

Although the addition appears to reduce the Contractor's liability for issues with criteria specified by the Owner and/or Architect, the deletion implies that the Contractor now is responsible for ensuring the criteria specified by others is accurate.

Subcontracts Must Be in Writing

Under former §5.3, agreements between the Contractor and its Subcontractors had to be in writing only "where legally required for validity." Revised §5.3 requires all agreements must be in writing. Lawyers trained about the Statute of Frauds in their first year of law school are often surprised to discover how often Contractors and Subcontractors operate without written agreements. Their counsel should welcome this change.

Work by Separate Contractors

The 2007 form required the Contractor to provide notice of "reasonably discoverable" discrepancies or defects in work performed by Separate Contractors. A201™-2007, §6.2.2. Section 6.2.2 of the 2017 form requires the Contractor to provide notice of discrepancies of defects that are "apparent." Failure to provide notice of discrepancies constitutes an acknowledgment that the Work of the Owner or Separate Contractors was proper. Revised §6.1.1 eliminates the Contractor's ability to make a Claim under Article 15 for delays and additional costs resulting from the Owner's action in performing work with its own employees or with Separate Contractors.

Requiring notice of "apparent" defects rather than those "reasonably discoverable" would seem to be a lower standard. However, a Contractor may wish to change "apparent" to "patent," a term more clearly defined by case law. In addition, the revision to §6.1.1 could have substantial impacts on the Contractor with regard to cost and scheduling. Contractors should seek to delete or modify this provision.

Calculation of Labor Costs

Regarding the calculation in the adjustment in Contract Price for Construction Change Directives, §7.3.7 of the 2007 edition included "Social Security, old age and unemployment insurance" in the list of labor costs. The 2017 edition deletes those costs, and includes only "applicable payroll taxes." A201™-2007, §7.3.7. This change leaves open the question of whether costs for Social Security or unemployment insurance may still be included in "applicable payroll taxes."

Minor Changes in the Work

Under former §7.4, the Architect had authority to bind the Owner and the Contractor, without their consent, to minor changes in the work as long as the changes did not contradict the Contract Documents, affect the Contract Price, or extend the Contract Time. Under revised §7.4, the Contractor now has an opportunity to reject the recommended changes if it believes the proposed change will, in fact, affect the Contract

Price or Contract Time. A Contractor who fails to object and nonetheless proceeds, however, waives any claim for adjustment.

The AGC believes this change presents a potential trap for Contractors if they do not timely notify the Architect of the increased cost of changes in the Scope of Work, and suggests Contractors raise the potential impact on Contract Price or Contract Time as a "preventative" measure.

Delays

Revised §8.3.1 now states that delays for adverse weather conditions must be "documented" as a Claim, and that all delays outside the control of the Contractor extend the Contract Time only as determined by the Architect, and not through a Change Order. The latter change implies that the Contractor now cannot contest the Architect's determination or request a Change Order to extend the Contract Time for delays not related to the actions of the Contractor.

Indemnity for Liens

In addition to requiring the Contractor to obtain a bond and indemnify the Owner against subcontractor and supplier liens resulting from final payment, new §9.6.8 adds the express requirement that, if the Owner has satisfied its payment obligations, a Contractor must defend and indemnify the Owner against subcontractors and supplier liens.

Similar protection is included in the catch-all indemnification provision (§3.18.1). However, this modification emphasizes that all the Owner's costs connected with the lien claims are recoverable as long as the Owner has satisfied its payment obligations.

Termination by Contractor

Former §§14.1.1 and 14.1.4 stated that the Contractor could terminate the Contract if work was suspended or delayed for a certain period due to enumerated reasons, provided that such delay was not caused by the Contractor, a Subcontractor, or any other party "under direct or indirect contract with the Contractor." Revised §§14.1.1 and 14.1.4 delete the "under direct or indirect contract with the Contractor" language. This change implies that the Contractor cannot terminate if any party performing Work caused the delay, regardless of whether the Contractor has control over that party.

Termination Fee Provisions

In former §14.4.3, on termination for the Owner's convenience, Contractors were entitled to payment for work executed (including reasonable overhead and profit (RO&P)), costs incurred due to termination, and RO&P on Work not executed. Under revised §14.4.3, the automatic entitlement to RO&P on Work not executed has been deleted and has been replaced with entitlement to a "termination fee, if any, set forth in the Agreement."

The AIA has indicated the former provision was removed because Owners typically struck that language. It is now up to the parties to negotiate a termination fee in lieu of arguing