



AMERICAN INSTITUTE OF ARCHITECTS 2017 INSURANCE REQUIREMENTS – AN INTRODUCTION

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In early 2017, the American Institute of Architects (“AIA”) introduced its 2017 updates to its form construction contract documents, including a new exhibit that addresses insurance requirements between the owner and contractor. As AIA forms are among the most popular and commonly used form documents in the construction industry,¹ the forms are usually considered construction industry standards. Any company involved in construction as a project owner, architect, contractor or subcontractor should familiarize itself with the new AIA insurance terms and carefully consider the insurance coverage for any project it will undertake.²

OVERVIEW OF THE AIA CHANGES

It has been AIA’s practice to revise its family of contract documents every 10 years, with the last revision in 2007. While the 2017 changes go beyond insurance, possibly the most noteworthy change in 2017 is the launch of a separate exhibit for insurance. Entitled AIA Document A101™ - 2017 Exhibit A – Insurance and Bonds, this document is intended to be used in conjunction with AIA Document A201™ 2017 General Conditions of Construction – Article 11.³ The new exhibit does not replace Article 11; rather, the exhibit is intended to expand upon the insurance provisions of Article 11.

BUILDER’S RISK INSURANCE CHANGES

While the changes to the owner’s responsibility for builder’s risk insurance have not changed significantly, a thorough review by the owner (including owner’s legal counsel) of this section in the new exhibit is still important. For instance, builder’s risk insurance must be in effect through the expiration of the period of correction of the work (in lieu of the final payment or no insurable interest of anyone other than the owner – whichever was later). The period of correction is to be set forth in Section 12.2.2 of the General Conditions.

In addition, the AIA prohibits certain exclusions (instead of enumerating every cause of loss) – coverage is to be purchased for direct physical loss or damage, not excluding the risks of fire, explosion, theft, vandalism, malicious mischief, collapse, earthquake, flood or windstorm.

Specifically required is coverage for ensuing loss or resulting damage from error, omission or deficiency in construction means, methods, design, specifications, workmanship or materials. As some insurers apply a very broad interpretation of faulty workmanship exclusions (and very narrowly construe what constitutes ensuing loss or resulting damage), this area of coverage is likely to be a point of contention.

Finally, the exhibit includes a menu, check-the-box approach to certain optional coverages – such as Loss of Use, Business Interruption, Delay in Completion, Ordinance or Law, Expediting Expenses, Extra Expense, Civil Authority, Ingress/Egress, Soft Costs and Cyber Security Insurance.

COMMERCIAL GENERAL LIABILITY INSURANCE CHANGES

Arguably, the most prominent changes in the new exhibit are found in the contractor’s liability insurance section. This includes the requirement that the coverage is to be in effect until the expiration of the period of correction or later if a different duration is stated in the documents. The contractor is also required to disclose to the owner any deductible or self-insured retentions applicable.

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ADDITIONAL INSURED

The contractor is required (to the extent permitted by law) to include as an additional insured the owner, the architect and the architect's consultants for claims "caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations."⁴ The owner is also to be an additional insured for claims "caused in whole or in part by the Contractor's negligent acts or omissions for which loss occurs during completed operations."⁵ Coverage for the additional insured is to be on a primary and non-contributory basis to any owner and, if commercially available, is to be no less than ISO CG 20 10 (07 04), CG 20 37 (07 04) and CG 20 32 (07 04) for the Architect and its consultants. In the context of the exhibit, whether the ISO April, 2013 edition additional insured endorsements provide less coverage than the ISO July, 2004 edition additional insured endorsements will be difficult to determine, as the scope of additional insured coverage depends on the fact and circumstances of a particular claim.

COMMERCIAL GENERAL LIABILITY – PROHIBITED EXCLUSIONS

The exhibit requires commercial general liability insurance (limits are inserted in the document) for most claims generally covered⁶ by a standard ISO Commercial General Liability policy. Instead of listing each of the type of coverage required in the CGL policy, AIA lists 11 exclusions or restrictions that are prohibited and are not to be included on the contractor's CGL policy.

The following are summaries of each prohibition. The CGL cannot exclude:

- Claims by one insured against another insured
- Claims of property damage to the contractor's work arising out of the products-completed operations hazard where the damaged work or the work out of which the damage arises was performed by a subcontractor
- Claims for bodily injury to employees, other than the insured's own employees
- Claims for the contractor's indemnity obligations for bodily injury to that contractor's own employees
- Claims for prior work or similar exclusions
- Claims for prior injury or similar exclusions
- Claims for residential, multi-family or habitational projects if the work is performed on such projects
- Claims related to roofing, if the work involves roofing
- Claims related to EIFS, if the work involves such coating or surfaces
- Claims related to earth subsidence or movement, where the work involves such hazards
- Claims related to explosion, collapse and underground hazards, where the work involves such hazards

As some of the above exclusions are widely used in the marketplace (particularly the non-admitted/surplus lines marketplace), a contractor may not be in compliance with the 2017 CGL insurance requirements.

UMBRELLA LIABILITY

The umbrella is to be no less broad than the underlying policies, which means that all of the above prohibited exclusions cannot be used in an umbrella policy. In addition, the exhibit requires that the umbrella shall not require exhaustion of the underlying insurance only through *actual payments* by the underlying insurer.

OTHER CHANGES

While a complete understanding of the automobile, workers' compensation and employers' liability insurance requirements is always necessary, the requirements are straightforward. The exhibit also contains a list of other possible contractor insurance requirements to be considered, including insurance for Jones Act, USL&H Act, professional liability, pollution liability, maritime liability, aircraft (manned and unmanned), Railroad Protective, Asbestos Abatement, coverage for storage and transportation of property to the construction site and property at the construction site owned by the contractor, such as equipment.

CONCLUSION

As noted on the sample AIA Document 101A™ - 2017 Exhibit A – Insurance and Bonds, the documents have important legal consequences and consultation by the owner or contractor with an attorney is encouraged. While the document discussed above is between the owner and the contractor, the expectation is that some, if not all, of the requirements imposed on the contractor will also be imposed on subcontractors of various tiers. Awareness of the 2017 AIA changes to insurance requirements is desirable for those who specialize in handling insurance and risk matters of the construction industry.



- ¹ Daniel M. Murdock, “Highlights of the 2017 Revisions to the AIA A201,” Build Smart, (May 5, 2017), © 2017 Bradley Arant Boult Cummings LLP.
- ² Kenneth Gorenberg, “Hot Topic: New AIA Terms for Insurance Construction Contracts,” (July 25, 2017), © 2017 Barnes & Thornburg LLP.
- ³ Sample - AIA Document A101™ -2017 Exhibit A Insurance and Bonds, pg. 1
- ⁴ Sample - AIA Document A101™ -2017 Exhibit A Insurance and Bonds, §A.3.1.3 pg. 4
- ⁵ Sample - AIA Document A101™ -2017 Exhibit A Insurance and Bonds, §A.3.1.3 pg. 4
- ⁶ As the standard ISO CGL policy contains numerous exclusions, no ISO CGL policy provides full coverage for the contractor’s indemnity obligations under the contract documents.

