“Not as Bad as it Sounds: An Overview of the American Institute of Architects’ New Contracts”

May 4, 2018 • Firestop Contractors International Association

Presented by:

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“Wagner’s music is better than it sounds.”

-Edgar Wilson Nye
Das Rheingold

Act One, Scene 2

Daybreak reveals

a mighty fortress, with twinkling towers, in a mountaintop clearing.

(The “PROJECT SITE”)
Das Rheingold

THE PROJECT SITE
(Photo courtesy of The Metropolitan Opera)
Awakening beside the fortress, in a bed of roses, is WOTAN, the king of the gods, and near him, his queen, FRICKA.

(THE “OWNERS”)
THE OWNERS, PERFORMING A SITE VISIT

(Photo courtesy of The Metropolitan Opera)
Enter: Fasolt and Fafner, both of colossal stature, armed with mighty clubs.
THE CONTRACTORS

(Photo Courtesy of the Metropolitan Opera)
“Was du bist, bist du nur durch Verträge...”
“What you are, you only are through contracts.”
AIA Document Comparative – A101

A101™ – 2017 Compared to A101™ – 2007

Additions to A101 – 2007 are underlined. Deletions from A101 – 2007 are in strikethrough text.
Article 3 Date of Commencement and Substantial Completion

§ 3.1 The date of commencement of the Work shall be the date of this Agreement unless a different date is stated below or provision is made for the date to be fixed by:
(Check one of the following boxes.)
[ ] The date of this Agreement.
[ ] A date set forth in a notice to proceed issued by the Owner.
(Insert the date of commencement if it differs from the date of this Agreement or, if applicable, state that the date will be fixed in a notice to proceed.)
[ ] Established as follows:
(Insert a date or a means to determine the date of commencement of the Work.)

If, prior to the commencement of the Work, the Owner requires time to file mortgages and other security interests, the Owner’s time requirement shall be as follows:

If a date of commencement of the Work is not selected, then the date of commencement shall be the date of this Agreement.

§ 3.2 The Contract Time shall be measured from the date of commencement of the Work.

§ 3.3 The Contractor shall achieve Substantial Completion of the entire Work not later than (___) days from the date of commencement, or as follows:

(Insert number of calendar days. Alternatively, a calendar date may be used when coordinated with the date of commencement. If appropriate, insert requirements for earlier Substantial Completion of certain portions of the Work.)

Substantial Completion

NEW! A “check the box” option.

Parties have to select:
- Date of Agreement
- Notice to Proceed
- Another Method

Time now measured from commencement of the Work, defined above.
§ 3.3.1 Subject to adjustments of the Contract Time as provided in the Contract Documents, the Contractor shall achieve Substantial Completion of the entire Work:

(Check one of the following boxes and complete the necessary information.)

[ ] Not later than (__) calendar days from the date of commencement of the Work.

[ ] By the following date:

NEW! Check-the-box style.

§ 3.3.2 Subject to adjustments of the Contract Time as provided in the Contract Documents, if portions of the Work are to be completed prior to Substantial Completion of the entire Work, the Contractor shall achieve Substantial Completion of such portions by the following dates:

<table>
<thead>
<tr>
<th>Portion of Work</th>
<th>Substantial Completion Date</th>
</tr>
</thead>
</table>

NEW! A space for milestone dates.

, subject to adjustments of this Contract Time as provided in the Contract Documents:

(Insert provisions, if any, for liquidated damages relating to failure to achieve Substantial Completion on time or for bonus payments for early completion of the Work.)

§ 3.3.3 If the Contractor fails to achieve Substantial Completion as provided in this Section 3.3, liquidated damages, if any, shall be assessed as set forth in Section 4.5.

NEW! A section in which to set out liquidated damages.
Typical Liquidated Damages provision:
Contractor acknowledges and agrees that the Owner will suffer damages if the Contractor does not substantially complete the Project within the Contract Time and that it is difficult to ascertain the extent of those damages in advance. Owner shall be entitled to recover from Contractor as liquidated damages the sum of $______ per day for each day Substantial Completion is delayed after __________. Damages may only be awarded under this provision to the extent that such delays are proximately caused by actions or inactions of Contractor, its Subcontractors, agents or employees. Payment of liquidated damages shall be in lieu of and replacement of any other damages, of any type or nature, that Owner might claim, either directly, indirectly or consequentially from the Contractor’s failure to meet the Substantial Completion date.
§ 5.1.6.1 The amount of each progress payment shall first include:

.1 That portion of the Contract Sum properly allocable to completed Work;

.2 That portion of the Contract Sum properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the completed construction, or, if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing; and

.3 That portion of Construction Change Directives that the Architect determines, in the Architect’s professional judgment, to be reasonably justified.

§ 5.1.6.2 The amount of each progress payment shall then be reduced by:

.1 The aggregate of any amounts previously paid by the Owner;

.2 The amount, if any, for Work that remains uncorrected and for which the Architect has previously withheld a Certificate for Payment as provided in Article 9 of AIA Document A201–2017;

.3 Any amount for which the Contractor does not intend to pay a Subcontractor or material supplier, unless the Work has been performed by others the Contractor intends to pay;

.4 For Work performed or defects discovered since the last payment application, any amount for which the Architect may withhold payment, or nullify a Certificate of Payment in whole or in part, as provided in Article 9 of AIA Document A201–2017; and

.5 Retainage withheld pursuant to Section 5.1.7.
A101 Retainage

§ 5.1.7.2 Reduction or limitation of retainage, if any, shall be as follows:
(If the retainage established in Section 5.1.7.1 is to be modified prior to Substantial Completion of the entire Work, including modifications for Substantial Completion of portions of the Work as provided in Section 3.3.2, insert provisions for such modifications.)

§ 5.1.7.3 Except as set forth in this Section 5.1.7.3, upon Substantial Completion of the Work, the Contractor may submit an Application for Payment that includes the retainage withheld from prior Applications for Payment pursuant to this Section 5.1.7. The Application for Payment submitted at Substantial Completion shall not include retainage as follows:
(Insert any other conditions for release of retainage upon Substantial Completion.)

§ 5.1.8 Reduction or limitation of retainage, if any, shall be as follows:
(If it is intended, prior to Substantial Completion of the entire Work, to reduce or limit the retainage resulting from the percentages inserted in Sections 5.1.6.1 and 5.1.6.2 above, and this is not explained elsewhere in the Contract Documents, insert here provisions for such reduction or limitation.)

If final completion of the Work is materially delayed through no fault of the Contractor, the Owner shall pay the Contractor any additional amounts in accordance with Article 9 of AIA Document A201-2017.

§ 5.1.9 Except with the Owner’s prior approval, the Contractor shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

The Owner now pays for delay not the fault of the Contractor.

Not limited to just events after substantial completion.
Article 9 Enumeration of Contract Documents

(List here any additional documents that are intended to form part of the Contract Documents. AIA Document A201™-2017 provides that the advertisement or invitation to bid, Instructions to Bidders, sample forms, the Contractor’s bid or proposal, portions of Addenda relating to bidding or proposal requirements, and other information furnished by the Owner in anticipation of receiving bids or proposals, are not part of the Contract Documents unless enumerated in this Agreement. Any such documents should be listed here only if intended to be part of the Contract Documents.)

Recommendation: specify what is part of the contract documents.
A102 Cost-Plus Agreement

A102™ – 2017 Compared to A102™ – 2007

Additions to the A102–2007 are underlined. Deletions from A102–2007 are in strikethrough text.
This list is now comprehensive!

§ 5.2.4 Assumptions, if any, upon which the Guaranteed Maximum Price is based: (Identify each assumption.)

§ 5.2.5 To the extent that the Drawings and Specifications are anticipated to require further development by the Architect, the Contractor has provided in the Guaranteed Maximum Price for Contract Documents are anticipated to require further development, the Guaranteed Maximum Price includes the costs attributable to such further development consistent with the Contract Documents and reasonably inferable therefrom. Such further development does not include such things as changes in scope, systems, kinds and quality of materials, finishes or equipment, all of which, if required, shall be incorporated by Change Order.

§ 5.2.6 The Owner shall authorize preparation of revisions to the Contract Documents that incorporate the agreed-upon assumptions contained in Section 5.2.4. The Owner shall promptly furnish such revised Contract Documents to the Contractor. The Contractor shall notify the Owner and Architect of any inconsistencies between the agreed-upon assumptions contained in Section 5.2.4 and the revised Contract Documents.

May work against contractors.
§ 7.1.2 Where, pursuant to the Contract Documents, any cost is subject to the Owner’s prior approval, the Contractor shall obtain this approval prior to incurring the cost. The parties shall endeavor to identify any such costs prior to executing this Agreement, such approval in writing prior to incurring the cost.

All approvals in writing, in advance
§ 12.1.5.2 The allocation of the Guaranteed Maximum Price under this Section 12.1.5 shall not constitute a separate guaranteed maximum price for the Cost of the Work of each individual line item in the schedule of values.

§ 12.1.5.3 When the Contractor allocates costs from a contingency to another line item in the schedule of values, the Contractor shall submit supporting documentation to the Architect.

BUT: Contractor must support allocation of any contingency.
§ 12.1.8
Retainage

§ 12.1.8.1 For each progress payment made prior to Substantial Completion of the Work, the Owner may withhold the following amount, as retainage, from the payment otherwise due:
(Insert a percentage or amount to be withheld as retainage from each Application for Payment. The amount of retainage may be limited by governing law.)

§ 12.1.8.1.1 The following items are not subject to retainage:
(Insert any items not subject to the withholding of retainage, such as general conditions, insurance, etc.)

§ 12.1.8.2 Reduction or limitation of retainage, if any, shall be as follows:
(If the retainage established in Section 12.1.8.1 is to be modified prior to Substantial Completion of the entire Work, insert provisions for such modification.)

§ 12.1.8.3 Except as set forth in this Section 12.1.8.3, upon Substantial Completion of the Work, the Contractor may submit an Application for Payment that includes the retainage withheld from prior Applications for Payment pursuant to this Section 12.1.8. The Application for Payment submitted at Substantial Completion shall not include retainage as follows:
(Insert any other conditions for release of retainage, such as upon completion of the Owner’s audit and reconciliation, upon Substantial Completion.)
§ 14.1.3 Termination by the Owner for Convenience
If the Owner terminates the Contract for convenience in accordance with Article 14 of AIA Document A201-2017, then the Owner shall pay the Contractor a termination fee as follows:

(Insert the amount of or method for determining the fee, if any, payable to the Contractor following a termination for the Owner’s convenience.)

NEW!
The Owner is required to pay a fee for termination for convenience.
A201 General Conditions

A201™ – 2017 Compared to A201™ – 2007

Additions to A201–2007 are underlined. Deletions from A201–2007 are in strikethrough text.
§ 2.2 Evidence of the Owner’s Financial Arrangements

§ 2.2.1 Prior to commencement of the Work, and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner’s obligations under the Contract. The Contractor may only request such evidence if there is no proof within 14 days of the Contractor’s written request. If commencement of the Work is delayed under this Section 2.2.1, the Contract Time shall be extended appropriately.

§ 2.2.2 Following commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner’s obligations under the Contract only 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; or (3) a change in the Work materially changes the Contract Sum. If the Owner fails to provide such evidence, as required, within fourteen days of the Contractor’s request, the Contractor may immediately stop the Work and, in that event, shall notify the Owner that the Work has stopped. However, if the request is made because a change in the Work materially changes the Contract Sum under (3) above, the Contractor may immediately stop only that portion of the Work affected by the change until reasonable evidence is provided. If the Work is stopped under this Section 2.2.2, the Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor’s reasonable costs of shutdown, delay and start-up, plus interest as provided in the Contract Documents.
AIA Document Review and Analysis ▪ May 4, 2018 ▪ Firestop Contractors International Association

A201 Means and Methods

§ 3.3 Supervision and Construction Procedures
§ 3.3.1 The Contractor shall supervise and direct the Work, using the Contractor’s best skill and attention. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences, or procedures, the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences, or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely written notice to the Owner and Architect and shall not proceed with that portion of the Work without further written instructions from the Architect. If the Contractor is then instructed to proceed with the required alternative means, methods, techniques, sequences, or procedures without acceptance of changes, the Architect shall evaluate the proposed by the Contractor, the Owner shall be solely responsible for any loss or damage arising solely from these Owner required conformance with the design intent for the completed construction. Unless the Architect objects to the Contractor’s proposed alternative, the Contractor shall perform the Work using its alternative means, methods, techniques, sequences, or procedures.

Contractor must provide notice of unsafe means and methods.

Contractor not obligated or allowed to stop work, though.

Architect’s responsibility is limited to review for design intent.
**A201 Contractor Design**

**§ 3.12.10.1** If professional design services or certifications by a design professional related to systems, materials, or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall be entitled to rely upon the adequacy and accuracy of the performance and design criteria provided in the Contract Documents. The Contractor shall cause such services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings, and other submittals prepared by such professional. Shop Drawings, and other submittals related to the Work, designed or certified by such professional, if prepared by others, shall bear such professional’s written approval when submitted to the Architect. The Owner and the Architect shall be entitled to rely upon the adequacy, and accuracy and completeness of the services, certifications, and approvals performed or provided by such design professionals, provided the Owner and Architect have specified to the Contractor all the performance and design criteria that such services must satisfy. Pursuant to this Section 3.12.10, the Architect will review and approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Contractor shall not be responsible for the adequacy of the performance and design criteria specified in the Contract Documents.

The limitation on Contractor’s responsibility for “adequacy” or “design criteria” is now deleted.

**§ 3.12.10.2** If the Contract Documents require the Contractor’s design professional to certify that the Work has been performed in accordance with the design criteria, the Contractor shall furnish such certifications to the Architect at the time and in the form specified by the Architect.

... and replaced with another right to rely on design criteria.
§ 6.2.2 If part of the Contractor’s Work depends for proper execution or results upon construction or operations by the Owner or a Separate Contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly report to the Architect of apparent discrepancies or defects in such other construction or operations by the Owner or Separate Contractor that would render it unsuitable for such proper execution and results of the Contractor’s Work. Failure of the Contractor to notify the Architect of apparent discrepancies or defects prior to proceeding with the Work shall constitute an acknowledgment that the Owner’s or Separate Contractor’s completed or partially completed construction is fit and proper to receive the Contractor’s Work, except as to defects not then reasonably discoverable. The Contractor shall not be responsible for discrepancies or defects in the construction or operations by the Owner or Separate Contractor that are not apparent.

Work by separate contractors: Contractors now responsible only for apparent discrepancies or defects, not “reasonably discoverable” areas.
§ 8.3 Delays and Extensions of Time

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner, or Separate Contractor; (2) by changes ordered in the Work; or (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor’s control; or (4) by delay authorized by the Owner pending mediation and arbitration; or binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

Contractors must document claims for adverse weather conditions.
§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor or a Subcontractor, a Sub-subcontractor, or their agents or employees, or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, for any of the following reasons:

1. Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;

2. An act of government, such as a declaration of national emergency, that requires all Work to be stopped;

3. Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents;

4. The Owner has failed to furnish to the Contractor promptly, upon the Contractor’s request, reasonable evidence as required by Section 2.2.4.

§ 14.1.3 If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days’ written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed, including as well as reasonable overhead and profit on Work not executed, and costs incurred by reason of such termination, and damages.

§ 14.1.4 If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor or a Subcontractor, a Sub-subcontractor, or their agents or employees or any other persons or entities performing portions of the Work under contract with the Contractor because the Owner has repeatedly failed to fulfill the Owner’s obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days’ written notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Section 14.1.3.
A201 Owner’s Termination for Convenience

*** IF OWNER TERMINATES FOR CONVENIENCE, NO ANTICIPATED OVERHEAD AND PROFIT FOR CONTRACTOR. ***

§ 14.4.3 In case of such termination for the Owner’s convenience, the Owner shall pay the Contractor shall be entitled to receive payment for Work properly executed, and; costs incurred by reason of such the termination, along with reasonable overhead and profit on the Work not executed including costs attributable to termination of Subcontracts; and the termination fee, if any, set forth in the Agreement.

Contractor only recovers costs to terminate Subcontracts, and any termination fee
§ 15.1.3 Notice of Claims

§ 15.1.3.1 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered prior to expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by written notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party must under this Section 15.1.3.1 shall be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

§ 15.1.3 CONTINUING CONTRACT PERFORMANCE

§ 15.1.3.2 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered after expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party. In such event, no decision by the Initial Decision Maker is required.
Exhibit A – Insurance Requirements

AIA Document A101™ – 2017 Exhibit A

Insurance and Bonds

Ogletree Deakins
Exhibit A – Insurance Requirements

• Insurance shall be maintained through the correction of work period rather than until the date of final payment. AIA Document A101-2017 Exhibit A at § A.3.2.1.

• Specifies the Contractor’s obligation to provide additional insured coverage to Owner, Architect and Architect’s consultants. AIA Document A101-2017 Exhibit A at § A.3.1.3.

• Requires the Contractor to secure professional liability insurance where it is required to furnish professional services as part of the Work. AIA Document A101-2017 Exhibit A at § A.3.2.8.
Exhibit A – Insurance Requirements

• Requires the Contractor to procure specialty insurance, such as for maritime liability risks, where the Work requires such activities. AIA Document A101-2017 Exhibit A at § A.3.2.9-12.

• Expressly prohibits eliminating or restricting commercial general liability insurance, including:
  o roofing exclusions where the Work involves such roofing Work.
  o the deletion of the subcontractor exception to the work-performed exclusion.
  o exclusions eliminating insurance for indemnity claims arising out of injuries to the Contractor’s employees.
Exhibit A – Insurance Requirements

• To disclose to the Owner any deductible or self-insured retentions applicable to any insurance. AIA Document A101-2017 Exhibit A at § A.3.1.2.

• Where the Contractor chooses to secure the required limits of liability through a combination of primary and excess insurance, the excess policy shall not require the exhaustion of the underlying limits only through the actual payment by the underlying insurers (i.e., the excess policy must be written on a “functional exhaustion” basis). AIA Document A101-2017 Exhibit A at § A.3.2.4.
Exhibit A – Insurance Requirements

• Remodeling an existing structure or constructing an addition to an existing structure: Owner must purchase all-risks property insurance protecting the existing structure against the same causes of loss to which the builder’s risk insurance must respond. AIA Document A101-2017 Exhibit A at § A.2.3.3.

• The Contractor shall provide certificates of insurance to the Owner
  o “upon the Owner’s written request”
  o prior to commencement of the Work; and
  o upon renewal or replacement of required insurance. AIA Document A101-2017 Exhibit A at § A.3.1.1.
Exhibit A – Insurance Requirements

• The requirement that the Contractor’s insurance may not be cancelled or allowed to expire until at least thirty days’ prior written notice has been given to the Owner has been eliminated. AIA Document A201-2017 at §§ 11.1.4 and 11.2.3.

• The certificates of insurance shall expressly identify the Owner as an additional insured on the Contractor’s commercial general liability policy and excess or umbrella liability policy or policies. AIA Document A101-2017 Exhibit A at § A.3.1.1.

Main advice: Give Exhibit A to your risk manager or insurance broker, to determine which coverages are in place, which can be obtained, at what cost, and in what limits.
AIA Document Comparative – A401

A401™ – 2017 Compared to A401™ – 2007

Additions to A401–2007 are underlined. Deletions from A401–2007 are in strikethrough text.
A401 Notice of Defects

• New paragraph
• No knowledge requirement, so left as is, it would require Contractor to audit the Subcontract Documents in order to comply

§3.2.5 § 3.3.5 The Contractor shall promptly notify the Subcontractor of any fault or defect in the Work under this Subcontract or nonconformity with the Subcontract Documents.
A401 Contractor’s Remedies

- Revised in favor of Contractor
- Stronger language regarding Contractor’s ability to hold back payments (“current or future”)
- Adds sentence obligating Subcontractor to pay amount not covered by the holdback amount

§ 3.45 Contractor’s Remedies
If the Subcontractor defaults or neglects to carry out the Work in accordance with this Agreement and fails within five working days after receipt of written notice from the Contractor to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, by appropriate Modification, and without prejudice to any other remedy remedies the Contractor may have, make good remedy such deficiencies and may deduct default or neglect and withhold, in accordance with Section 11.1.7.2, the reasonable cost thereof from the current or future payments then or thereafter due the Subcontractor. If payments due to the Subcontractor are not sufficient to cover such amounts, the Subcontractor shall pay the difference to the Contractor.
A401 Subcontractors’ Representations

- Significant addition in favor of Contractor
- Subcontractor makes three *representations* regarding study-and-compare obligations

§ 4.2.3.2 By submitting Shop Drawings, Product Data, Samples, and similar submittals, the Subcontractor represents to the Contractor that the Subcontractor has (1) reviewed and approved them; (2) determined and verified materials, field measurements, and field construction criteria related thereto, or will do so; and (3) checked and coordinated the information contained within such submittals with the requirements of the Work and of the Subcontract Documents.
A401 Protection of the Work

- Subcontractor previously was obligated to protect its own work and that of other subcontractors
- Now, additionally must protect work of Contractor and any Separate Contractors

§ 4.42.7 The Subcontractor shall take necessary precautions to protect the work of the Contractor, Separate Contractors, and other subcontractors from damage caused by operations under this Subcontract.
A401 Warranties

- Standardized a Subcontractor warranty obligation which generally has been written into every subcontract

§ 4.6.2 All material, equipment, or other special warranties required by the Subcontract Documents shall be issued in the name of the Owner, or shall be transferable to the Owner, and shall commence in accordance with the Subcontract Documents.
Section 4.9 Professional Services Provided by Subcontractor

§ 4.9.1 The Subcontractor shall not be required to provide professional services that constitute the practice of architecture or engineering unless such services are specifically required by the Subcontract Documents or unless the Subcontractor is required to provide such services in order to carry out the Subcontractor's responsibilities for its own construction means, methods, techniques, sequences, and procedures. The Subcontractor shall not be required to provide professional services in violation of applicable law.

§ 4.9.2 If professional design services or certifications by a design professional related to systems, materials, or equipment are specifically required of the Subcontractor by the Subcontract Documents, the Contractor will provide all performance and design criteria that such services must satisfy to the extent the Contractor has received such
A401 Professional Services

performance and design criteria from the Owner and Architect under the terms of the Prime Contract.

§ 4.9.3 If professional design services or certifications by a design professional are required because of means, methods, techniques, sequences, or procedures required by the Contractor and related to the Work of the Subcontractor, the Contractor will provide all performance and design criteria that such services must satisfy.

§ 4.9.4 The Subcontractor shall be entitled to rely upon the adequacy, accuracy, and completeness of the performance and design criteria received from the Contractor under this Section 4.9.

§ 4.9.5 The Subcontractor shall cause the professional services performed under this Section 4.9 to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings, and other submittals prepared by such professional. Shop drawings and other submittals related to the Work designed by such design professional shall bear the professional's written approval when submitted to the Contractor. The Contractor shall be entitled to rely upon the adequacy, accuracy, and completeness of the services, certifications, and approvals performed or provided by the design professionals, provided the Contractor has provided to the Subcontractor all performance and design criteria required by this Section 4.9.
A401 Consequential Damages

§ 6.5 Waiver of Claims for Consequential Damages
The Contractor and Subcontractor waive claims against each other for consequential damages arising out of or relating to this Subcontract, including without limitation, any consequential damages due to either party’s termination in accordance with Article 7. Nothing contained herein shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of this Agreement.
§ 9.1 The date of commencement of the Subcontractor’s Work, shall be:
(Check one of the following boxes.)

[ ] The date of this Agreement.
[ ] A date set forth in a notice to proceed issued by the Contractor.
[ ] Established as follows:
   (Insert a date or a means to determine the date of commencement of the Subcontractor’s Work.)

If a date of commencement of the Subcontractor’s Work is not selected, then the date of commencement shall be the date of this Agreement.

§ 9.2 Subcontract Time
§ 9.2.1 The Subcontract Time is the period of time, including authorized adjustments, allotted in the Subcontract Documents for Substantial Completion of the Work described in the Subcontract Documents. The Subcontractor’s date of commencement is the date from which the Subcontract Time of Section 9.3 is measured; it shall be the date of this Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Contractor. The Subcontract Time shall be measured from the date of commencement of the Subcontractor’s Work.
A401 Progress Payments

§ 11.1.7.1 The amount of each progress payment shall first include:

1. That portion of the Subcontract Sum properly allocable to completed Work;
2. That portion of the Subcontract Sum properly allocable to materials and equipment delivered and suitably stored at the site by the Subcontractor for subsequent incorporation in the Subcontractor’s Work or, if approved by the Contractor, suitably stored off the site at a location agreed upon in writing; and
3. The amount, if any, for changes in the Work that are not in dispute and have been properly authorized by the Contractor, to the same extent provided in the Prime Contract, pending a final determination by the Contractor of the cost of changes in the Subcontractor’s Work, even though the Subcontract Sum has not yet been adjusted.

§ 11.1.7.2 The amount of each progress payment shall then be reduced by:

1. The aggregate of previous payments made by the Contractor;
2. The amount, if any, for Work that remains uncorrected and for which the Contractor has previously withheld a Certificate for Payment as provided in Article 9 of AIA Document A201-2017 for a cause that is the fault of the Subcontractor;
3. For Work performed or defects discovered since the last payment application, any amount for which the Contractor may withhold payment in whole or in part, as provided in Article 9 of AIA Document A201-2017, for a cause that is the fault of the Subcontractor; and
4. Retainage withheld pursuant to Section 11.1.8 of this Agreement.

• Article 11.7, which supplied the method for calculating a progress payment, has been stricken completely...
• ...in favor of a clear, more streamlined method to calculate a progress payment.
§ 11.1.8 Retainage

§ 11.1.8.1 For each progress payment made prior to substantial completion of the Subcontractor’s Work, the Contractor may withhold the following amounts as retainage from the payment otherwise due:
(Insert a percentage or amount to be withheld as retainage from each Application for Payment. The amount of retainage may be limited by governing law.)

§ 11.1.8.1.1 The following items are not subject to retainage:
(Insert any items not subject to the withholding of retainage, such as general conditions, insurance, etc.)

§ 11.1.8.2 Reduction or limitation of retainage, if any, shall be as follows:
(If the retainage established in Section 11.1.8.1 is to be modified prior to substantial completion of the entire Work, including modifications for substantial completion of portions of the Subcontractor’s Work as provided in Section 9.2.3, insert provisions for such modification.)
A401 Progress Payments

Another provision which is often written into subcontracts
- Requires Subcontractor to indemnify Contractor for all losses, liabilities, etc. (including attorney’s fees and litigation expenses) arising out of any lien claim by any of Subcontractor’s subcontractors, suppliers, or vendors.

§ 11.1.10 Provided the Contractor has fulfilled its payment obligations under the Subcontract Documents, the Subcontractor shall defend and indemnify the Contractor and Owner from all loss, liability, damage, or expense, including reasonable attorney’s fees and litigation expenses, arising out of any lien claim or other claim for payment by any of the Subcontractor’s subcontractors, suppliers, or vendors of any tier. Upon receipt of notice of such lien claim or other claim for payment, the Contractor shall notify the Subcontractor. If approved by the applicable court, when required, the Subcontractor may substitute a surety bond for the property against which the lien or other claim for payment has been asserted.
### A401 Insurance

<table>
<thead>
<tr>
<th>Article 12</th>
<th>Insurance and Bonds</th>
</tr>
</thead>
<tbody>
<tr>
<td>12.1.3</td>
<td>requires professional liability insurance if applicable (re Section 4.9)</td>
</tr>
<tr>
<td>12.1.4</td>
<td>standardizes Subcontractor’s additional-insured obligation for certificates of insurance</td>
</tr>
<tr>
<td>12.1.6</td>
<td>standardizes Subcontractor’s additional-insured obligation as primary and noncontributory</td>
</tr>
<tr>
<td>12.1.6</td>
<td>“…no less than that provided by Insurance Services Office, Inc. (ISO) CG 20 10 07 04, CG 20 37 07 04, and, with respect to the Architect and the Architect’s consultants, CG 20 32 07 04.”</td>
</tr>
<tr>
<td>12.5</td>
<td>adds language to subrogation waiver to include insurance applicable “to property at or adjacent to the Project site.”</td>
</tr>
</tbody>
</table>
## A401 – Additional Insureds

### Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization

This endorsement modifies insurance provided under the following:

#### COMMERCIAL GENERAL LIABILITY COVERAGE PART

**SCHEDULE**

<table>
<thead>
<tr>
<th>Name Of Additional Insured Person(s) or Organization(s)</th>
<th>Location(s) Of Covered Operations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any persons or organization for whom you are performing operations when you and such persons or organization have agreed in writing to a contract or agreement, either directly or through your operations for that person or organization otherwise, that such person or organization shall be added as an additional insured on your policy.</td>
<td></td>
</tr>
</tbody>
</table>

### Information required to complete these blanks If not shown, will be shown in the declaration:

1. Section 9. - Who is an Insured is amended to include:
   - Any additional insured that person(s), and any all of that person's organization(s), agents, or employees not on the schedule, must make any with respect to liability for "bodily injury", "property damage" or "personal and advertising injury", issued, in whole or in part, by:
      - Your conduct or omission, or
      - The acts or omissions of those acting on your behalf;

2. In the performance of your ongoing operations at the location(s) designated above,

3. With respect to the insurance afforded to these additional insureds, the following additional events are excluded:
   - This insurance does not apply to "bodily injury" or "property damage" occurring after:
      1. All work, including materials, parts or equipment furnished in connection with such work, on the project other than airfoil, maintenance or repairs to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been discontinued;
      2. The period or the project of which has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as part of the same project.

OGLETHORPE REALTY, INC.

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Page 1 of 1
A401 – Additional Insureds

“Any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement, effected prior to the date your operations for that person or organization commenced, that such person or organization be added as an additional insured on you policy.”
A401 Claims

- Standardizes notice requirements for Project generally and for Claims.
- 14.4.1 - All notices required in Agreement must be written notice.
- 14.4.2 – Notices of claims must be written and sent by certified or registered mail or by courier with proof of delivery.

§ 14.4 Notice
§ 14.4.1 Except as otherwise provided in Section 14.4.2, where the Subcontract Documents require one party to notify or give notice to the other party, such notice shall be provided in writing to the designated representative of the party to whom the notice is addressed and shall be deemed to have been duly served if delivered in person, by mail, by courier, or by electronic transmission if a method for electronic notice is set forth in Section 14.4.3.

§ 14.4.2 Notice of claims shall be provided in writing and shall be deemed to have been duly served only if delivered to the designated representative of the party to whom the notice is addressed by certified or registered mail, or by courier providing proof of delivery.
Conclusion

For access to redlines between the old and new versions, go to:

https://www.aiacontracts.org/learn

Under the “Resources” heading, filter for “Comparison”.