

PART 1

THE AIA STANDARD DOCUMENTS

The AIA's standard Contract Documents have been a significant force in unifying, shaping, and regulating the construction industry for 120 years. The background information in Part 1 provides users with a more thorough understanding of the documents. The chapters in Part 1 provide information on the role that the documents play, their history, and how the documents are written and updated. The various "families" into which the documents have evolved are described here. Finally, the many educational and supporting resources that are part of the AIA's documents program are reviewed.

CHAPTER 1

Introduction: Standardization of Construction Contracts

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1.1 Freedom of Contract: The Concept of “Private Law-Making”

In the United States, laws are made by the legislature, the executive branch, and the courts. Private citizens can also make and shape their own legal environment, through their freedom to enter into contracts with others.

In the American political system, each of the three branches of government—legislative, executive, and judicial—has a role in making the laws that govern private and business behavior. Our British common-law heritage means that we are governed not only by the statutes passed by the legislature and the regulations promulgated by the executive branch but also by an uncoded body of law composed of hundreds of years of decisions handed down by the courts.

The law that most deeply affects the construction industry is the law of contracts, and, for the most part, this is part of the common law. In the mercantile world, the Uniform Commercial Code, adopted by each of the states and the District of Columbia, regulates commercial transactions, with the article on Sales governing contracts among merchants. Because construction involves permanent improvements to real property rather than fungible goods, it falls outside of the Uniform Commercial Code. Although there are many statutes and regulations that affect the construction industry, such as mechanic's lien laws, building codes and regulations, and licensing laws, construction remains largely in the realm of the common law of contracts, torts, and real property.

The Ninth and Tenth Amendments to the U. S. Constitution underscore the principle that the powers of the government are limited to those granted by the people, and that the people possess a "residuum" of rights not expressly or implicitly granted to the government.¹ Among these rights, in a capitalist society, is economic freedom, and that freedom is inextricably linked to the freedom of contract. While some areas of contract law are circumscribed, particularly in the areas of employment, antitrust, landlord-tenant, and consumer law, people in business remain largely free to deal with each other as they feel will be to their best advantage.

Although we are no longer in an age of laissez-faire economics, neither the courts nor the legislatures are inclined to interfere with the freedom of contract outside of the areas noted above. Moreover, the courts will generally enforce the contracts that have been freely entered into by people in business. This gives the contracting parties the power to define their own legal rights and responsibilities—and in doing so, they are engaged in what is referred to as private law-making. They not only control their contracts but can also influence their liability to third parties in tort, because the terms of those contracts can also affect the standard of care that applies in those cases. Contracting parties can even alter the terms of governing laws, when those laws so permit.

The construction industry is complex and highly decentralized. Someone desiring to have a building does not simply purchase one from one of a few manufacturers and have it delivered—complete, tested, and in working order—the way that an airline can purchase an aircraft or a railroad can purchase a locomotive. A building is not a product, in the sense of something that emerges from the end of a factory. Rather, the building owner sets in process a web of relationships that will involve dozens of companies and individuals for an extended period of time. At the center of this web is the tripartite relationship among the client, the design professional, and the builder. Ancillary to that are relationships involving lenders, insurers, sureties, regulatory officials, agents, consultants, professional advisers, subcontractors, material suppliers, manufacturers, tenants, building users and occupants, and a host of others.

Of course, not everyone involved in the construction industry has the same ability to promote or protect his or her legal interests. While a building owner, lender, or surety may have experienced law firms on retainer, the interior design consultant or the flooring subcontractor is much less likely to have such talent available. Given the diversity and disparity of size, economic power, and legal sophistication of the participants in a construction project, and the complexity of the process, one may well wonder how it can all come together to result in a finished structure.

If anything can be considered a unifying force in the construction industry, it is the standard contract forms and documents issued by the American Institute of Architects. They establish a common framework of roles and responsibilities for many of the

¹Amendment IX: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

project participants, using consistent terminology and legal principles. They tend to level the playing field between the large and the small, the rich and the poor, those who can afford lawyers to scrutinize every transaction and those who cannot. By reducing transaction costs, they promote transactional economy. They also save time, permitting projects to move forward much more quickly than they otherwise could if each participant had to come to agreement on new, unfamiliar terms with every project. The AIA documents make it possible for construction industry participants to engage in private law-making as a practical reality.

The influence of the AIA documents extends far beyond their users. Most non-AIA construction contracts, upon closer inspection, are revealed to be adaptations, to a greater or lesser extent, of an AIA form. This includes many state and local, and corporate and institutional contracts. Concepts and terminology introduced by and embodied in the AIA forms, such as substantial completion, have been enshrined in legislation, regulations, and government contracts that do not rely on the actual language of the AIA forms. Even more important, the balance of rights and responsibilities established in the AIA documents has been accepted by the courts as part of construction industry trade and custom. As these principles have become part of the common law, they affect even relationships in which an AIA document has not been used.

1.2 Construction Contract Documentation

Construction contracts are extremely complex. They involve many separate documents including text, graphics, tables, and charts, prepared by many different people. They must deal with a very complex set of relationships among many different entities. Unless these documents can work together in a consistent and comprehensible fashion, the “controlled chaos” that represents the typical construction project could become pure legal pandemonium.

The Documents That Make Up a Construction Contract

The Agreement. A typical construction contract consists of many written documents that, together with the graphic drawings, constitute what is referred to as the Contract Documents. The Contract Documents, together, form the contract for construction. One of the form documents almost invariably included in the Contract Documents is the Owner-Contractor Agreement form. Typically, this form contains the business terms of the contract—such as the scope of the work, the contract price, and time of completion—and, most importantly, will bear the signatures of the parties. Much of this form is “fill-in-the-blanks” information. Because this form lists all of the other documents that form the contract, thereby incorporating them by reference, it is not necessary for the parties to sign other parts of the contract to make them binding.

General Conditions. The General Conditions form contains the “legal” terms and conditions of the contract, establishing the divisions of responsibility and risk among the members of the construction team. Unlike the “business” terms of the Owner-Contractor Agreement form, these provisions are normally applicable to many different projects. The AIA standard form of General Conditions, AIA Document A201™–2007, covers all of the important legal aspects of the owner-contractor relationship and the role of the architect in the administration of the contract, is well known throughout the construction industry, and has been widely accepted since it was first issued in 1911. Its influence in bringing about transactional efficiency in the construction industry can be compared to that of the Uniform Commercial Code in standardizing commercial transactions.

In more abbreviated forms of contracts, the Owner-Contractor Agreement and the General Conditions are combined into a single document.

Supplementary Conditions. In order to account for conditions of the contract that are specific to a particular project—for instance, the bonding and insurance requirements—the construction contract also includes supplementary conditions that are used to add to or change the standard terms and conditions found in the standard General Conditions document. The supplementary conditions are written by the owner, or prepared by the architect based on the owner’s directives.

The general and supplementary conditions deal primarily with basic legal terms of the construction contract. Some of these requirements, such as bonds, insurance, and permits, have costs associated with them and are referred to as “general conditions items” in the contractor’s cost breakdowns.

The Specifications. Written provisions of the contract that describe the actual work to be performed by the contractor and provide the details of how the contract is to be administered are found in the written specifications typically prepared by the architect. These specifications normally include general provisions dealing with the administration of the contract (known as the General Requirements or “Division One”) and technical sections that describe and establish quality requirements for all of the materials, products, and assemblies that go into the finished project. The most widely accepted method of organizing specifications and product information was originally developed by the AIA and the Construction Specifications Institute (CSI); it is now called MasterFormat and is maintained and published by CSI.

The Drawings. Completing the construction contract (at the time it is entered into) are the graphic drawings prepared by the architect and its consultants. “Drawings” rather than “plans” is the proper term to use, because the drawings include far more than just floor plans—they also include elevations, sections, details, equipment layouts, and other information that can be communicated better graphically than in the written specifications.

Addenda. The proposed Contract Documents that are issued to bidders or prospective contractors for procurement purposes may be changed prior to the execution of the contract. For instance, the owner may approve certain substitutions proposed by bidders, or additional detail drawings may have been issued. Such changes are typically accomplished by a written and/or graphic document referred to as an addendum. Changes made after the contract is signed are referred to in AIA documents as modifications.

Post-execution Documents. One of the defining characteristics of construction contracts is that they are subject to change while the contract is being carried out. Construction changes are one of the facts of life in this business. To accomplish these changes, additional documents will become part of the Contract Documents after execution of the contract. As noted above, these are referred to as modifications, and they include change orders and other documents signed by the owner and contractor. Certain other documents generated during the course of construction—such as the architect’s interpretations and the contractor’s shop drawings—do not become Contract Documents.

Separation of the Agreement and General Conditions. When the AIA published its first standardized construction contract in 1888, the business and legal terms of the contract were all included in a single document that contained both text and fill-in portions. In 1911, the AIA published its first set of coordinated standard documents in which the owner-contractor agreement was a document separate from the general conditions. This arrangement helped simplify the contracting process. Issuing the general conditions along with the drawings and specifications made it possible for bidders and their subcontractors to see all of the terms and conditions that would apply to their work during the bidding period, before the business terms of the contract had been concluded. The time and price information contained in the successful bid was included in the agreement form to be signed by the parties.

Having a separate agreement form also allows different price mechanisms to be used, without having to have a different set of general conditions. The AIA publishes

Owner-Contractor Agreement forms for fixed-price, cost-plus, and guaranteed maximum price contracts (AIA Documents A101™–2007, A102™–2007, and A103™–2007), which are all designed to be used with the same General Conditions, A201™–2007.

In more abbreviated forms of contracts, it is easier to include the agreement and general conditions in a single document. The AIA's contracts for projects of a more limited size and scope, AIA Documents A107™–2007 and A105™–2007, combine the fill-in business terms with abbreviated versions of general conditions.

Separation of the General and Supplementary Conditions. While there are significant benefits to be obtained by following widely accepted construction contracting practices, the AIA has always recognized that its standardized forms cannot anticipate all the needs of every project. They should not be used without appropriate additions and changes needed for each individual project. Before the advent of word processing, the only practical way to make such modifications was by drafting a separate set of supplementary conditions.

The advantage of using supplementary conditions is that the General Conditions remain intact. Once a bidder determines that the familiar AIA General Conditions are being used, it may focus its attention during the bidding period on the changes set forth in the supplementary conditions. Likewise, contract negotiations can be focused on the terms and conditions that vary from the norm.

Some owners prefer to have a contract where the changes have been integrated into a single General Conditions document. AIA Contract Documents software allows users to make changes in the text of the General Conditions if they prefer this method. The software also includes a “redlining” feature so that changes are clearly marked. Disclosure of the modifications avoids the need for a party to make a word-for-word comparison of lengthy documents to see how they differ from the accepted industry-standard document.

Related Contracts, Documents, and Forms Needed for a Project

A construction project involves many participants, and it is critical that they are all operating under consistent terms and conditions. Since 1911, AIA standard documents have included additional contracts and forms to ensure that the rights and responsibilities of all of the major participants are closely coordinated.

In order to provide the owner with financial assurances that the project will be completed, the contractor may be called upon to provide a bond from a surety, covering the faithful performance of the contract. Subcontractors and suppliers also welcome a bond that will provide for payment for labor and materials used. Standard performance and payment bonds, developed in conjunction with the surety industry, have been part of the standard AIA documents since 1911. The AIA also issues a form of bid bond to provide assurances that a successful bidder will actually enter into the contract and provide the required performance and payment bonds.

While there is a general legal principle that a subcontractor assumes the obligations of the general contractor, there is no substitute for a subcontract form that explicitly provides for the performance that is called for by the prime contract. Since there are many subcontracts for every general contract, AIA subcontract forms have always been among the most widely used of its documents.

To most owners, it is important that the performance they receive from the contractor reflects what is called for by the architect's drawings and specifications. To accomplish this end, traditionally the construction contract has been managed or administered by the architect—a practice that has endured for hundreds of years. The general conditions of the contract describe the architect's responsibilities during construction in detail, but the architect is not a party to that contract. The architect's responsibilities are actually fixed in the agreement between the owner and the architect. When the architect is involved in both the design and the construction phases of a project, as is usually the case, it is critical that the owner-architect agreement and the owner-contractor contract be

tightly coordinated. Since the architect frequently relies on consultants such as structural, mechanical, and electrical engineers and other professionals, the terms of their agreements with the architect must also be consistent with the owner-architect agreement. One of the important reasons for using AIA documents on a project is that they are carefully coordinated to be consistent with each other.

Form documents are also used to aid in the procurement process. These include the instructions to bidders form—essentially, the general conditions of the bidding process—and a standard contractor qualification form allowing the owner to evaluate a bidder’s financial condition, experience, and organization.

Standard forms are also used during the construction phase. Such forms include standard application and certificate for payment, change order, certificate of substantial completion, contractor affidavits, and consent of surety forms. Many of these forms are required by financial institutions and third parties, and are used even where the construction contract is based on a non-AIA form.

The Parties in Interest

Because the construction contract is between the owner and its contractor, they will be the principal parties in interest. The architect is an interested party, however, because the owner has relied upon the architect to describe, through the drawings and specifications, the performance that will be required of the contractor. Traditionally, the owner has also relied upon the architect to administer the contract for construction.

The AIA’s role in developing construction contracts and forms is to facilitate the entire design and construction contracting process. With respect to contracts and forms to which the architect is not a party, the AIA has been able to serve as an independent and impartial body that has proven itself able to promulgate terms and conditions that are objectively fair. By providing coordinated, consistent documents that serve all the principal participants, the AIA has, in the words of Thomas Walter, brought about “a great deal of good” and accomplished “one of the best things we have done.”

1.3 The AIA Documents as a Management Tool

The AIA documents are best known as legal and professional practice tools that are used to establish and manage the relationships among the participants in the construction process.

Consistency and Coordination among Documents

One of the hallmarks of the AIA standard forms is their consistency and the coordination that they exhibit, in four different respects. First, each document is *internally* consistent. AIA documents are carefully drafted to avoid inconsistencies that create ambiguities or call their meaning into question. More than a hundred years of review, feedback, and intense, careful editing have helped promote this internal consistency.

Second, related documents within a particular family² are consistent and coordinated *with each other*. The Owner-Architect Agreements for small projects or for projects where a construction manager is used are carefully drafted to “track” with the corresponding construction contract forms.

Third, the AIA documents are consistent *between families*. The dispute resolution provisions in one family of documents will be very similar, if not identical, to those in the other families of documents. Variations are made only where the method of project

²See Chapter 4 for descriptions of the AIA document families.

delivery dictates a different approach. Users who are familiar with the principles embodied in the Conventional Family of construction contract forms will find those same principles reflected in the construction management and design-build contract forms.

Finally, the AIA documents are highly consistent *over time*. Despite the seemingly constant changes in the construction industry, most of the basic provisions found in the 1888 or 1911 editions of the AIA forms can be traced forward to the 2007 documents, reflecting a continuous process of refinement. The AIA recognizes that the practices of an entire industry are reflected in and guided by its documents and that unnecessary changes can be highly disruptive. Changes in the documents—particularly those that depart from well-established previous practices—are carefully considered before being made.

Inherent Limitations of Standard Form Contracts

Standard form documents have inherent limitations. Principal among these is that standard form documents cannot anticipate all of the needs of a particular contracting situation, no matter how well crafted they may be. They are drafted not by the individual contracting parties, but by surrogates acting on their behalf, dealing with a hypothetical owner, architect, consultants, contractor, and subcontractors on a hypothetical building project. Invariably, standard form documents will need to be supplemented or modified to tailor them to the particular needs of the parties, the project, and the nuances of state and local law.

Some types of document do not even lend themselves to standardization. For example, the AIA does not publish a standard invitation or advertisement for bids or a bid form, because there are too many differences between projects.

The other major limitation of standard form documents is that they are general-purpose documents that must be drafted for broad applicability throughout the United States. It is not possible to include provisions that reflect local construction industry practice or those necessary to comply with local laws. For this reason, the AIA does not publish a standard waiver of lien form. This is something that would be more appropriate for a state construction industry association or bar association to do.

The AIA Contract Documents and forms are specifically designed to be flexible to allow necessary changes to be made. The traditional method by which form contracts are customized is through the use of fill-in provisions. AIA documents also provide flexibility by using check-off boxes for different payment methods and dispute resolution options. Another approach to flexibility has been to offer alternate forms for major variations in approach when it is impractical to offer options within a document. Three different versions of the Owner-Contractor Agreement form are offered in order to provide the flexibility for different payment methods. Abbreviated forms of contracts are available for projects of limited scope, and entirely different “families” of related documents have been issued to account for different contracting approaches, such as construction management or design-build. Finally, the AIA Contract Documents® software provides users the ability to fully customize any of the documents.

1.4 The AIA Documents as a Model

The AIA documents are more than a management tool. They provide a model for many other contracts that are drafted for situations where users prefer not to use a form that is identifiably an AIA document.

While the AIA documents have proven to be extremely useful as a product used directly by contracting parties, the documents have also served as model documents or templates for over 100 years. When an original AIA document

cannot be used in its entirety, it is frequently used as a model, with the larger portion remaining unchanged. This saves the drafter the effort of having to develop a contract entirely from scratch. The Institute began receiving requests to reproduce and adapt the standard documents as soon as they were published. One of the first such instances occurred on publication of the Uniform Contract in 1888: Construction industry representatives in the Pittsburgh area sought and received permission to develop a standard subcontract form based on the Uniform Contract. Many users have been permitted to develop customized versions of the documents to meet their special needs.

A comparison of the AIA documents and those published by other construction industry organizations may reveal some close similarities. This has been no accident. AIA documents were used as the basis for the first national engineering standard form contracts developed in the 1920s. In the early 1970s, the Canadian Construction Documents Committee (CCDC) and the Royal Architectural Institute of Canada (RAIC) were given permission to develop forms that closely followed the AIA documents. In the United States, AIA-developed provisions can be found in forms published by other construction industry associations—sometimes even before the AIA document is published.

The AIA Contract Documents are copyrighted to protect the content from being misused. Occasionally, people have taken it upon themselves to copy the documents and treat them as their own work product, despite the copyright. A review of the contract language quoted in construction cases back to the early 1890s reveals that liberal use was being made of the language in the contract published in 1888. One contractor went to the trouble of having its onerous subcontract form typeset in the AIA style, clearly hoping to give unsuspecting subcontractors the impression that they were using the real thing. Following the advent of desktop word processing, it was not uncommon to find the entire text of AIA documents in contracts prepared by prominent law firms in cities across the country.

Private parties are not the only users who have decided to develop their “own” versions of the AIA documents. The construction contract forms issued by eight out of ten local government agencies in the Washington, D.C., area in the 1980s were clearly based on the language contained in the AIA General Conditions. Differences in the language made it possible to identify the specific edition of the General Conditions that had been adapted by the public agency: Some of the contracts were based on AIA documents that had been out of print for over 30 years.

The development of AIA Contract Documents software has alleviated many of the problems of infringement and unauthorized use of the documents. The software allows users to make modifications directly in the documents and customize them to their own needs. The great advantage to users is that their documents can be based upon the most recent editions of the AIA documents.

1.5 The AIA Documents as an Industry Standard

The influence of the AIA documents extends well beyond the particular contracts in which they are used. While the documents reflect standard industry practices, they also embody “best practices” of the industry and, through their use, help to bring those practices into the mainstream

Influence on Construction Industry Practices, Terms, and Conditions

Because of the widespread acceptance of the AIA documents, their terms soon come to represent the standards of the industry. When a contract is silent on an issue that is

before a court, the court will often look at normal trade practices. The AIA documents provide strong evidence of those practices even in cases where the documents have not been used in the particular contract that is at issue.

A few examples serve to illustrate that influence. Early in the twentieth century, only a few states recognized the doctrine of “substantial performance” of a construction contract. The law was very strict: If a contractor had not completed a contract in all of its particulars, the contractor was in breach and was unable to recover any part of the contract price. Furthermore, the contractor could not recover based on the value of the services it had provided or the work it had completed, because that remedy was only allowed in “quasi-contract” situations where there was no express contract between the parties. After the AIA introduced the concept of “substantial completion” in 1925, it quickly became the accepted norm that when the point of Substantial Completion is achieved, the contractor is entitled to the balance of the contract price, less the value of any remaining uncompleted or uncorrected work.

Another innovation in the AIA documents, also introduced in 1925, was to provide for payment for materials delivered and suitably stored at the site or another location, before they had been physically incorporated into the building. This has also become the norm, and contractors today expect to be paid as a matter of course for stored materials that have been “identified” to the contract.

Fifty years later, another innovation was introduced. From 1911 to 1963, the contractor’s only remedy if it had not been paid on time was interest. The contractor’s obligation to perform the work was considered to be independent from the owner’s obligation to pay for it. In 1966, the contractor was given the right to stop work if payment was not made, and in 1976, the contractor was given the right to recover its shut-down, delay, and start-up costs in response to a failure of payment. These remedies are now considered normal.

Effect on Supporting Institutions—Lenders, Insurers, Sureties

The AIA documents are significant not only to the contracting parties but to many of the institutions and enterprises that help support the construction process. Lenders rely on and expect to see the AIA Application and Certificate for Payment and the price breakdown in its continuation sheet to support draws on a construction loan. They look for an Owner-Architect Agreement and a construction contract in the loan documentation as evidence of the transaction that they are underwriting.

The insurance provisions of the AIA contract forms are familiar to property and casualty underwriters. While the AIA documents generally promote the purchasing of adequate insurance, they also regulate the policies in ways that are sometimes resisted by the insurers, such as in the waiver of subrogation provisions.

Sureties welcome the use of a familiar AIA contract when they issue performance and payment bonds. They know what their rights and obligations will be if the contractor is placed in default and the surety is called upon to remedy the contractor’s performance. The surety will look closely at the AIA Certificates for Payment to determine if the architect has over-certified payments to the contractor, and will look for AIA consent of surety forms to support any reduction in or release of retainage, or final payment.

1.6 The AIA Documents as a Legal Standard

The AIA documents set legal standards that are reflected in thousands of cases.

The AIA construction contract forms have been extremely popular from the time the Uniform Contract was first published in 1888. One of the earliest cases interpreting that contract was decided in 1892, with several more being decided in

1893 and subsequent years. By the time the First Standard Edition of the General Conditions was published in 1911, a considerable body of law had been developed dealing specifically with the AIA contracts. It was reported that no decisions had been encountered in which the contract had not been upheld as written.³

The AIA has always sought to meet high standards of legal quality and draftsmanship in its contract forms. The AIA committee responsible for the contract documents has always been served by outside legal counsel, and the drafts of the First Standard Edition were reviewed by Harvard University's Professor Samuel Williston, one of the primary legal authorities on contracts. Since the early 1970s, attorneys trained and licensed as architects have provided staff support for the AIA's documents program.

The widespread use of the AIA documents has resulted in a large body of law construing almost every one of their provisions. The care used in drafting the documents has been evident in the consistent support they have received in written opinions upholding those documents. For example, the waiver of subrogation provision in the AIA General Conditions has consistently withstood challenges from insurers seeking to recover their loss payouts from one or another of the project participants. The AIA has repeatedly demonstrated its ability to anticipate trends in legal decisions affecting the construction industry, making preventative changes in the documents before the weight of legal opinion came to dictate the change.

In order to assist the legal community in construction law cases, the AIA developed *The American Institute of Architects Legal Citator*, which has cataloged and digested thousands of legal decisions construing all of the principal AIA contract forms since it was introduced in the mid-1960s.⁴

³See discussion of the Uniform Contract in Chapter 2.

⁴Since the mid-1980s, *The American Institute of Architects Legal Citator* has been published by Matthew Bender & Company, a member of the Lexis-Nexis group, as part of its multivolume *Construction Law* treatise.