



Scotti Law Group

Construction Law: Concept through Completion ©

Review and Drafting Construction and Design Contracts in the Age of COVID-19©

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Goal of my
presentation

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Awareness of present issues that

affect your review and drafting of
contracts

in the Age of COVID 19

OVERVIEW

- A. Restarting/Running your Project - Owner/Contractor
- B. Contractual Language Applicable to COVID-19
- C. Change Orders - Owner's and Contractor's
- D. Worker Tests Positive for COVID 19 - Claims and Insurance
- E. Drafting a Contract for a New Project

Owner's Preparation to Restart/Run a Project

What is required?

- Evaluate current status
- schedule and supply issues?
- Review your Contract
- What changes are needed due to COVID-19



Owner requirements for a Project in the Age of COVID-19?



Look to the CDC, OSHA and
Orders of the State Government

Local Laws and regulations,
OSHA Alerts

How does your
existing
contract
address what
has
happened?



Status your Contract



Use a Form Contract as Guide



Why a Form Contract?

Why Use the A201 General Conditions

- One of the most common documents
- First published 1911
- Updated 2017 – 17th edition
- Established general terms
- Combine with other AIA Form Contracts

Poll Question

- Do you currently use the A201 on any of your Projects?

Contractor – Restarting/ Running Your Project



What is required?

- Evaluate current status
 - Project Schedule
 - Additional Costs?
 - Need to Amend Contract?

Does the
Contract
Address the
Contractor's
Needs?

Added Responsibility

- Amend language;
- Review Insurance;
- Consider Contingencies

What needs to be added to the Contract?

- Adherence to COVID19 Requirements
- Posting of Notice
- Contractor Plan re COVID-19
- Contractor Designated Representative
- Examine insurance coverage
- Contractor Action Plan for Worker with COVID -19

Some Operative Provisions of A201



- Owner Finances (2.2.2)
- Contract's Duty to comply with and give notices required by law (3.7) (10.2)
- Construction Schedules (3.10.1)
- Construction Change Orders (7.3)
- Delays and Extensions of Time (8.3)
- Protection of Persons and Property (Article 10)
- Safety Precautions and Programs (10.1) (10.2.3)
- Suspension by the Owner for Convenience (14.3)
- Contractor's responsibility to take reasonable Safety precautions (10.2.1)
- Loss of Use, Business Interruption, and Delay in Completion Insurance (§11.4)

Evidence of Owner's Financial Arrangements (§2.2)

- **§ 2.2.2** ...reasonable concern regarding the Owner's ability to make payment when due;

Permits, Fees, Notices and Compliance with Laws (§3.7)

- **§3.7.2** ...required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to performance of the Work.

Contractor's Construction Schedules (§3.10)

- **§ 3.10.1** ...Contractor's construction schedule for the Work... The schedule shall be revised at appropriate intervals as required by the conditions of the Work and Project.

Contractor's Submittal Schedule (§3.10)



§ 3.10.2 ...Contractor to maintain a current submittal schedule ...shall be coordinated with the construction schedule.

Article 10 – Protection of Persons and Property

- **§10.1 Safety Precautions and Programs** –Contractor responsible for ...all safety precautions and programs...
- **§10.2.1 ...Lawful Orders of Public Authorities**
- **The CDC assigns the responsibility for COVID-19 to the Contractor**

Suspension by the Owner for Convenience (§ 14.3)

- **§ 14.3.1** The Owner may, without cause...suspend, delay or interrupt the Work, ...for such period of time as the Owner may determine.
- **§ 14.3.2** The Contract Sum and... Time shall be adjusted for increases in cost and time ...shall include profit.

Contractor's Duty to Take Reasonable Safety Precautions

§10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection *to prevent damage, injury or loss* to ...

Loss of Use, Business Interruption, and Delay in Completion Insurance (§11.4)



- The Owner, at the Owner's option, may purchase and maintain insurance that will protect the Owner against loss of use of the Owner's property, or the inability to conduct normal operations, due to fire or other causes of loss. **The Owner waives all rights of action against the Contractor and Architect for loss of use of the Owner's property, due to fire or other hazards however caused.**
- Virtually all loss of use and business interruption insurance policies exclude losses due to micro-organisms and viruses.

Poll question


- Have you experienced delays on your Projects from COVID-19?

A Change Order Is Coming

- Owner needs a Change Order to:
 - Add COVID related Changes;
 - Revise Contract for issues related to COVID
 - Revise Construction Schedule
 - Address the Contractor's Claims for time and/or money

Contractor Requested Change Order

- For reimbursement for costs related to:
 - Demobilization
 - Remobilization
 - Project shutdown
 - Extended General Conditions
 - Loss of Productivity
 - Staffing Difficulties
 - Supply Chain Disruption
 - Material increases
 - Personal Protective Equipment



Contractor's Loss of Productivity

Due to:

- Health Screening
- Social Distancing
- Inability to share equipment
- Frequent sanitizing of the job site - disruptive


Change Orders

Adding time or money ...accomplished through a written Change Order... agreed upon by both the Owner and the Contractor.



§ 7.2.1 A Change Order is...written ... prepared by ... Architect and signed by the Owner, Contractor and Architect stating their agreement upon ...

- The change in the Work;
- The amount of the adjustment, if any, in the Contract Sum; and
- The extent of the adjustment, if any, in the Contract Time.

A close-up, high-angle photograph of several rolled-up architectural blueprints. The blueprints are white with black lines and text, showing various technical drawings and dimensions. The rolls are stacked and slightly unrolled, revealing detailed floor plans and structural elements. The background is a light, neutral color.

Is the Contractor entitled to additional time due to the shutdown?

- **Delays and Extensions of Time (§8.3)**
- **§ 8.3.1** If the Contractor is delayed ... (3) by ... unusual delay in deliveries, unavoidable casualties, or other causes beyond the Contractor's control; ...or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.

Contractor Claim for Additional Time



Contractor Claims for Additional Time (§ 15.1.6)

§ 15.1.6.1 ...Contractor ...Claim for...increase in Contract Time, notice ... shall be given... include estimate of cost and probable effect of delay on progress of the Work.

Notice is given for the Contractor to restart work, is Contractor entitled to more money?

- **§ 8.3.3** This Section 8.3 **does not preclude recovery of damages for delay** by either party under other provisions of the Contract Documents

Contractor
claim for
money once
the Project is
restarted



Claims for Additional Cost (§ 15.1.5)

If the Contractor wishes to make a Claim for an increase in the Contract Sum, notice as provided in Section 15.1.3 shall be given before proceeding to execute the portion of the Work that is the subject of the Claim. Prior notice is not required for Claims relating to an emergency endangering life or property arising under 10.4

Is COVID-19 a Force Majeure Event?

- Definition – A superior or irresistible force
- Party seeking protection has burden of proving event was beyond their control.
- Is Covid-19 a cause beyond the Contractor's control?

Force Majeure



Force Majeure Clauses are used to allocate risk that is considered beyond a party's control



Not part of the A201 General Conditions



Typical force majeure clauses provide that **unexpected events** such as natural disasters, terrorism, wars or **other “acts of God”** excuse a party's non-performance of a contractual obligation



Force majeure clauses are intended to provide **some level of relief from the negative effects** of force majeure events, such as business interruption and supply chain disruption.

Force Majeure Event

Pennsylvania courts have required that the force majeure event must have been beyond the party's control and not due to any fault or negligence of the non-performing party.

However, COVID-19 is an “act of God” event that has not been considered in any force majeure cases to date.

Poll Question

- Have you had someone test positive for COVID-19 on your jobsite?

Preparing for/Reacting to Worker Testing Positive for COVID 19.

Need to have an
action plan in place

Potential claims

Insurance
Implications

Future Projects

**Can no longer claim
that a pandemic was
not contemplated.**

The cover of 'The 2017 A201 Deskbook' features a stylized, golden wireframe illustration of a modern building's facade, composed of numerous intersecting lines that create a sense of depth and architectural complexity. The title is prominently displayed in the upper right quadrant.

THE 2017 A201 DESKBOOK

Editors
Peter W. Hahn
Joseph C. Kovars
Amanda S. MacVey

The cover of 'The Construction Contracts Book' has a dark blue background with a torn paper effect at the top, revealing a lighter background with faint text from a contract. The title is in large, bold, white and yellow letters. Below the title, it lists the annotated analysis and comparison of various contract forms, and identifies it as the third edition. The editors' names are listed at the bottom right.

THE Construction Contracts Book

Annotated Analysis and Comparison of the AIA,
ConsensusDocs, and EJCDC Contract Forms

Third Edition

Editors:
Carrie Okizaki
R. Carson Fisk
David A. Scotti



ABA FORUM ON CONSTRUCTION LAW

<https://www.americanbar.org/products/inv/book/400620307/>