



**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 5<sup>th</sup>. 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 inquires regarding the A201 may be directed to Brian M. Perlberg, AGC of America's Senior Counsel of Contract Documents and Construction Law, at [perlbergb@agc.org](mailto: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 1.05 may be added as follows:**

##### Section 1.05 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 an 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 1.06:**

##### Section 1.06 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 10<sup>th</sup> 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,~~ 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 10.4.2.

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."

## 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. . . .”~~