

Insurance and Bonding Provisions | 2017 AIA Document Series – Revisions to the Core Contract Documents (Part 4)

Article
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Part 4: A201 and Related Documents: Insurance and Bonding Provisions.

The Lay of the Land. The most significant changes brought about by the 2017 modifications are those related to the insurance and bonding. The modifications are sweeping, both in form and in substance. From a form standpoint, the documents look very different. In prior versions, the “guts” of the insurance requirements were contained in the very lengthy and complicated provisions of Article 11 of the A201. Often, the user-unfriendly nature of Article 11 caused many contracting parties to delete Article 11 altogether and replace it with their own custom insurance program exhibit. The 2017 changes reformat the documents to reflect this ever-growing practice. Article 11 has been “skinned down” significantly, and the crux of the required insurance program has now been relocated (and substantially rewritten) in the new Exhibit A. That exhibit takes a different approach that should prove to be more user-friendly and more adaptable to the uniqueness of any given project. While it contains some of the boilerplate formerly of Article 11, it also presents an easily understandable check-the-box feature for certain types of coverage requirements and limits. While a comprehensive review of all the changes is beyond the scope of this article, the more significant aspects of the new documentation are discussed herein.

Builder’s Risk Insurance. One significant area of change lies in the Owner’s obligation to procure Builders’ Risk Insurance (BRI). The BRI coverage now required features all of the following: 1) the insurance would be written on an “all-risks” completed value or equivalent policy form; 2) the total value of the project on a replacement cost basis would be covered; 3) the insurance would be maintained until Substantial Completion, then continued until the expiration of the period for correction of the Work; 4) the Owner, Contractor, Subcontractors (and further tiers) would be all covered by the insurance; and 5) the insurance cannot exclude the risks of, among others, fire, vandalism, collapse, flood, or losses caused by professional error or defective workmanship. (See Subsections

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of A.2.3.) Further, in the case of additions or remodeling projects, coverage is required for the already-existing structure. (A.2.3.3.) One convenient feature requires the parties to check boxes for the varying types of additional coverage (i.e., business interruption, expediting costs) (A.2.4) and to specifically identify the submits required for each. (A.2.3.1.2.)

Section 11.5 of A201 now clarifies that the Owner has the sole responsibility to adjust and settle a BRI claim. In doing so, it acts as a fiduciary and the distribution of proceeds must be handled accordingly. Prior to such settlement, the Owner is required to “notify the Contractor of the terms of the proposed settlement as well as the proposed allocation of the insurance proceeds.” The Contractor has 14 days to object, and in the absence of timely objection, the Contractor is forever bound by the settlement and allocation. If timely objection is made, the Owner may proceed to settle, but the allocation may be subject to the dispute resolution procedures of A201’s Article 15. Another important change is that, if the Owner fails to procure the required insurance, it is liable to the Contractor under Section 11.2.2 “for all reasonable costs and damages attributable thereto.”

Comprehensive General Liability. Another significant set of changes revolves around the Contractor’s insurance obligations. The various types of coverage which the parties agree to be the Contractor’s responsibility are separately and succinctly described in Article A.3 of the exhibit. There is a blank to fill in to insert the limits of each, and a check-the-box listing for certain types of insurance. The one requiring the most focus is Comprehensive General Liability (CGL). While there are few changes in the basic types of CGL coverage, several items are notable. First, like BRI, the documents now require CGL coverage to remain in place through the period for corrective work and must also cover the Contractor’s completed operations. Second, the new form outright prohibits numerous exclusions that have historically been commonplace in typical CGL policies. For example, Section A.3.2.2.2 lists eleven different CGL exclusions or restrictions on coverages that, if left as is, would require procurement of a CGL policy that does not contain such exclusions or restrictions. Frankly, there may not be such insurance products in many markets, making the required insurance impossible (or prohibitively expensive) to procure. For example, the boilerplate would prohibit the *Insured v. Insured* exclusion as well as the subcontractor exception to the Your Work exclusion, which are standard clauses in most industry-accepted CGL forms. Careful review with the parties’ insurance providers is critical here before taking on obligations that simply cannot be satisfied.

Third, the Contractor is required to procure insurance to cover its indemnity obligations under A201’s Section 3.18.1. This, of course, is a good thing for all parties, though it may not change much for either. One of the most notable aspects of the 2017 revisions is the absence of changes to Section 3.18.1. This happened for a very important reason: that section has been tested over time to define the scope of a Contractor’s indemnity obligations as such that will be

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covered by standard CGL policies. The important lesson is that parties who insist on modifying Section 3.18.1 might be unwittingly defeating CGL coverage for indemnified claims. This is particularly important now for the Contractor, who is expressly taking on the obligation to provide insurance to cover indemnification claims. In the event of modifications, parties should consult with their insurance providers to make sure coverage has not been defeated.

These changes necessitate thorough review with counsel and with the appropriate risk managers and/or insurance brokers for the various parties. The good news is that the user-friendly nature of the new Exhibit should make that review efficient. The bad news is that the standard language contains many traps for the unwary who might not be familiar with the interplay of the many changes.

- **Part 1: Dispute Resolution Under the Revised A201 General Conditions Document**
- **Part 2: 2017 AIA Contract Document Series Revisions to the AIA Core Contract Documents: Notice Requirements**
- **Part 3: 2017 AIA Contract Document Series: Revisions to the AIA Core Contract Documents**
- **Part 5: B101 Owner/Architect Agreement | 2017 AIA Document Series – Revisions to the Core Contract Documents**
- **Part 6: Additional Changes to A201 | 2017 AIA Document Series – Revisions to the Core Contract Documents**

Insurance and Bonding Provisions I 2017 AIA Document Series – Revisions to the Core Contract Documents (Part 4)