

The First Commandment:

By Philip W. Kabza, AIA, CSI, CCS, CCCA



The purpose of standard construction contract documents such as the American Institute of Architects' (AIA) venerable A201 General Conditions is to help owners and design professionals avoid the direct and indirect costs of reinventing contracts with every project. These documents provide a consistent basis to conduct business and have a large body of case law behind interpretation of their provisions. No such standard document addresses every party's and every project's requirements; that is what supplementary conditions are for. It is a challenge to create a consensus document in a contentious industry; however, the A201 represents the best means to fairly assign construction

project risk that is available to us today.

Most of this author's personal experience in construction contract administration has been with projects governed by the A201. However, I also have administered projects governed by owner-developed general conditions produced by three state governments, two universities, several school districts, and a national retail chain. That experience has given me a firm and clear answer to the question, "When should an owner develop unique general conditions?" My answer is a fervent, "Almost never."

The Great Usefulness of Standard Conditions

I can think of at least five good reasons to stay with industry-standard general conditions.

The first is the breadth of experience and industry consensus behind the drafting of the conditions. The A201, for example, reflects over 80 years of development and refining—the best thinking and input of dozens of legal experts experienced in construction contract law. The interests of all members of the building team are addressed: owners through organizations such as Building Owners and Managers Association International (BOMA); contractors through the Associated General Contractors of America (AGC); and design professionals through the AIA.

The second reason is protection of the parties. Major liability insurance carriers also participate in the process of developing the AIA standard general conditions. The available insurance policies that protect parties to a contract are written to reflect the risk management provisions built into the standard general conditions.

The third reason is integration of documents. The A201 can be integrated with AIA's standard Owner/Architect Agreements. When both documents come from the same source, definitions of terms, descriptions of scopes of service, and the relationship of the parties during construction administration are consistent. Custom agreements and conditions can leave the contractor expecting services from the design professional that the owner has not contracted for.

The fourth reason is that general acceptance makes standard general conditions familiar entities for bidders trying to assess costs and risks on hundreds of projects across the country and

AIA DOCUMENT A101-1997
Standard Form of Agreement Between Owner and Contractor
where the basis of payment is a STIPULATED SUM

AGREEMENT made as of the first day day of October in the year 2002
(In words, indicate day, month and year)

BETWEEN the Owner:
(Name, address and other information)
XYZ Company
0730 Mason Street
Sebago, New Hampshire 00701
555-555-5555
xyzco@xyzco.com

and the Contractor:
(Name, address and other information)
XYZ Roofing Inc.
72360 Baker Lane
Youngstown, Ohio 91011
777-777-6777
xyzroofing@xyzroofing.net

The Project is:
(Name and location)
Globe Enterprise Center,
The James Building
27 Canton Drive
Cleveland, OH

The Architect is:
(Name, address and other information)
Mark Prague
Mark Prague Partners, LCC.
Euclid Front Road
Toledo, OH
mprague@mppllc.biz

The Owner and Contractor agree as follows.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

AIA Document A201-1997, General Conditions of the Contract for Construction, is adopted in this document by reference. Do not use with other general conditions unless this document is modified.

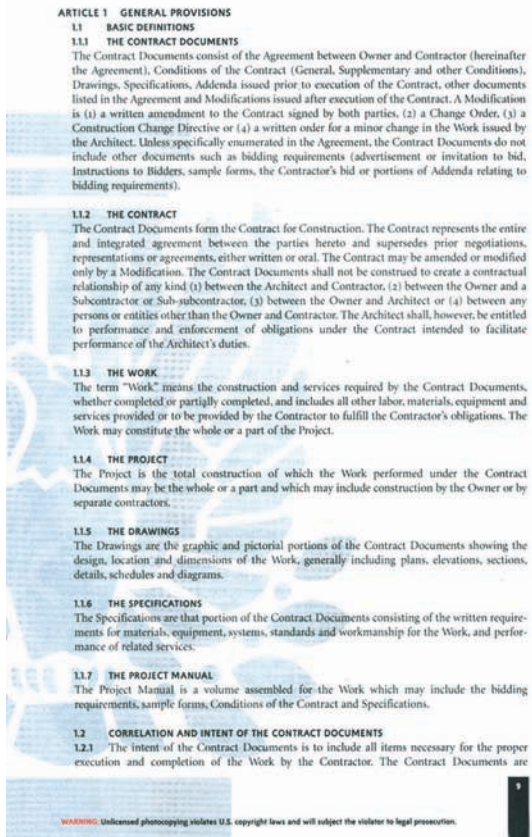
This document has been approved and endorsed by The Associated General Contractors of America.

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AIA DOCUMENT A101-1997
OWNER-CONTRACTOR
AGREEMENT

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Washington, D.C. 20006-5292

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Screen shot of an AIA standard form of agreement between owner and contractor.



Screen shot of an AIA standard form of agreement between owner and contractor, describing General Provisions.

internationally. Bidding is a high pressure undertaking, and having to comb dozens of pages of unfamiliar language to try to assess potential risks and costs is a difficult task.

The fifth reason is flexibility. The A201, for example, can apply to both bid and negotiated, large and small projects. It is used for simple and complex owner and constructor teams, accommodates multiple prime work, and serves state governments, universities, international corporations, and homeowners equally well. Customization of A201 through careful drafting of supplementary conditions makes it a very powerful, broad-reaching document.

Shortfalls of Owner-Drafted General Conditions

Many owner organizations insist on creating their own construction contract documents from scratch. Yet seldom does this result in superior projects or cost savings. Few municipal, state, or corporate attorneys are specialists in construction contract law, and the general conditions they draft are frequently evidence of that fact. Every example of owner general conditions I have administered has been seriously flawed. We've had to hold our

breath, get through the job, and hope that claims don't end up in court.

Sometimes the flaws in owner-drafted general conditions are deliberate because the owner does not perceive project players as a team, but rather as competitors. The owner wants the advantage on the playing field. But shifting the ground under the feet of bidders and contractors can backfire on an owner through increased initial cost, extensive claims, litigation, and projects fraught with suspicion and manipulation by all parties.

Following are typical problems with owner general conditions:

- Inconsistent with design services agreements.
- Inconsistent with professional standards of design practice and licensure laws.
- Judicially unenforceable provisions not reflective of case law.
- Unfair risk assigned to the contractor (which can backfire on an owner).
- Poorly drafted legal language, which makes interpretation difficult.
- Failure to reflect established construction industry procedures and terminology.
- Failure to separate the content of general conditions from Division 1 General Requirements.

The result of these errors and omissions is an administrative environment with high uncertainties that results in higher contractor markups and increased claims and post-construction litigation. We have seen the first tier of competent contractors

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avoid bidding on projects of clients that make unusual contractual demands. The projects too often yield low profits and high legal fees. Consequently, these owners have to fight it out with less capable contractors. The projects have more delays, cost overruns, and lower quality of work. The owners, in a further attempt to control this losing situation, add an additional tier of administrative expense via construction managers, who try to offset the lack of experienced contractor management. The result is often that everyone loses money on the project, while less money is available to go into quality.

Recommendations for Project Team Members

Contractors and owners whose projects need special contractual and administrative provisions do have a solution: negotiating and drafting supplementary conditions. For example, when designing a casino on Native American land several years ago, our firm learned we were working with a separate nation for whom many special judicial and mediation provisions applied. Supplementary conditions allowed us to use the A201.

Project administrative details do not belong in the conditions of the contract. Project administrative and procedural requirements, such as schedule responsibilities and payment provisions, belong in properly written Division 1 General Requirements. This misunderstanding of the separate roles of the conditions of the contract and their related Division 1 general requirements gives rise to many of the attempts to draft unique contract conditions. Eighty-page supplementary conditions are not necessary.

If you are intending to utilize non-standard general conditions on a project, consider these recommendations:

- Base a construction program on industry standard general conditions.
- Have the company's experienced, in-house project management department and an experienced consultant team draft standard supplementary conditions — with review by legal counsel familiar with construction industry practices and case law.
- Keep supplementary conditions at a bare minimum; put administrative details in Division 1 General Requirements where they belong.
- Utilize Division 1 General Requirements specifications based upon the Construction Specifications Institute's (CSI) MasterFormat™ — the industry standard — and one of the widely accepted master guide specification systems, such as AIA's MASTERSPEC®, which is written to coordinate with the AIA's general conditions documents.

Following on these suggestions are two more, aimed at assisting project team members in understanding and communicating about construction documents:

- Have the project management personnel participate in the Construction Specifications Institute (CSI). It is the only comprehensive source of education on the topic of contract conditions.
- Have project management personnel participate in CSI's Construction Document Technology education program and obtain Construction Contract Administrator (CCCA) certification. Details for this excellent program are found on CSI's website at www.csinet.org.



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This writer has yet to see a project that would not have been better administered using these recommendations rather than the poorly drafted, verbose, and sometimes draconian custom-drafted general conditions we often encounter. All members of the building team have a strong interest in the well being of this industry. Consistent use of standard industry general conditions makes a useful contribution to its health. ■

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ABOUT THE AUTHOR

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STANDARD CONTRACT DOCUMENTS AVAILABLE IN ELECTRONIC FORMAT

The latest upgrade to the electronic contract documents software published by The American Institute of Architects (AIA) now makes AIA electronic contract documents easier to purchase, install, and use. Additionally, for existing users, a free upgrade to EF 3.0 is available and includes 11 new or revised contract administration forms. The upgrade can be downloaded from the AIA web site at www.aia.org.

The AIA has published standardized contract forms for 114 years. During that time, owners, architects, contractors, attorneys, insurance experts, and many others have contributed to the development and revision of the AIA documents. AIA Contract Documents provide the basis for nationwide uniformity in contractual relationships in the design and construction process. They represent the state of the law regarding construction industry practices and new legal developments. Those new to AIA Electronic Format Contract Documents can get more information about the program from Sheila Owens, (202) 626-7467, or sowens@aia.org