph limits the claims of either party to the direct loss that may arise from the other party's breach and explicitly excludes indirect or incidental damages. This results in a more equitable distribution of risk between the owner and contractor. While this provision may benefit both parties, the primary beneficiary is the contractor, who will no longer risk unforeseen and potentially enormous consequential damage liability. With minor modification in language, this protection could be extended to the architect as the owner's agent.

Indemnification [3.18.1]

The indemnification language in A201™—1987 was significantly broader than in A201™—1997, which no longer requires the contractor to indemnify the owner and the architect from and against loss-of-use damages. The change was necessary to achieve consistency with the principle of mutual waiver of consequential damages.

A201™—1987 also required the contractor to indemnify the owner and the owner's agents even if the contractor was only partially responsible for a loss; A201™—1997 requires the contractor to indemnify only to the extent that the contractor is responsible for a loss.

Project Management Protective Liability Insurance [3.18.1, 11.3]

The risk assumed by the contractor is further reduced by the development of a new type of insurance coverage that replaces a portion of the contractor's indemnification obligation. Project Management Protective Liability (PMPL) insurance covers the owner, contractor, architect, and any construction manager for their vicarious or derivative liability arising out of their respective "general supervision" of the contractor's operations on their behalf. The contractor purchases the policy at the direction of the owner. If the contractor cannot transfer the risk to an insurer by purchasing such a policy, the contractor's indemnification obligation is not reduced.

Whether or not a PMPL policy is purchased, the contractor cannot be required to include the owner, architect, or others as additional insureds on the contractor's commercial general liability insurance policy.

Hazardous Materials [10.3]

A201™—1997 adds protection to both the contractor and architect concerning hazardous materials and broadens the definition to include "a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site" from which arises the risk of "foreseeable bodily injury or death." The owner must have a licensed laboratory verify the presence or absence of the material or substance, be responsible for rendering the hazard harmless, and indemnify the contractor and architect for any damages to them.

Contractor-Provided Design Services [3.12.10]

This is a clear statement of the conditions under which a contractor may be required to provide professional services. Although some contractors may consider this provision an unreasonable and risk-prone delegation of design responsibility, it is only an allocation of responsibility for design delivery and is an opportunity for the contractor to expand its services and compensation. This clarifies language that existed in A201™—1987. The new, more explicit wording provides significant protections for the contractor, without reducing the responsibilities of the architect for design and performance criteria. Contractors can also obtain professional liability insurance for the vicarious liability risks inherent in furnishing the services of a licensed design professional to meet the contractual requirements.

CHANGES TO THE CONTRACTOR'S DUTIES

The paragraphs that change or clarify the contractor's duties include the following:

3.2.1—The contractor is required to review the contract documents, owner-provided information, and site conditions "for the purpose of facilitating construction" but not for "discovering errors, omissions, or inconsistencies."

3.7.4—The contractor bears "appropriate" rather than "full" responsibility for work knowingly performed contrary to laws, statutes, ordinances, building codes, and rules and regulations.

3.10.3—The contractor performs work in "general accordance" with the most recent schedule submitted to the owner and architect.

3.12.5—The contractor's review and approval of shop drawings and other submittals is only for "compliance with the Contract Documents."

3.17.1—The contractor must defend against infringement claims and indemnify the owner and architect if the contractor does not pay royalty or

license fees or has reason to believe that a design, process, or product infringes a copyright or patent and does not report this information to the architect. Otherwise, the contractor is not responsible for copyright or patent violations in the information provided by the owner or architect.

CHANGES TO THE OWNER’S RIGHTS AND DUTIES

The paragraphs that change or clarify the owner’s rights and duties include the following:

2.2.1—The owner must provide, upon the contractor’s request, reasonable evidence of the owner’s financial arrangements for the project. The information must be provided before the contractor starts or continues work. This enables the contractor to assess the owner’s capacity and ability to fulfill its financial obligations. The owner also must notify the contractor of any material variance in the project’s financial arrangements during the course of the project.

2.2.3—The contractor is entitled to rely on the accuracy of the information furnished by the owner. The owner must provide other information or services relevant to the contractor’s performance of the work under the owner’s control if the contractor requests such information in writing.

14.3, 14.4—In a provision similar to that found in AIA Document B141™—1997 Standard Form of Agreement Between Owner and Architect with Standard Form of Architect’s Services, the owner now has the right to suspend, delay, or interrupt the work and to terminate the contract for reasons of its own. While the suspension for convenience is tied to an adjustment in time and cost, the termination for convenience explicitly requires payment for the work executed, for the costs incurred by the contractor because of the termination, and for the reasonable overhead and expected profit from the work not executed. As in AIA Document B141™, these provisions may reduce litigation that often accompanies the suspension or abandonment of a project.

RESOURCES

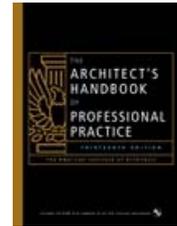
More Best Practices

The following AIA Best Practices provide additional information related to this topic:

- 18.02.01 Forms of Agreement: Which Should You Use?
- 17.02.02 Client-Selected Consultants
- 17.01.06 Steps for Reviewing a Contract

For More Information on This Topic

See also “Construction Agreements” and “The AIA Documents” by Dale R. Ellickson, FAIA, *The Architect’s Handbook of Professional Practice*, 13th edition, Chapter 11, pages 299 and 308, respectively.



See also the 14th edition of the *Handbook*, which can be ordered from the AIA Bookstore by calling 800-242-3837 (option 4) or by email at bookstore@aia.org.



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