

How the AIA A201-2017 General Conditions are Applicable to COVID-19

David A. Scotti

The AIA A201 General Conditions of the Contract for Construction (“A201”) is one of the most commonly used contract documents in the construction industry. It was first published in 1911 and the most recent version published in 2017 is the seventeenth edition. The A201 helped establish most of the general terms between the Architect, the Owner, the Contractor and Subcontractors. The A201 is generally used together with other AIA Form Contracts which together comprise the terms of the contract.

In reviewing the A201, you will not find a Force Majeure Clause or even the term “Force Majeure.” Force Majeure Clauses are used to allocate risk and address the concept of delay caused by events that are considered beyond a party’s control. 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. 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.

So lacking a Force Majeure Clause, how does the A201 address an event such as the COVID-19 pandemic? The A201 treats events of delay such as COVID-19 in **§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, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, **unusual delay in deliveries, unavoidable casualties**, adverse weather conditions documented in accordance with Section 15.1.6.2, **or other causes beyond the Contractor’s control;...or (5) by other causes that the Contractor asserts and the Architect determines, justify delay...**

In the event of a delay that fits within the categories of delay provided for in **§ 8.3.1**, the A201 provides that there shall be an extension of Contract Time and does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents (**§ 8.3.2**).

Operative Contract Provisions

Beyond the concept of force majeure, there are many other provisions of the A201 that are implicated by events related to COVID-19. Below is a non-exhaustive list of some of the many operative provisions.

§3.7 Permits, Fees, Notices and Compliance with Laws

§3.7.2 The Contractor shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, *and lawful orders of public authorities* applicable to performance of the Work.

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

§10.2.2 The Contractor shall comply with, and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury, or loss.

Section 10.2.2 is broader than Section 10.2.1 as the use of the word “safety” is much more inclusive. Requiring the Contractor to comply with lawful orders of public authorities bearing on safety seems to clearly invoke Contractor responsibility for protection of workers from COVID-19.

§ 10.2.3 The Contractor shall implement, erect, and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying the owners and users of adjacent sites and utilities of the safeguards.

§ 10.2.8 – If either party suffers injury or damage to person or property because of an act or omission of the other party...

Section 10.2.8 should be amended to also include “illness.” The time period within which notice is to be provided also needs to be adjusted.

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

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.

Note that virtually all loss of use and business interruption insurance policies exclude losses due to viruses.

§ 14.1 Termination by the Contractor

§ 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, Subcontractor...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...

The requirement that all work be stopped will likely affect this clause’s applicability.

Although the OSHA Alert, COVID-19 Guidance for the Construction Workforce needs to be referenced, it is somewhat remarkable how AIA A201 can be readily adapted to a previously unforeseen set of circumstances.

David A. Scotti, Esq.

Scotti Law Group

www.scottilaw.net

w: 412.254.9274