

Changes to AIA Construction Agreements Released in 2017 Should be Noted

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Greenbaum, Rowe, Smith & Davis LLP 2018 Real Estate Update: Trending Issues & Topics of Interest

February 2018

The American Association of Architects (AIA) released updated and revised versions of most of its family of construction agreements during 2017. The AIA forms of construction documents, which are updated every ten years, are the most widely used form of agreements in the commercial construction industry, so contractors, subcontractors, property owners, architects and other design professionals are all likely to encounter the revised documents in the course of business.

While the 2017 changes are more evolutionary than revolutionary, the revisions still require careful attention. Significant changes to the principal "A" series construction contracts, designed to be used by owners and contractors, include, among many other changes, (i) increased prominence for liquidated damages for late completion, (ii) a new section for insertion of bonus and incentives for early completion; (iii) a provision for a termination fee to be negotiated in the event the owner terminates for convenience; (iv) streamlined terms for the calculation of progress payments and (v) more detailed and nuanced treatment of retainage.

One of the most significant revisions to the A101, A102 and A103 construction contracts is that insurance requirements are now addressed in a 7-page exhibit that provides a much more sophisticated approach to insurance issues. By moving insurance to an exhibit to the contract, owners and contractors can also more easily provide the insurance exhibit to their insurance advisors for review. This reflects the increasing importance and complexity of insurance in construction contracts, and the need for careful attention to insurance requirements.

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The A201 General Conditions that are incorporated by reference into the AIA's construction contracts (other than the short form or abbreviated form) was also significantly revised. For example, a contractor is given the right not to commence work if an owner fails to provide evidence of its financial arrangements to pay for the initial scope of the work. Thereafter, the contractor can stop work if the owner fails to respond to a request for evidence of financial ability if requested after a material increase in the contract sum due to changes in the work, late payments by the owner, or reasonable concerns about the owner's ability to pay. The revised A201 also places on owners an affirmative obligation to notify the architect of the substance of all direct communications between the owner and contractor, which may be an unworkable obligation. There are numerous other revisions as well.

The 2017 revisions also include the principal owner-architect forms (B101 through B105), the primary AIA form of subcontract (A401), and many of the AIA's administrative and specialty documents.

The release of the 2017 AIA documents has many implications. For owners and others who do not normally use AIA documents, it is important to recognize that although the AIA construction documents are widely used, as with any form of contract, they are a starting point only and need to be carefully tailored to the needs of each party and the demands of the particular transaction. When presented with a proposed contract on an AIA form, a party should have it reviewed and customized by an attorney knowledgeable about the documents strengths and weaknesses.

There are implications for the many developers, contractors, subcontractors and design professionals who regularly use the existing AIA 2007 documents as well. Many users have developed their own customizations and riders that are appropriate for the existing 2007 AIA documents. After an eighteen month phase-in period, which for many of the AIA documents will end in October of 2018, use of the 2007 versions will no longer be permitted. As a result, even those parties active in the construction industry will need to develop new riders and modifications to address the 2017 AIA form agreements.