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# **Commentary on AIA Document A201-1997**

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**Annotated A201**

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## Introduction

Most prime contracts on construction projects include a general conditions document. On building projects in the United States, the one most commonly used is AIA Document A201. Perhaps because this document is so familiar to architects and contractors, its usefulness in coordinating the project is often overlooked.

Subcontracts ordinarily adopt by reference the relevant portions of the contract between owner and contractor—including the general conditions. The subcontracts then require that their terms “pass through” to sub-subcontractors, and so on down through the tiers, so that all parties performing work on the site will be coordinated by one general conditions document. The general conditions define the owner’s and architect’s roles and authority on the project, and are referenced in turn by the owner-architect agreement. If the contractor provides performance and payment bonds, the contractor’s surety guarantees what is required under those same general conditions. If the owner’s lender requires assignment of the construction contract, it proposes to assume the owner’s responsibilities under the general conditions as well.

On a well-organized project, all participants are bound in some measure by the general conditions. This document brings order to a diffuse process, seemingly made to order for finger-pointing, by establishing clearly defined lines of authority. The general conditions perform another vital function on competitively bid projects, providing a commonly recognized baseline that bidders can use—in a relatively short time and with limited legal services—to measure the risks and benefits of the proposed bargain. Not coincidentally, the widespread use of general conditions in this country may be traced to the years immediately following passage of the Snag Act, which first required open competitive bidding on U.S. government contracts.

The AIA published its first general conditions document, the ancestor of A201, in 1911. Since that time, many procedures that have become customary in construction contracting have originated in AIA general conditions documents. Numerous government construction contract forms have been patterned on A201. The document represents the accumulated experience of generations of owners, architects, contractors, subcontractors and others involved in the construction process, and its language has been drafted with a view to allowing only one unambiguous interpretation. That language has formed the basis for thousands of court decisions. A useful guide to the case law on A201 and other AIA documents is *The American Institute of Architects Legal Citator* (New York: Matthew Bender, 1999).

A further advantage of A201 is that experienced participants in the construction process are thoroughly familiar with it. They can then focus on the supplementary and other conditions that modify the known baseline. And, at the risk of stating the obvious, the document is intended to be modified. It is a standard form and cannot perfectly fit all the projects on which it is used.

A201’s wide acceptance stems in part from the AIA’s drafting process, which seeks to develop a consensus among those who represent interests significantly affected by the document. A201-

1997, like its precursors, is the product of years of discussions involving owners, contractors, subcontractors and architects, as well as legal and insurance counsel. It has been approved and endorsed by the Associated General Contractors of America.

Drafting of A201-1997 was coordinated with the drafting of other related AIA documents. These include the 1997 editions of the A101 and A111 agreement forms, the A401 subcontract form and the owner-architect agreements, B141 and B151. All of these documents incorporate the 1997 A201 by reference. Because of interlinkages among the various AIA documents, users should be careful to use only the latest edition of any AIA document in order to ensure consistency in the terms of the various documents.

A201 is also incorporated by reference into some of AIA's owner-construction manager agreements and design/build agreements. Contact the AIA concerning any recently published amendments for use in adapting A201-1997 to these other documents.

A201-1997 is the fifteenth edition, incorporating the latest refinements as well as experience gained over the past century. The revisions are based on input received from owners, contractors, architects, subcontractors and others involved in the construction process. Note, however, that the scope of this Commentary is not limited to the 1997 revisions. The annotations contained herein are intended to cover "frequently asked questions" about the entire document.

### **Changes in the 1997 Edition**

The principal changes are summarized below. For a side-by-side comparison of the 1997 edition with its predecessor, showing changes with underlining and strike-throughs, see AIA Document A201: Comparison of 1987 and 1997 Editions. This publication is contained in the A201-1997 Education Kit, along with the Briefing Module Manual and a copy of the document itself.

**Owner's Information.** Under Subparagraph 2.2.1, the owner is required to notify the contractor prior to changing financial arrangements for the project. Under Subparagraph 2.2.3, the contractor is entitled to rely on information provided by the owner. Subparagraph 2.2.4 requires the owner to furnish information or services relevant to the Contractor's Work.

**Contractor's Review of Contract Documents and Field Conditions.** Paragraph 3.2 requires the contractor to review the contract documents and report any errors or omissions to the architect. The contractor performs this review in its capacity as a contractor, and is not required to second-guess decisions made by the architect as a design professional.

**Substitutions.** Under Subparagraph 3.4.2, substitutions may only be made in accordance with a change order, thus requiring the owner's approval.

**Incidental Design Services.** Subparagraph 3.12.10 lays out the ground rules for provision of design services for systems or components by the contractor.

**Indemnification.** The phrase "in whole or in part" has been eliminated from Subparagraph

3.18.1, bringing it fully into line with the comparative fault rule adopted in most jurisdictions. The exception for actions of the architect has also been eliminated. The indemnification provision has also been modified for use with Project Management Protective Liability coverage, discussed below.

**Mutual Waiver of Consequential Damages.** Under Subparagraph 4.3.10, the owner and contractor waive claims for consequential damages. This provision limits the parties to direct damages arising out of any dispute under the contract.

**Mediation.** Under Paragraph 4.5, mediation is now required as a condition precedent to arbitration or litigation. This requirement is independent of the arbitration provision, and will apply even if arbitration is deleted.

**Construction Change Directives.** Subparagraph 7.3.8 requires that amounts not in dispute under construction change directives be included in applications for payment, and provides for interim determination by the architect of amounts that remain in dispute.

**Applications for Payment.** Under Clause 9.3.1.2, the contractor may apply for amounts it does not intend to pay to subcontractors if the work in question has been performed by others whom the contractor does intend to pay.

**Payments to be Held for Subcontractors.** Subparagraph 9.6.7 requires the contractor, in the absence of a bond, to hold in trust payments received for subcontractors or suppliers who have properly performed work.

**Release of Retainage.** Under Subparagraph 9.8.5, full release of retainage is required at substantial completion.

**Hazardous Materials.** Subparagraph 10.3.1 defines hazardous materials to include harmful substances other than asbestos and PCB. Under Subparagraph 10.3.2, Work in an area affected by hazardous material will resume by agreement of the parties and without a decision by the architect. Under Paragraph 10.4, the owner is absolved of responsibility for materials brought on the site by the contractor (other than those required by the contract documents). Under Paragraph 10.5, the owner indemnifies the contractor for remediation costs of the kind that might arise under CERCLA, provided the contractor was not negligent and incurred liability solely by performing work as required under the contract.

**Insurance.** Paragraph 11.3 gives the owner the option of requiring the contractor to purchase a Project Management Protective Liability policy. This new policy provides primary coverage for the owner's, contractor's and architect's liability to third-parties based on their authority to manage the project. If the owner chooses to exercise this option, the contract sum will be adjusted to reflect the cost of purchase.

**Correction of Work.** Under Clause 12.2.2.1, failure by the owner to notify the contractor of

defective work discovered during the one-year correction period is deemed a waiver of both the correction and warranty remedies with respect to that work.

**Termination by the Owner for Convenience.** Under Paragraph 14.4, the owner is now permitted to terminate the contract for convenience.

As the foregoing discussion makes clear, the 1997 edition of A201 is a refinement of the 1987 edition and builds on the experience gained with it and earlier editions. Much of the document is unchanged. Provisions that are essentially unchanged include the contractor's warranty, shop drawing review, arbitration, change orders, tests and inspections, and termination by the contractor.

### **Modifying the General Conditions**

As mentioned earlier, A201 is intended to be modified. It is designed for general use, and cannot include all the requirements applicable to a specific project and location. Changes should be made with great care, however. Numerous considerations specific to each project will determine what modifications are needed, but guidance on how to make them may be given in terms of four broad principles.

**Make sure the changes show.** Parties such as contractors, subcontractors, lenders, insurers and sureties routinely take risks based on contract documents prepared by others. To the extent those documents are based on recognized standard forms, the variations in risk from the baseline of the standard form are exposed for scrutiny. The operative term here is recognized: modifications should be made in such a way that they will stand out clearly from the text of the standard document. If the document is retyped, scanned or otherwise merged with text from another origin, that distinction will be obscured.

There are a number of problems with retyping and scanning: they introduce the possibility of errors, and even minor errors may make the legal effect of the language less certain. The overriding problem, however, is that the baseline of the standard document is obscured and the efficiency inherent in standardization is lost. A lending institution, for example, will often authorize its loan officer to sign off on construction loans when standard forms are used. Retyped or scanned versions of the same forms commonly require review by the lender's attorneys, because these processes introduce many of the same unknowns as are present in manuscript contracts.

Contractors, who must quickly calculate risk based on vast amounts of information, make similar judgments. Lacking the time to have legal counsel review an unfamiliar general conditions document, a prudent contractor will at least apply a contingency multiplier to its bid or proposal. Or, depending on market conditions and the unknowns involved, the contractor may forego the project.

**Make changes in the proper location.** Over the years, the construction industry has developed a pattern of accepted locations of subject matter within the contract documents. AIA Document A521, Uniform Location of Subject Matter, sets out this pattern in great detail. A521 is prepared

and updated by the AIA and the Engineers' Joint Contract Documents Committee (EJCDC), and published jointly by the AIA, EJCDC's member organizations and the Construction Specifications Institute (CSI). No summary statement can substitute for actual study of this document, but the following considerations apply generally to changes to the general conditions.

Matters affecting the basic legal rights and responsibilities of the parties, but which vary from one project to another, should be included in the supplementary conditions.

Matters having to do with temporary facilities and administrative and procedural requirements should be included in division 1 of the specifications.

Matters relating to specifications are outside the scope of this commentary; readers are referred to AIA's MASTERSPEC™ and CSI's Manual of Practice. Guidance in preparing supplementary conditions may be found in AIA Document A511, Guide for Supplementary Conditions.

As the term would imply, supplementary conditions are usually assembled as a separate document. Users of the software AIA Contract Documents: Electronic Format for Windows™ may wish to incorporate such modifications directly into the text of A201-1997, where they will be distinguished from the standard language via underscoring and strike-throughs. Generally, the use of separate supplementary conditions is the more accepted practice at this time.

**Make only the changes you need.** In order to coordinate the efforts of the various participants on the project, A201's language contains numerous linkages. These occur both within A201 itself and between A201 and other AIA documents. For obvious reasons, A201 is adopted by reference into certain AIA owner-contractor agreement forms. It is also adopted into AIA owner-architect agreements and into AIA's subcontract form. All of these documents rely on common definitions, most of which are found in A201. Finally, "flow down" provisions require that rights and responsibilities originating in A201 and other contract documents be passed through to subcontractors and sub-subcontractors.

All this means that changes made to A201 can have unintended consequences. To guard against this possibility, the wise course is to make only the modifications required and to do so using the vocabulary of the document itself. Purely stylistic changes should be avoided.

### **Other AIA General Conditions Documents**

AIA Document A201 is the keystone document for construction projects organized along "conventional", "traditional," or "design/bid/build" lines—where the architect and contractor are retained directly, and separately, by the owner, and where an independent construction manager is not retained. Other AIA general conditions documents are described briefly below.

AIA Document A201/CMA, General Conditions of the Contract for Construction—Construction Manager/Adviser Edition, is intended for use on construction projects where a construction manager is retained in the role of independent adviser to the owner. Note that this document should not be used on projects where the construction manager acts as the constructor, or where

the construction manager contracts directly with those who supply labor and materials for the project.

AIA Document A205, General Conditions of the Contract for Construction of a Small Project, is packaged with AIA Document A105, Standard Form of Agreement Between Owner and contractor for a Small Project. These documents are intended for use on projects of modest size and brief duration where the basis of payment is a stipulated sum. They do not contain the detail of other AIA documents, and should not be considered substitutes for them.

AIA Document A271, General Conditions of the Contract for Furniture, Furnishings and Equipment, is intended for use for use as part of interiors contracts under which only incidental construction is performed.

Condensed general conditions are contained in AIA Documents A107, Abbreviated Owner-Contractor Agreement Form for Construction Projects of Limited Scope, and A177, Abbreviated Owner-Contractor Agreement for Furniture, Furnishings and Equipment. These abbreviated forms should not be used with other general conditions documents.

### **General Principles Underlying AIA Forms**

AIA form documents are intended to benefit all who participate in the design and construction process. This includes, above all, the public, whose members are the ultimate users of the built environment. They are, in fact, the focus of the AIA's commitment to "coordinate the building industry and the profession of architecture to insure the advancement of the living standards of our people through their improved environment." To ensure the acceptance of its standard form contracts by the construction industry, the AIA relies on a consensus-building process aimed at balancing the interests of all participants through a reasonable apportionment of risks and responsibilities. No one party's interests are allowed to dominate, including those of the architect. This is the basis of the reputation of fairness and balance that AIA forms have gained in over a century of use. To learn more about the AIA's approach to drafting contract documents, write to obtain a copy of AIA Document M120, Documents Drafting Principles.

## DOCUMENT TEXT

## COMMENTS

### **GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION**

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

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### **ARTICLE 1 GENERAL PROVISIONS**

#### **1.1 BASIC DEFINITIONS**

##### **1.1.1 THE CONTRACT DOCUMENTS**

The **Contract Documents** consist of the Agreement between Owner and Contractor (hereinafter the Agreement), Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of the Contract, other documents listed in the Agreement and Modifications issued after execution of the Contract. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Architect. Unless specifically enumerated in the Agreement, the Contract Documents do not include other documents such as **bidding requirements**

The contract documents include the listed elements, as appropriate for the project. The term *other conditions* refers to federal, state, local or private contract conditions; these are usually prescribed by the owner. For example, see AIA Document A201/SC, Federal Supplementary Conditions of the Contract for Construction.

The definitions used in AIA Document A201-1997 are capitalized under the conventions described in Subparagraph 1.3.1. They are incorporated into many of the other related AIA documents by reference to AIA Document A201-1997. These documents include owner-contractor, owner-architect, contractor-subcontractor and architect-consultant agreements.

The *contract documents* defined here generally apply to the owner-contractor contract. In addition, specific parts of the contract documents, mainly the general conditions (i.e., A201) are adopted (usually by reference) into other contracts. This serves to coordinate the legal relationships on the project.

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Some public owners require that the bidding requirements be included in the definition of the contract documents. This may create conflicts or ambiguities with the other documents that comprise the contract. This problem can be avoided if the bidding requirements are superseded when the contract for construction is awarded. If statutorily required contract language is contained in the bidding requirements, such language can be included in the supplementary conditions.

One effect of this provision is that everything that was discussed as part of negotiations that conflicts with or is inconsistent with the written agreement is not part of the contract.

AIA Document A201-1997 and its related family of AIA documents are based on the premise that legal relationships on a construction project are comprised of two-party contractual arrangements. Thus, there are the owner-contractor contract, owner-architect contract, contractor-subcontractor contracts and architect-consulting engineering contract. Each party to those respective contracts is deemed to be in privity only with the other party to the contract.

There is no direct contractual relationship between the architect and the contractor. The architect is in some instances entitled to enforce certain obligations of the contractor (such as indemnifying the architect for certain risks, performing warranty obligations, providing certain types of insurance and affording the architect access to the work). In cases where the owner is unavailable, insolvent or uncooperative, it can be important for the architect to have the right to enforce these obligations directly against the contractor.

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(advertisement or invitation to bid, Instructions to Bidders, sample forms, the Contractor's bid or portions of Addenda relating to bidding requirements).

### **1.1.2 THE CONTRACT**

The Contract Documents form the Contract for Construction. The Contract represents the **entire and integrated agreement** between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. **The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor, (2) between the Owner and a Subcontractor or Sub-subcontractor, (3) between the Owner and Architect or (4) between any persons or entities other than the Owner and Contractor. The Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Architect's duties.**

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### **1.1.3 THE WORK**

The term "**Work**" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

The term *work* appears throughout AIA Document A201-1997 family of documents. As a defined term, *work* is especially important (1) for describing the contractor's obligations to provide improvements to the project, (2) for defining the scope of the property insurance required under Paragraph 11.4, and (3) for distinguishing between the contractor's efforts and the efforts of the owner's other contractor who may also be on the project.

### **1.1.4 THE PROJECT**

The **Project** is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner or by separate contractors.

The term *project* is broader than the term *work*, and may involve separate contractors or the owner's own forces. Each separate contract includes a scope of work that is unique to that contract.

### **1.1.5 THE DRAWINGS**

The **Drawings** are the graphic and pictorial portions of the Contract Documents showing the design, location and dimensions of the Work, generally including plans, elevations, sections, details, schedules and diagrams.

The term *drawings* includes more than the bound set of prints first received by the contractor. Drawings are also found in addenda, change orders, construction change directives, minor changes in the work and other modifications in the work.

### **1.1.6 THE SPECIFICATIONS**

The **Specifications** are that portion of the Contract Documents consisting of the written requirements for materials, equipment, systems, standards and workmanship for the Work, and performance of related services.

The *specifications* are written descriptions that qualitatively define the work. It is now common construction industry practice to organize the specifications according to the 16 divisions of MASTERFORMAT, a publication of the Construction Specifications Institute. Each division is further organized into a collection of custom sections which describe the general scope, products to be used and execution of the particular item of work, such as cast-in-place concrete. Under the AIA's auspices, a library of master specification sections, known as MASTERSPEC, is currently published and available on an annual subscription basis.

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The *project manual* is the volume (or volumes) usually assembled for the project containing those contract documents that can be bound in book format. It may also contain other documents, such as bidding requirements, which are not contract documents.

Because the contract documents are a collaborative effort sometimes involving the owner, architect and numerous consultants, there is no inherent order of precedence among those documents. For instance, a plan may show a door, a door schedule will designate the type of door and hardware, one specification section may specify the quality of door and another specification section will specify the quality of hardware. Collectively, those contract documents are used to describe that particular work item. Moreover, a pre-selected order of precedence assumes that one item is more important than another. For instance, assuming that the plans are chosen to prevail over the specifications, if the plans did not show the hinges on the door even though the specifications required them, the owner might get a hingeless door. Under these circumstances, a pre-selected order of precedence may cause an absurd result.

The contractor is expected to make reasonable inferences from the contract documents. When the documents show wall partitions covered by drywall, for example, it may be inferred that some reasonable method will be used to attach the drywall to the underlying framework.

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### **1.1.7 THE PROJECT MANUAL**

The **Project Manual** is a volume assembled for the Work which may include the bidding requirements, sample forms, Conditions of the Contract and Specifications.

### **1.2 CORRELATION AND INTENT OF THE CONTRACT DOCUMENTS**

**1.2.1** The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are **complementary**, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and **reasonably inferable from them as being necessary to produce the indicated results.**

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**1.2.2** Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Contractor in **dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.**

The contractor is responsible for allocating portions of the work to the subcontractors and others, within the limits required by the contract documents.

**1.2.3** Unless otherwise stated in the Contract Documents, words which have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

In years past, attempts were made by owners and architects to separate different scopes of work utilizing the specifications. This produced considerable controversy and confusion, which was finally resolved by the construction industry's adoption of the 16-division organization for specifications that is not linked to any particular allocation of work to subcontractors.

### **1.3 CAPITALIZATION**

**1.3.1** **Terms capitalized** in these General Conditions include those which are (1) specifically defined, (2) the titles of numbered articles and identified references to Paragraphs, Subparagraphs and Clauses in the document or (3) the titles of other documents published by the American Institute of Architects.

The convention of capitalizing defined terms in AIA Document A201-1997 is not required to be carried through to other contract documents that may utilize these definitions.

### **1.4 INTERPRETATION**

**1.4.1** In the interest of brevity the Contract Documents frequently omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

### **1.5 EXECUTION OF CONTRACT DOCUMENTS**

**1.5.1** The Contract Documents shall be signed by the Owner and Contractor. If either the Owner or Contractor or both do not sign all the Contract Documents, the Architect shall identify such **unsigned Documents upon request.**

These unsigned documents might be included in the contract by reference but not physically attached to it. If the identity of such documents becomes an issue, this provision describes the procedure for authenticating them.

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Drawings, specifications and other documents created by the architect and architect's consultants to provide their services are collectively called "Instruments of Service." This term underscores the fact that these documents, whether in printed or electronic form, cannot be separated from the services the architect provides through them and through other activities on the project.

The contractor and the various subcontractors, sub-subcontractors and suppliers are given a limited authorization to use such instruments of service on the project. Restrictions on their use protect the interests of the owner, architect and architect's consultants, and also serve to protect the public from harm that may result from their misapplication.

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**1.5.2** Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.

### **1.6 OWNERSHIP AND USE OF DRAWINGS, SPECIFICATIONS AND OTHER INSTRUMENTS OF SERVICE**

**1.6.1** The Drawings, Specifications and other documents, including those in electronic form, prepared by the Architect and the Architect's consultants are **Instruments of Service** through which the Work to be executed by the Contractor is described. The Contractor may retain one record set. Neither the Contractor nor any Subcontractor, Sub-subcontractor or material or equipment supplier shall own or claim a copyright in the Drawings, Specifications and other documents prepared by the Architect or the Architect's consultants, and unless otherwise indicated the Architect and the Architect's consultants shall be deemed the authors of them and will retain all common law, statutory and other reserved rights, in addition to the copyrights. All copies of Instruments of Service, except the Contractor's record set, shall be returned or suitably accounted for to the Architect, on request, upon completion of the Work. The Drawings, Specifications and other documents prepared by the Architect and the Architect's consultants, and copies thereof furnished to the Contractor, are for use solely with respect to this Project. **They are not to be used by the Contractor or any Subcontractor, Sub-subcontractor or material or equipment sup-**

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plier on other projects or for additions to this Project outside the scope of the Work without the specific written consent of the Owner, Architect and the Architect's consultants. The Contractor, Subcontractors, Sub-subcontractors and material or equipment suppliers are authorized to use and reproduce applicable portions of the Drawings, Specifications and other documents prepared by the Architect and the Architect's consultants appropriate to and for use in the execution of their Work under the Contract Documents. All copies made under this authorization shall bear the statutory copyright notice, if any, shown on the Drawings, Specifications and other documents prepared by the Architect and the Architect's consultants. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of the Architect's or Architect's consultants' copyrights or other reserved rights.

## **ARTICLE 2 OWNER**

### **2.1 GENERAL**

**2.1.1** The **Owner** is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Owner shall designate in writing a **representative** who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. Except as otherwise provided in Subparagraph 4.2.1, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

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The term *owner* is used to designate the party contracting with the construction contractor. That person or entity may or may not actually own the project. For example, the owner may be a tenant.

For certain purposes the architect is a representative of the owner, but the "owner's designated representative" is the person appointed to serve in that capacity under Article 2. Provisions requiring approval or action by the owner's designated representative refer to that individual and not to the architect.

If more than one designated representative is required, the separate roles and functions of each individual should be clearly defined so as to avoid conflicts, gaps and confusion as to each individual's proper authority to act on behalf of the owner.

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Every state with a mechanic's lien statute requires filings of liens to state the correct legal description of the property against which the lien claim is being asserted. If the statute is not strictly complied with, the filing may not be adequate to enforce the lien. Thus, the lien rights of the contractor, sub-contractors and sub-subcontractors may depend on the information required of the owner under this subparagraph.

Reasonable evidence of the owner's ability to finance the project may be a loan commitment letter from an institutional lender, a governmental appropriation or other equally convincing documentation. If financial arrangements will not be concluded prior to execution of the agreement, a supplementary condition will be needed to clarify those exceptional circumstances.

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**2.1.2** The Owner shall furnish to the Contractor within fifteen days after receipt of a written request, **information necessary and relevant for the Contractor to evaluate, give notice of or enforce mechanic's lien rights.** Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein.

### **2.2 INFORMATION AND SERVICES REQUIRED OF THE OWNER**

**2.2.1** The Owner shall, at the written request of the Contractor, prior to commencement of the Work and thereafter, furnish to the Contractor **reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract.** Furnishing of such evidence shall be a condition precedent to commencement or continuation of the Work. After such evidence has been furnished, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

**2.2.2** Except for permits and fees, including those required under Subparagraph 3.7.1, which are the responsibility of the Contractor under the Contract Documents, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

**2.2.3** The Owner shall furnish surveys

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describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site. **The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner** but shall exercise proper precautions relating to the safe performance of the Work.

**2.2.4** ~~Information or services~~ required of the Owner by the Contract Documents shall be furnished by the Owner with reasonable promptness. Any other information or services relevant to the Contractor's performance of the Work under the Owner's control shall be furnished by the Owner after receipt from the Contractor of a written request for such information or services.

**2.2.5** Unless otherwise provided in the Contract Documents, the Contractor will be furnished, free of charge, **such copies of Drawings and Project Manuals as are reasonably necessary** for execution of the Work.

## **2.3 OWNER'S RIGHT TO STOP THE WORK**

**2.3.1** **If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents** as required by Paragraph 12.2 or persistently fails to carry out Work in accordance with the Contract Documents, the Owner may issue a written order to the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity, except to the

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Since the owner retains the surveyor, the contractor should be able to rely upon the survey and not have to duplicate this effort and expense.

This provision makes explicit, with respect to the owner, that the parties will cooperate with each other and will not hinder the other's work or progress.

Any restrictions on the number of copies of drawings and project manuals furnished to the contractor should be stated in the supplementary conditions.

Under the proper circumstances, the owner may stop the work. In this provision, the owner's right to stop work relates specifically to the contractor's failure to comply with the contract documents. This right may be exercised by the owner or the owner's designated representative under Subparagraph 2.1.1.

## COMMENTS

Under these circumstances, the owner must follow a specific procedure before beginning some or all of the work under this contract. An initial written notice must be given to the contractor demanding correction of the problem. Upon receipt of this notice, the contractor has seven days to begin and continue to remedy the matter. If remedial action has not been undertaken by the end of this seven-day period, the owner may give the contractor a second notice. This notice should state that the owner intends to carry out the work if the contractor fails to respond adequately within three days. The contractor must commence and continue to correct deficiencies within this three-day period, but is not required to complete the work within that time frame. If the contractor does not commence and continue such remedial action, the owner may correct the deficiencies with the owner's own forces.

A literal interpretation of this article requires no additional notice beyond the three-day period. The owner should consider notifying the contractor immediately before commencing work in order to avoid jurisdictional disputes at the job site.

Correcting the work is not intended to preclude the owner from pursuing other remedies such as arbitration or legal action for breach of contract or breach of a warranty. The owner may also execute a change order or construction change directive deducting from the contract sum the cost of corrections, including compensation for the architect's services in this regard.

The architect's approval is required for all of the actions described above. The architect is expected to apply reasonable professional judgment in evaluating the issues as they occur. The architect may endeavor to obtain written representations on which to rely.

## DOCUMENT TEXT

extent required by Subparagraph 6.1.3.

### **2.4 OWNER'S RIGHT TO CARRY OUT THE WORK**

**2.4.1 If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a seven-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may after such seven-day period give the Contractor a second written notice to correct such deficiencies within a three-day period. If the Contractor within such three-day period after receipt of such second notice fails to commence and continue to correct any deficiencies, the Owner may, **without prejudice to other remedies** the Owner may have, correct such deficiencies. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor the reasonable cost of correcting such deficiencies, including Owner's expenses and compensation for the Architect's additional services made necessary by such default, neglect or failure. Such action by the Owner and amounts charged to the Contractor are both **subject to prior approval of the Architect**. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner.**

## **ARTICLE 3 CONTRACTOR**

## **DOCUMENT TEXT**

## **COMMENTS**

### **3.1 GENERAL**

**3.1.1** The **Contractor** is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Contractor" means the Contractor or the Contractor's authorized representative.

Those persons or entities authorized to represent the contractor (such as the construction superintendent or manager) should be identified to the owner and architect.

**3.1.2** The Contractor shall perform the Work in accordance with the Contract Documents.

**3.1.3** The Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect in the Architect's administration of the Contract, or by tests, inspections or approvals required or performed by persons other than the Contractor.

### **3.2 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR**

**3.2.1** Since the Contract Documents are complementary, before starting each portion of the Work, the Contractor shall carefully study and compare the various Drawings and other Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Subparagraph 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, any errors, inconsistencies or omissions discovered by the Contractor shall be

## COMMENTS

The contractor is required to report errors and omissions promptly in order to minimize the costs of correction.

The contractor is not expected to engage in a professional review of the architect's design. If professional design services are required of the contractor pursuant to Subparagraph 3.12.10, review by the contractor's design professional is required to the extent necessary to coordinate such design professional's services with those of the contractor.

As with discovery of errors and omissions, above, prompt notice is required in order to minimize the costs of correction.

## DOCUMENT TEXT

reported promptly to the Architect as a request for information in such form as the Architect may require.

~~3.2.2~~ Any design errors or omissions noted by the Contractor during this review shall be reported **promptly** to the Architect, but it is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and **not as a licensed design professional unless otherwise specifically provided in the Contract Documents**. The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations, but any nonconformity discovered by or made known to the Contractor shall be reported **promptly** to the Architect.

~~3.2.3~~ If the Contractor believes that additional cost or time is involved because of clarifications or instructions issued by the Architect in response to the Contractor's notices or requests for information pursuant to Subparagraphs 3.2.1 and 3.2.2, the Contractor shall make Claims as provided in Subparagraphs 4.3.6 and 4.3.7. If the Contractor fails to perform the obligations of Subparagraphs 3.2.1 and 3.2.2, the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations. The Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents or for differences between field measurements or conditions and the Contract Documents unless the Contractor recognized such error, inconsistency, omission or difference and

## DOCUMENT TEXT

knowingly failed to report it to the Architect.

### **3.3 SUPERVISION AND CONSTRUCTION PROCEDURES**

**3.3.1** The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the jobsite safety thereof and, **except as stated below**, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely written notice to the Owner and Architect and shall not proceed with that portion of the Work without further written instructions from the Architect. If the Contractor is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any resulting loss or damage.

**3.3.2** The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities

## COMMENTS

This subparagraph recognizes the expertise of the contractor, who determines the contract price based upon the particular construction process and sequence contemplated.

In the event the contract documents give specific instructions regarding the construction process, an exception is recognized in the area of responsibility for jobsite safety. Responsibility remains with the contractor unless the contractor gives timely written notice of a particular safety concern and is instructed to proceed as specified.

## COMMENTS

The contractor's duty to furnish labor and materials incorporates the contractor's right to perform these services, but this right may be limited by the owner's right to stop work (Paragraph 2.3) or even carry out work (Paragraph 2.4) if the contractor is failing to perform adequately.

Substitutions made after execution of the agreement become changes in the work and must be made in accordance with Article 7.

This warranty is a general representation by the contractor that materials, equipment and workmanship will conform to good quality standards and the requirements of the contract documents. This general warranty is in addition to, and not in lieu of, any additional obligations (see Paragraph 12.2 on Correction of Work) and other warranties, such as those received from product manufacturers and fabricators and forwarded to the owner by the contractor.

The warranty under Paragraph 3.5 will typically commence at the date of substantial completion (see Subparagraph 9.8.4) and continue through the period of the applicable statute of limitations or repose, whichever is shorter. The one-year correction period of Paragraph 12.2 is a separate and distinct obligation of the contractor, and should not be confused with the contractor's warranty obligation.

## DOCUMENT TEXT

performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors.

**3.3.3** The Contractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work.

### **3.4 LABOR AND MATERIALS**

**3.4.1** Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

**3.4.2** **The Contractor may make substitutions only with the consent of the Owner**, after evaluation by the Architect and in accordance with a Change Order.

**3.4.3** The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

### **3.5 WARRANTY**

**3.5.1** The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that

## DOCUMENT TEXT

## COMMENTS

the Work will conform to the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

### **3.6 TAXES**

**3.6.1 The Contractor shall pay sales, consumer, use and similar taxes for the Work provided by the Contractor** which are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

If the owner is a tax-exempt organization and intends to have its tax exemption apply to the contractor's work, this subparagraph will need to be modified.

### **3.7 PERMITS, FEES AND NOTICES**

**3.7.1** Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the building permit and other permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work which are **customarily secured after execution of the Contract** and which are legally required when bids are received or negotiations concluded.

Under Subparagraph 2.2.2, the owner pays costs associated with approvals and permits obtained before execution of the contract that relate to project feasibility (e.g., zoning, environmental impact, and the like).

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

## COMMENTS

Ordinarily, the contractor does not participate in the creation of the contract documents. For this reason, the contractor is not responsible for their failure to comply with applicable law (including building codes) unless the contractor knows of such failure and fails to report it as required in this subparagraph (see Subparagraph 3.7.4, below). If the project is the personal residence of the owner, however, statutes in some jurisdictions may supersede Subparagraph 3.7.3 and require the contractor to assume responsibility for compliance with building codes.

Allowances are customarily used as an accounting device with regard to materials and equipment whose selection and cost cannot be determined precisely at the time the original bid or proposal is submitted. This could occur because the finish or level of quality has not been finally selected or because of variations expected to occur after bidding.

The owner has the right to decide who shall supply items covered by allowances. The contractor, however, is not required to employ persons or entities to whom it reasonably objects. Once employed, subcontractors under this provision have an identical status to those selected directly by the contractor.

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**3.7.3 It is not the Contractor's responsibility to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations.** However, if the Contractor observes that portions of the Contract Documents are at variance therewith, the Contractor shall promptly notify the Architect and Owner in writing, and necessary changes shall be accomplished by appropriate Modification.

**3.7.4** If the Contractor performs Work knowing it to be contrary to laws, statutes, ordinances, building codes, and rules and regulations without such notice to the Architect and Owner, the Contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction.

## **3.8 ALLOWANCES**

**3.8.1** The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and **by such persons or entities as the Owner may direct**, but the Contractor shall not be required to employ persons or entities to whom the Contractor has reasonable objection.

**3.8.2** Unless otherwise provided in the Contract Documents:

**.1** allowances shall cover the cost to the Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;

**.2 Contractor's costs for unloading and handling at the site, labor,**

## DOCUMENT TEXT

**installation costs, overhead, profit and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum but not in the allowances;**

.3 whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Clause 3.8.2.1 and (2) changes in Contractor's costs under Clause 3.8.2.2.

**3.8.3** Materials and equipment under an allowance shall be selected by the Owner in sufficient time to avoid delay in the Work.

### **3.9 SUPERINTENDENT**

**3.9.1** The Contractor shall employ a **competent superintendent** and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor. Important communications shall be confirmed in writing. Other communications shall be similarly confirmed on written request in each case.

### **3.10 CONTRACTOR'S CONSTRUCTION SCHEDULES**

**3.10.1** The Contractor, promptly after being awarded the Contract, shall **prepare and submit** for the Owner's and Architect's information a Contractor's construction schedule for the Work. The schedule shall not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire

## COMMENTS

The contractor's overhead costs—those not specifically attributable to the items covered by the allowance—are excluded from the allowance, but are to be included in the contract sum. For example, if it is known that 1,000 square yards of carpet must be installed, costs for unloading and handling, installation and other expenses can be calculated. Given the allowance amount, overhead and profit can also be calculated. All of those elements are already included in the contract sum. The only unknown is the cost of the carpet itself, and that is the allowance figure.

A superintendent cannot build a project alone, but an incompetent superintendent can single-handedly ruin one. For that reason, the owner and architect must insist that the contractor be a competent and experienced superintendent. As obvious as this might seem, contractors, construction managers and program managers who broker projects and use skeletal staffing are often the one's most likely to ignore the importance of the superintendent's function, leaving a project's details to their subcontractors or to the architect.

The contractor's construction schedule is for the information of the owner and architect rather than for their approval. This is consistent with the concept that the contractor is solely responsible for the sequence and progress of the work.

Division 1 of the specifications may specify the number of days allowed to prepare the schedule, its format or specific data required to demonstrate a realistic, expeditious plan for completing the work within the parameters of the contract documents.

## COMMENTS

The architect has the right to approve or disapprove of the contractor's planned schedule of submittals. This gives the architect and contractor the opportunity to agree on and coordinate their respective roles with the timing of submittals so as to allow time for adequate review.

The contractor, as the party responsible for the actual construction, is in the best position to prepare a permanent record of the project for ultimate submittal through the architect to the owner. This record consists of *record documents*, and the detailed requirements for them should be included in the technical sections of division 1 of the specifications.

Shop drawings are not generic and should not simply be preprinted manufacturers' diagrams.

## DOCUMENT TEXT

Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work.

**3.10.2** The Contractor shall prepare and keep current, for the Architect's **approval**, a schedule of submittals which is coordinated with the Contractor's construction schedule and allows the Architect reasonable time to review submittals.

**3.10.3** The Contractor shall perform the Work in general accordance with the most recent schedules submitted to the Owner and Architect.

### **3.11 DOCUMENTS AND SAMPLES AT THE SITE**

**3.11.1** The Contractor shall maintain at the site for the Owner one record copy of the Drawings, Specifications, Addenda, Change Orders and other Modifications, in good order and **marked currently to record field changes and selections made during construction**, and one record copy of approved Shop Drawings, Product Data, Samples and similar required submittals. These shall be available to the Architect and shall be delivered to the Architect for submittal to the Owner upon completion of the Work.

### **3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES**

**3.12.1** Shop Drawings are drawings, diagrams, schedules and other data **especially prepared for the Work** by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.

**3.12.2** Product Data are **illustrations, standard schedules, performance**

## DOCUMENT TEXT

**charts, instructions, brochures, diagrams and other information** furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

3.12.3 Samples are physical examples which illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

**3.12.4 Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents.** The purpose of their submittal is to demonstrate for those portions of the Work for which submittals are required by the Contract Documents the way by which the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents. Review by the Architect is subject to the limitations of Subparagraph 4.2.7. Informational submittals upon which the Architect is not expected to take responsive action may be so identified in the Contract Documents. **Submittals which are not required by the Contract Documents may be returned by the Architect without action.**

3.12.5 The Contractor shall review for compliance with the Contract Documents, approve and submit to the Architect Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of separate contractors. Submittals which are not marked as reviewed for compliance with the Contract Documents and approved by the Contractor may be returned by the

## COMMENTS

Product data are usually taken from catalogs and other materials supplied by manufacturers for their standard products. Generally, they are not specially prepared for the project, but are often marked to highlight the specific model or style of product that will be used on the project.

Administrative procedures for handling these submittals should be included in division 1 of the specifications.

The purpose of these submittals is to illustrate how the contractor intends to implement the architect's design. Because the owner may not have the opportunity to agree with changes incorporated into shop drawings, product data or samples, the submittals from the contractor to the architect cannot represent the mutual agreement of the parties to the same degree as the contract documents.

Occasionally, shop drawings, product data, samples or other submittals will be sent to the architect as a matter of routine even though the contract documents do not require them. In that event, an architect is not obliged to review or take other action with regard to them.

The contractor is to assemble shop drawings and other required submittals from subcontractors and others, coordinate and review the submittals and, if they are found to be proper, mark them "approved" before submitting them to the architect. Subcontractors, sub-subcontractors and others should not send submittals directly to the architect.

## COMMENTS

The owner's agreement with the contractor is based upon mutual agreement as memorialized in the contract documents. Shop drawings, product data, samples and other submittals do not modify that agreement. To avoid confusion, the contractor and architect are required to document any intended change in the contract documents which results from the shop drawing process.

## DOCUMENT TEXT

Architect without action.

**3.12.6** By approving and submitting Shop Drawings, Product Data, Samples and similar submittals, the Contractor represents that the Contractor has determined and verified materials, field measurements and field construction criteria related thereto, or will do so, and has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

**3.12.7** The Contractor shall perform no portion of the Work for which the Contract Documents require submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittal has been approved by the Architect.

**3.12.8** The Work shall be in accordance with approved submittals except that the Contractor shall not be relieved of responsibility for **deviations from requirements of the Contract Documents by the Architect's approval of Shop Drawings, Product Data, Samples or similar submittals** unless the Contractor has specifically informed the Architect in writing of such deviation at the time of submittal and (1) the Architect has given written approval to the specific deviation as a minor change in the Work, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by the Architect's approval thereof.

**3.12.9** The Contractor shall direct spe-

## DOCUMENT TEXT

cific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples or similar submittals, to **revisions other than those requested by the Architect on previous submittals**. In the absence of such written notice the Architect's approval of a resubmission shall not apply to such revisions.

**3.12.10** The Contractor shall not be required to provide professional services which constitute the practice of architecture or engineering **unless such services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services in order to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences and procedures**. The Contractor shall not be required to provide professional services in violation of applicable law. If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, **the Owner and the Architect will specify all performance and design criteria that such services must satisfy**. The Contractor shall cause such services or certifications to be provided by a **properly licensed design professional**, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional. Shop Drawings and other submittals related to the Work designed or certified by such professional, if prepared by others, **shall bear such professional's written approval** when submitted to the

## COMMENTS

If a submittal has been returned to the contractor for correction and resubmission, it is likely that the architect will check only previously noted items to see if they have been corrected. Therefore, this provision requires the contractor to call specific attention to other changes, if any, from the previous submission. The architect can then quickly review such new information.

Design services may only be required of the contractor if such requirements are contained in the contract documents, either specifically (in the form of performance specifications, for example) or as part of the contractor's responsibility for construction means and methods.

Such requirements are often referred to as "design delegation," but the architect has no contractual relationship with the contractor and cannot delegate to the contractor. What takes place is, in fact, a form of design allocation by the owner, who can realize substantial savings through the adaptation by the contractor of standard sub-assemblies. For example, the routing of sprinkler systems is usually handled by the contractor, who is then free to select the most economical method to install the system and to integrate it into other building components.

While such criteria will commonly be developed by the architect or architect's consultants, the owner or outside consultants of the owner may also be involved.

The person providing design services on behalf of the contractor must be licensed in the jurisdiction in which the project is located.

## **COMMENTS**

Submittals relating to work designed or certified by an architect or engineer retained on behalf of the contractor must be approved by that professional, just as the architect approves submittals relating to the architect's own work.

## **DOCUMENT TEXT**

Architect. The Owner and the Architect shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such design professionals, provided the Owner and Architect have specified to the Contractor all performance and design criteria that such services must satisfy. Pursuant to this Subparagraph 3.12.10, the Architect will review, approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Contractor shall not be responsible for the adequacy of the performance or design criteria required by the Contract Documents.

### **3.13 USE OF SITE**

**3.13.1** The Contractor shall confine operations at the site to areas permitted by law, ordinances, permits and the Contract Documents and shall not unreasonably encumber the site with materials or equipment.

### **3.14 CUTTING AND PATCHING**

**3.14.1** The Contractor shall be responsible for cutting, fitting or patching required to complete the Work or to make its parts fit together properly.

**3.14.2** The Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or separate contractors by cutting, patching or otherwise altering such construction, or by excavation. The Contractor shall not cut or otherwise alter such construction by the Owner or a separate contractor except with written consent of the Owner and of such separate contractor; such consent shall not be

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## COMMENTS

unreasonably withheld. The Contractor shall not unreasonably withhold from the Owner or a separate contractor the Contractor's consent to cutting or otherwise altering the Work.

### **3.15 CLEANING UP**

**3.15.1** The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials.

**3.15.2** If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and the cost thereof shall be charged to the Contractor.

### **3.16 ACCESS TO WORK**

**3.16.1** The Contractor shall provide the Owner and Architect access to the Work in preparation and progress **wherever located**.

This includes work in progress at locations other than the project site.

### **3.17 ROYALTIES, PATENTS AND COPYRIGHTS**

**3.17.1** The Contractor shall pay all **royalties and license fees**. The Contractor shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner and Architect harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents or where the copyright violations are contained in Drawings, Specifications or other documents prepared by the Owner or Architect. However, if the Contractor has

Royalties and license fees are part of the cost of construction and are thus properly included in the contract sum.

## COMMENTS

In many jurisdictions, anti-indemnification statutes limit the validity and enforceability of indemnification provisions in contracts. Most prohibit only *broad-form* indemnification (requiring indemnification for the indemnitee's sole negligence). This subparagraph contains a *narrow-form* of indemnification, under which the indemnitor's obligation only covers the indemnitee's losses to the extent caused by the indemnitor or one for whose acts the indemnitor is responsible. The statutes and the courts' interpretations of surety provisions vary, and for this reason Subparagraph 3.18.1 should be reviewed by legal counsel.

Many losses which might otherwise give rise to claims for indemnification are covered by Project Management Protective Liability insurance, if such a policy is in effect for the project.

This provision does not cover injury or damage to the work itself nor does it cover a claim by the owner that the contractor has failed to construct the building according to the contract documents.

The contractor's obligation to indemnify is triggered by an act or omission of the contractor or one of the contractor's agents or employees, and covers the indemnitee's loss *only to the extent* that it was caused by such act or omission. This is comparative fault language: for example, if the indemnitee and all other third parties are found to be 20 percent responsible, the contractor's obligation to indemnify would extend to 80 percent of the loss.

In some jurisdictions, indemnification may also be available under applicable law. This sentence makes it clear that Paragraph 3.18 is not meant to limit such relief.

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reason to believe that the required design, process or product is an infringement of a copyright or a patent, the Contractor shall be responsible for such loss unless such information is promptly furnished to the Architect.

### **3.18 INDEMNIFICATION**

**3.18.1** To the fullest extent permitted by law **and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability insurance purchased by the Contractor in accordance with Paragraph 11.3**, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (**other than the Work itself**), but **only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable**, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. **Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18.**

**3.18.2** In claims against any person or entity indemnified under this Paragraph

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3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, **the indemnification obligation under Subparagraph 3.18.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.**

## ARTICLE 4 ADMINISTRATION OF THE CONTRACT

### 4.1 ARCHITECT

**4.1.1** The **Architect** is the person lawfully licensed to practice architecture or an entity lawfully practicing architecture identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Architect" means the Architect or the Architect's authorized representative.

**4.1.2** Duties, responsibilities and limitations of authority of the Architect as set forth in the Contract Documents shall not be restricted, modified or extended **without written consent of the Owner, Contractor and Architect.** Consent shall not be unreasonably withheld.

## COMMENTS

It is not unusual for an injured worker to seek redress from the owner or architect, since statutory compensation awards are typically rather low. This subparagraph makes it clear that such compensation awards should not be construed to limit the contractor's indemnity obligation to the payment of statutory compensation in the event the owner or architect is found liable for accidents due to the contractor's negligence.

In most states, the title *architect* may only be used by persons lawfully licensed to practice architecture in that state, and by entities controlled by such persons. The form of such entities (for example, corporations) may be restricted as well.

Ordinarily, the related owner-architect agreement requires the architect to provide administration of the construction contract as set forth in AIA Document A201-1997. A change in contract administration services would thus require modification of the owner-architect agreement as well.

## COMMENTS

The word *administration* is not intended to imply that the architect either supervises or directs the construction effort.

If, under the owner-architect agreement, the architect will not be providing full construction contract administration as described in this article and elsewhere in AIA Document A201-1997, the relevant provisions must be modified accordingly.

The architect's duty to provide administration of the construction contract terminates when final payment to the contractor is due (whether or not it is actually made on time), unless the owner chooses to retain the architect's services during the one-year correction period.

The architect is *not* the general agent of the owner. The architect's powers are those enumerated in the contract documents, and the contractor should not rely on actions of the architect beyond the scope of those powers.

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### **4.2 ARCHITECT'S ADMINISTRATION OF THE CONTRACT**

**4.2.1** The Architect will provide administration of the Contract **as described in the Contract Documents**, and will be an Owner's representative (1) during construction, (2) **until final payment is due** and (3) with the Owner's concurrence, from time to time during the one-year period for correction of Work described in Paragraph 12.2. **The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents**, unless otherwise modified in writing in accordance with other provisions of the Contract.

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**4.2.2** The Architect, as a representative of the Owner, will visit the site **at intervals appropriate to the stage of the Contractor's operations (1) to become generally familiar with and to keep the Owner informed about the progress and quality of the portion of the Work completed, (2) to endeavor to guard the Owner against defects and deficiencies in the Work, and (3) to determine in general if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents.** However, the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. **The Architect will neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work,** since these are solely the Contractor's rights and responsibilities under the Contract Documents, **except as provided in Subparagraph 3.3.1.**

**4.2.3** The Architect will not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect will not have control over or charge of and will not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.

This requirement does not imply any definite time interval between site visits. Instead, intervals are related to project requirements, as determined by the architect in the architect's professional judgment. The architect's professional judgment is also the gauge of the number of visits required, unless a specific number is stated in the owner-architect agreement.

The architect is not required to be at the site full-time or to make detailed inspections, and in any case is not empowered to direct the contractor's workers or subcontractors. Site visits are intended to permit review of the contractor's work and to give the architect a basis for reporting to the owner.

*Historical note.* The eighth edition of A201 (1961) deleted the term *supervision*, which had been misinterpreted by certain courts, and clarified the architect's role by using the term *observation*.

This language underscores the statement of the contractor's responsibilities in Subparagraph 3.3.1 and reinforces the dividing line between the contractor's responsibilities and those of the architect. A clear allocation of responsibility is in the interests of all participants in the construction project. Note, however, that the architect must take care not to alter this division of responsibility through conduct—for example, by giving instructions to the contractor's employees at the site regarding safety procedures.

Specific instructions in the contract documents regarding construction means, methods, techniques, sequences or procedures trigger an exception contained in Subparagraph 3.3.1, under which the contractor is required to perform an evaluation of jobsite safety.

## COMMENTS

Only work that conforms to the requirements of the contract documents and the representations on the application will be certified for payment. This involves the architect's professional determination and goes beyond merely transmitting applications for payment to the owner.

The authority to reject work is one of the principal means at the architect's disposal for guarding the owner against defects and deficiencies in the contractor's work. Other means are the authority to require special testing and inspections under Subparagraph 13.5.4, and the authority to withhold or nullify certification for payment under Subparagraph 9.5.1. Note that while the architect has authority to reject work, only the owner may order the contractor to stop work under Subparagraph 2.3.1.

*Historical note.* Due to legal interpretations that were widely believed to subject architects to unwarranted liability, a provision allowing the architect to stop the work was deleted in the twelfth edition of A201 (1970). That provision previously enabled the architect to prevent construction of further defective work by ordering the contractor to stop working. However, some courts determined that such a right implied a duty of the architect to anticipate defects in construction that might subsequently result in injury, and to use this power to stop the work before that happened. This was contrary to the intended result that the contractor be solely responsible for safety at the site.

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**4.2.4 Communications Facilitating Contract Administration.** Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized, the Owner and Contractor shall endeavor to communicate with each other through the Architect about matters arising out of or relating to the Contract. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and material suppliers shall be through the Contractor. Communications by and with separate contractors shall be through the Owner.

**4.2.5** Based on the Architect's evaluations of the Contractor's Applications for Payment, the Architect will **review and certify the amounts due the Contractor** and will issue Certificates for Payment in such amounts.

**4.2.6** The Architect will have **authority to reject Work** that does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect will have authority to require inspection or testing of the Work in accordance with Subparagraphs 13.5.2 and 13.5.3, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work.

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**4.2.7** The Architect will review and approve or take **other appropriate action** upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking **for conformance with information given and the design concept expressed in the Contract Documents**. The Architect's action will be taken with **such reasonable promptness as to cause no delay in the Work or in the activities of the Owner, Contractor or separate contractors, while allowing sufficient time in the Architect's professional judgment to permit adequate review**. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect's review of the Contractor's submittals shall not relieve the Contractor of the obligations under Paragraphs 3.3, 3.5 and 3.12. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

Appropriate action may include instructions to correct a submittal and resubmit it.

In a letter of transmittal accompanying a return of shop drawings to the contractor, or on the shop drawing stamp, the architect might point out that review and approval of shop drawings, product data or samples does not indicate approval of changes in the contract sum or contract time. These changes can be authorized only as provided in Article 7, Changes in the Work.

Shop drawings, product data and samples are not contract documents. They represent the contractor's intentions for implementing the requirements of the contract documents. Architects, therefore, review them only for the limited purposes stated.

No specific interval is established within which the architect must review and act on submittals. The important factors to be balanced are "with such reasonable promptness as to cause no delay" and "while allowing sufficient time...to permit adequate review." Prompt review by the architect helps avoid claims for delay under Paragraph 8.3.

**4.2.8** The Architect will prepare Change Orders and Construction Change Directives, and may authorize minor

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Inspections are distinct from normal site visits. The inspections described here are the only ones the architect performs unless others are specifically provided for in the contract documents, required pursuant to Subparagraph 13.5.1, or otherwise agreed to by the owner and architect.

Final completion and final payment are covered in Paragraph 9.10.

The exhibit should not expand the architect's responsibilities unless the owner-architect agreement is appropriately modified.

Because the architect has prepared the drawings and specifications, has participated in preparation of the other contract documents, and is actively engaged in administering the construction contract, the architect is uniquely qualified to render initial decisions on the requirements of the contract.

The 15-day period stated here should not be confused with the time periods applicable to the architect's decisions on claims (see Subparagraphs 4.4.1 and 4.5.1).

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changes in the Work as provided in Paragraph 7.4.

**4.2.9** The Architect will conduct **inspections to determine the date or dates of Substantial Completion and the date of final completion**, will receive and forward to the Owner, for the Owner's review and records, written warranties and related documents required by the Contract and assembled by the Contractor, and will issue a **final Certificate for Payment** upon compliance with the requirements of the Contract Documents.

**4.2.10** If the Owner and Architect agree, the Architect will provide one or more project representatives to assist in carrying out the Architect's responsibilities at the site. The duties, responsibilities and limitations of authority of such project representatives shall be as set forth in an **exhibit** to be incorporated in the Contract Documents.

**4.2.11** The Architect will **interpret and decide matters concerning performance** under, and requirements of, the Contract Documents on written request of either the Owner or Contractor. The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness. If no agreement is made concerning the time within which interpretations required of the Architect shall be furnished in compliance with this Paragraph 4.2, then delay shall not be recognized on account of failure by the Architect to furnish such interpretations **until 15 days after written request** is made for them.

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**4.2.12** Interpretations and decisions of the Architect will be consistent with the intent of and reasonably inferable from the Contract Documents and will be in writing or in the form of drawings. **When making such interpretations and initial decisions, the Architect will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either and will not be liable for results of interpretations or decisions so rendered in good faith.**

**4.2.13** The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

### **4.3 CLAIMS AND DISPUTES**

**4.3.1 Definition.** A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

**4.3.2 Time Limits on Claims.** Claims by either party must be **initiated** within 21 days after occurrence of the event giving rise to such Claim or within 21 days

In most jurisdictions, the law provides for such immunity even in the absence of this language.

The word *initiated* underscores the fact that notice of a claim need not contain all the information pertaining to the claim.

## COMMENTS

This is intended to mitigate damages that might otherwise be waived by both parties because it avoids the expense of shutting down the project and later restarting it. The exceptions cover situations justifying suspension or termination.

This covers physical conditions not specifically addressed in the contract documents, but those that differ materially from conditions that might reasonably be assumed to exist at the site. For example, the actual bedrock encountered may fracture much more readily than is typical and expected for that type of rock, or a concealed structure may include iron connections when only wood joints were expected. If deviation is material to the required work, a claim would be allowable.

The observing party must give notice before disturbing the conditions *and* within 21 days of first observing them in order to give the architect the opportunity to investigate the conditions.

Changed conditions may result in either an increase or decrease in the contract sum or contract time. Owners as well as contractors may take advantage of these provisions if circumstances so warrant.

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after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the Architect and the other party.

**4.3.3 Continuing Contract Performance.** Pending final resolution of a Claim except as otherwise agreed in writing or as provided in Subparagraph 9.7.1 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

**4.3.4 Claims for Concealed or Unknown Conditions.** If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party **promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions.** The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an **equitable adjustment** in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different

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from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within 21 days after the Architect has given notice of the decision. If the conditions encountered are materially different, the Contract Sum and Contract Time shall be equitably adjusted, but if the Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Architect for initial determination, subject to further proceedings pursuant to Paragraph 4.4.

**4.3.5 Claims for Additional Cost.** If the Contractor wishes to make Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Paragraph 10.6.

**4.3.6** If the Contractor believes additional cost is involved for reasons including but not limited to (1) a written interpretation from the Architect, (2) an order by the Owner to stop the Work where the Contractor was not at fault, (3) a written

### **4.3.7 Claims for Additional Time**

**4.3.7.1** If the Contractor wishes to make **Claim for an increase in the Contract Time**, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. **In the case of a continuing delay only one Claim is necessary.**

Only delays impacting the critical path of the work entitles the contractor to additional time.

A delay can be continuing even if it is interrupted from time to time, provided it originates from the same cause.

## COMMENTS

In general, this may be done through the records of the National Oceanographic and Atmospheric Administration (NOAA). For example, four days of rain could make the site impassable and unworkable for seven days, or it could be irrelevant if all work is under cover.

Unit prices are normally quoted in relation to anticipated quantities.

By waiving claims for consequential damages, the owner and contractor limit themselves to direct damages. This eliminates some of the incentive to escalate claims and may encourage settlement. Other contracts on the project (such as the owner-architect agreement and the subcontracts) should include similar provisions so that other parties are not targeted for receipt of claims waived between the owner and contractor.

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**4.3.7.2** If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be **documented by data** substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated and had an adverse effect on the scheduled construction.

**4.3.8 Injury or Damage to Person or Property.** If either party to the Contract suffers injury or damage to person or property because of an act or omission of the other party, or of others for whose acts such party is legally responsible, written notice of such injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

**4.3.9** If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed in a proposed Change Order or Construction Change Directive so that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor, **the applicable unit prices shall be equitably adjusted.**

**4.3.10 Claims for Consequential Damages. The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract.** This mutual waiver includes:

.1 damages incurred by the Owner for rental expenses, for losses of use,

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income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

.2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Subparagraph 4.3.10 shall be deemed to preclude an award of liquidated direct damages, when applicable, in accordance with the requirements of the Contract Documents.

### **4.4 RESOLUTION OF CLAIMS AND DISPUTES**

**4.4.1 Decision of Architect.** Claims, including those alleging an error or omission by the Architect but excluding those arising under Paragraphs 10.3 through 10.5, **shall be referred initially to the Architect** for decision. An initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Architect with no decision having been rendered by the Architect. The Architect will not decide disputes between the Contractor and persons or entities other than the Owner.

## COMMENTS

Generally, all claims must be referred to the architect first—even if they involve alleged errors or omissions of the architect. The architect, who is actively engaged in administering the construction contract, is uniquely positioned to render initial decisions on claims. An exception is made for claims having to do with hazardous materials.

## COMMENTS

Depending on the nature and magnitude of a claim against the contractor, it is possible that the surety would be willing and able to step in to help the contractor resolve the problem. This may help to mitigate potential damages to everyone's benefit. No communications to the surety should occur without consultation with the owner's legal counsel.

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**4.4.2** The Architect will review Claims and within ten days of the receipt of the Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) **advise the parties that the Architect is unable to resolve the Claim if the Architect lacks sufficient information to evaluate the merits of the Claim or if the Architect concludes that, in the Architect's sole discretion, it would be inappropriate for the Architect to resolve the Claim.**

**4.4.3** In evaluating Claims, the Architect may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the Architect in rendering a decision. The Architect may request the Owner to authorize retention of such persons at the Owner's expense.

**4.4.4** If the Architect requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within ten days after receipt of such request, and shall either provide a response on the requested supporting data, advise the Architect when the response or supporting data will be furnished or advise the Architect that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Architect will either reject or approve the Claim in whole or

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in part.

**4.4.5** The Architect will approve or reject Claims by written decision, which shall state the reasons therefore and which shall notify the parties of any change in the Contract Sum or Contract Time or both. The approval or rejection of a Claim by the Architect shall be final and binding on the parties **but subject to mediation and arbitration.**

Note the exception stated in Subparagraph 4.2.13 and reiterated in Subparagraphs 4.5.1 and 4.6.1: the architect's decisions on matters relating to aesthetic effect are *not* subject to mediation and arbitration.

**4.4.6** When a written decision of the Architect states that (1) the decision is final but subject to mediation and arbitration and (2) a demand for arbitration of a Claim covered by such decision must be made within 30 days after the date on which the party making the demand receives the final written decision, then failure to demand arbitration within said 30 days' period shall result in the Architect's decision becoming final and binding upon the Owner and Contractor. If the Architect renders a decision after arbitration proceedings have been initiated, such decision may be entered as evidence, but shall not supersede arbitration proceedings unless the decision is acceptable to all parties concerned.

This clause establishes a mechanism for limiting the time within which the architect's decision may be appealed to arbitration. If the written decision so provides, the parties have only 30 days to demand arbitration on the claim or controversy following the architect's decision. Under these circumstances, if no demand for arbitration has been made within the specified time, the architect's decision becomes final and binds the owner and contractor without further opportunity for appeal.

**4.4.7** Upon receipt of a Claim against the Contractor or at any time thereafter, the Architect or the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor's default, the Architect or the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

Lien notice and filing deadlines may be complied with regardless of the stage in the claim process.

**4.4.8** If a Claim relates to or is the subject of a mechanic's lien, the party

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Mediation may be thought of as assisted negotiation. A neutral mediator endeavors to assist the parties in reaching a settlement, but has no authority to impose a settlement.

The architect's decision on a claim is immediately subject to mediation. Mediation of a claim may also be requested if 30 days have passed with no decision by the architect.

Copies of the rules are available from regional offices of the American Arbitration Association or from the national office in New York City.

The mediation and arbitration provisions are drafted so as to work independently of one another. If Paragraph 4.6 is deleted, the stay provided for in Subparagraph 4.5.2 applies to litigation.

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asserting such Claim **may proceed in accordance with applicable law** to comply with the lien notice or filing deadlines prior to resolution of the Claim ~~by the Architect, by mediation or by arbitration.~~

### **4.5 MEDIATION**

**4.5.1** Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5 shall, **after initial decision by the Architect or 30 days after submission of the Claim to the Architect**, be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

**4.5.2** The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the **Construction Industry Mediation Rules of the American Arbitration Association** currently in effect. Request for mediation shall be filed in writing with the other party to the Contract and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration **or legal or equitable proceedings**, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

**4.5.3** The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless

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another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

### **4.6 ARBITRATION**

**4.6.1** Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5, shall, after decision by the Architect or 30 days after submission of the Claim to the Architect, be **subject to arbitration**. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Paragraph 4.5.

**4.6.2** Claims not resolved by mediation shall be decided by arbitration which, **unless the parties mutually agree otherwise**, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association, and a copy shall be filed with the Architect.

**4.6.3** A demand for arbitration shall be made within the time limits specified in Subparagraphs 4.4.6 and 4.6.1 as applicable, and in other cases within a reasonable time after the Claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7.

## COMMENTS

If the architect has rendered a decision on a claim, that decision is immediately subject to arbitration. If no decision is forthcoming, however, the parties must wait 45 days from the date the claim was submitted to the architect before they can demand arbitration, unless other conditions exist as described in Subparagraph 4.3.2.

After a dispute has arisen, the parties may wish to settle it by litigation or an arbitration procedure other than the Construction Industry Rules of the AAA. This, however, requires an amendment to the contract and can be accomplished only by written mutual agreement.

## COMMENTS

The architect, owner, contractor, and person or entity to be joined must all agree in writing before the architect or architect's employees or consultants can be joined in an owner-contractor arbitration or have their arbitrations joined with the owner-contractor arbitration. If there is agreement to consolidate arbitrations or to be joined to one in progress, such agreement is to apply only to the specified case and is not meant to be generally applicable to other or future disputes. Additionally, joinder of other people or entities (such as subcontractors) or consolidation of their arbitration proceedings will not be allowed unless such other people or entities are substantially involved in the owner-contractor dispute and, in fact, *must* be involved for the arbitrators to grant complete relief.

Language limiting or specifically prohibiting joinder of parties or consolidation of arbitrations is included in all AIA documents having arbitration clauses. This helps to keep issues simpler for the arbitrators. It may be particularly important that proceedings between the owner and architect, and the owner and contractor be conducted separately because the architect and contractor each have different responsibilities. The contractor warrants that the work will strictly conform to specified requirements, whereas the architect's duty is to provide services that will meet the professional standard of care. Normally, when there are multiple disputes, several individual arbitration proceedings are held. This eliminates the confusion, complexity and delay experienced in multiparty litigation.

The law in several states allows a court to order consolidation or joinder despite the language included here. Advice of an attorney familiar with the construction industry

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**4.6.4 Limitation on Consolidation or Joinder.** No arbitration arising out of or relating to the Contract shall include, by consolidation or joinder or in any other manner, the Architect, the Architect's employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined. No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the Owner, Contractor, a separate contractor as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. No person or entity other than the Owner, Contractor or a separate contractor as described in Article 6 shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a Claim not described therein or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

**4.6.5 Claims and Timely Assertion of Claims.** The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to

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be demanded.

**4.6.6 Judgment on Final Award.** The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

## **ARTICLE 5 SUBCONTRACTORS**

### **5.1 DEFINITIONS**

**5.1.1** A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include a separate contractor or subcontractors of a separate contractor.

**5.1.2** A Sub-subcontractor is a person or entity who has a direct or **indirect contract** with a Subcontractor to perform a portion of the Work at the site. The term "Sub-subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Sub-subcontractor or an authorized representative of the Sub-subcontractor.

### **5.2 AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK**

**5.2.1** Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, **as soon as practicable after award of the Contract**, shall furnish in writing to the Owner through the Architect the names

may be valuable in this regard. After arbitration, one cannot typically go to court to try the same dispute again. If either party fails to comply with an arbitration award, the other party can go to court to have it enforced.

The term *subcontractor* does not include suppliers who do not perform work at the site but provide materials and equipment to the contractor and subcontractors.

The term *indirect contract* refers to lower tiers of contractors such as sub-subcontractors.

If the owner and architect require a specific time limit for submitting proposed names, this limit should be stated in the supplementary conditions.

## COMMENTS

The owner is permitted to reject proposed subcontractors who are not reasonably capable of performing the work without incurring additional cost or time.

If the parties disagree as to whether a particular proposed subcontractor is reasonably capable, the contractor may submit the disagreement as a claim pursuant to Article 4.

Any adjustment in the contract sum or contract time is a one-time change and the change order is issued before the substitute subcontractor begins performing work. If the substituted subcontractor later fails to perform in a proper or timely manner, the contractor bears the same responsibility as if no substitution had occurred.

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of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Architect will promptly reply to the Contractor in writing stating whether or not the Owner or the Architect, after due investigation, has reasonable objection to any such proposed person or entity. Failure of the Owner or Architect to reply promptly shall constitute notice of no reasonable objection.

**5.2.2** The Contractor shall not contract with a proposed person or entity to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

**5.2.3 If the Owner or Architect has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner or Architect has no reasonable objection.** If the proposed but rejected Subcontractor was reasonably capable of performing the Work, **the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change**, and an appropriate Change Order shall be issued before commencement of the substitute Subcontractor's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

**5.2.4** The Contractor shall not change

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a Subcontractor, person or entity previously selected if the Owner or Architect makes reasonable objection to such substitute.

### **5.3 SUBCONTRACTUAL RELATIONS**

**5.3.1** By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, **to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work, which the Contractor, by these Documents, assumes toward the Owner and Architect.** Each subcontract agreement shall preserve and protect the rights of the Owner and Architect under the Contract Documents with respect to the Work to be performed by the Subcontractor **so that subcontracting thereof will not prejudice such rights,** and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner. **Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors.** The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound,

## COMMENTS

A basic requirement of the contract is that subcontractors be bound by the terms of the contract documents. AIA Document A401, Standard Form of Agreement Between Contractor and Subcontractor, so provides. If other subcontract forms are utilized, care must be taken to coordinate them with Subparagraph 5.3.1.

The contractor may include terms and conditions in subcontracts that vary from those in the contract as long as such terms and conditions do not prejudice the rights of the owner and architect.

The pass-through of terms and conditions of the contract documents serves to coordinate all parties performing work on the site. AIA Document A401 contains language permitting the contractor to make this requirement of subcontractors.

## **COMMENTS**

In the event of contractor default, the owner needs to be able to continue the work with a minimum of disruption and expense. The owner receives the benefit of the original subcontract price, which is subject to adjustment only pursuant to Subparagraph 5.4.2. Where a performance bond or payment bond is involved, consultation with the contractor's surety is essential before exercising these rights. Assignment of subcontracts can involve a number of complicated legal issues.

On some projects, the owner may retain multiple contractors, each of whom will perform a separate scope of work. The owner is then responsible for coordinating the work of the separate contractors in much the same way as the contractor is responsible for coordinating the work of the separate subcontractors. The owner may perform this responsibility by use of its own employees or consultants or by including this coordination responsibility within the scope of one of the separate contractor's agreement.

Separate contracts may require additional responsibility and services by the architect. These should be addressed in the owner-architect agreement.

The provisions of this subparagraph are consistent with the concept that the project may be more comprehensive than the work of the contractor under the contract documents. There may also be other construction or operations on the site that are not part of the project.

## **DOCUMENT TEXT**

and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement which may be at variance with the Contract Documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors.

### **5.4 CONTINGENT ASSIGNMENT OF SUBCONTRACTS**

**5.4.1** Each subcontract agreement for a portion of the Work is assigned by the Contractor to the Owner provided that:

- .1** assignment is effective only after termination of the Contract by the Owner for cause pursuant to Paragraph 14.2 and only for those subcontract agreements which the Owner accepts by notifying the Subcontractor and Contractor in writing; and
- .2** assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

**5.4.2** Upon such assignment, if the Work has been suspended for more than 30 days, the Subcontractor's compensation shall be equitably adjusted for increases in cost resulting from the suspension.

### **ARTICLE 6 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS**

#### **6.1 OWNER'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS**

**6.1.1** The Owner reserves the right to perform construction or operations relat-

## DOCUMENT TEXT

## COMMENTS

ed to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under Conditions of the Contract identical or substantially similar to these including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such Claim as provided in Paragraph 4.3.

6.1.2 When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Contractor" in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.

6.1.3 **The Owner shall provide for coordination of the activities of the Owner's own forces and of each separate contractor with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with other separate contractors and the Owner in reviewing their construction schedules when directed to do so.** The Contractor shall make any revisions to the construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Contractor, separate contractors and the Owner until subsequently revised.

6.1.4 Unless otherwise provided in the Contract Documents, when the Owner performs construction or operations related to the Project with the Owner's

The owner is responsible for coordinating the activities of the owner's forces and of all separate contractors with those of the contractor. This coordination may be achieved either directly by the owner's staff or through a separate contractual agreement, with coordination undertaken by the architect, the contractor, one of the separate contractors, a construction manager or another designated person or entity.

The contractor is required to cooperate with the owner and separate contractors in coordinating construction schedules, making such revisions as are necessary and following the revised schedules.

## COMMENTS

When the contractor's work depends upon construction performed by the owner or by other separate contractors, the contractor must promptly notify the architect of apparent discrepancies or defects in the work that would prevent the contractor from properly performing its work. Otherwise, the assumption is that such partial or completed construction is (except for defects not then reasonably discoverable) in accordance with the contract documents.

If the owner's separate contractor is damaged by the contractor, the owner's separate contractor must look to the owner for redress, since there is no direct contractual relationship between the various contractors. The owner in turn may seek reimbursement from the contractor who is at fault.

## DOCUMENT TEXT

own forces, the Owner shall be deemed to be subject to the same obligations and to have the same rights which apply to the Contractor under the Conditions of the Contract, including, without excluding others, those stated in Article 3, this Article 6 and Articles 10, 11 and 12.

### 6.2 MUTUAL RESPONSIBILITY

6.2.1 The Contractor shall afford the Owner and separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

6.2.2 If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a separate contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly report to the Architect **apparent discrepancies or defects** in such other construction that would render it unsuitable for such proper execution and results. Failure of the Contractor so to report shall constitute an acknowledgment that the Owner's or separate contractors' completed or partially completed construction is fit and proper to receive the Contractor's Work, except as to defects not then reasonably discoverable.

6.2.3 **The Owner shall be reimbursed by the Contractor for costs incurred by the Owner which are payable to a separate contractor**

## **DOCUMENT TEXT**

## **COMMENTS**

**because of delays, improperly timed activities or defective construction of the Contractor.** The Owner shall be responsible to the Contractor for costs incurred by the Contractor because of delays, improperly timed activities, damage to the Work or defective construction of a separate contractor.

**6.2.4** The Contractor shall promptly remedy damage wrongfully caused by the Contractor to completed or partially completed construction or to property of the Owner or separate contractors as provided in Subparagraph 10.2.5.

**6.2.5** The Owner and each separate contractor shall have the same responsibilities for cutting and patching as are described for the Contractor in Subparagraph 3.14.

### **6.3 OWNER'S RIGHT TO CLEAN UP**

**6.3.1** If a dispute arises among the Contractor, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and the Architect will allocate the cost among those responsible.

## **ARTICLE 7 CHANGES IN THE WORK**

### **7.1 GENERAL**

**7.1.1** Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and else-

## COMMENTS

If the owner and contractor can agree on both the change in contract sum and contract time, a change order is issued. If no agreement can be reached, the owner can still require the work to be performed by issuance of a construction change directive. In either event, and also in the case of an order for a minor change in the work issued by the architect, the contractor must perform changes that are within the general scope of the work.

Change orders are prepared in writing by the architect, and all of the listed items must be stated and agreed upon. If those items are not agreed upon, the owner may issue either a construction change directive or abandon the proposed change.

Even if the contract sum or contract time are to remain unchanged, that fact should be recorded by marking "no net change" on the change order. This helps to avoid disputes as to whether an increase in the contract sum or extension of the contract time was intended, particularly if such changes were suggested in the contractor's proposal.

The list of methods set out in Subparagraph 7.3.3 is mandatory with respect to construction change directives. Those methods are optional with respect to change orders.

## DOCUMENT TEXT

where in the Contract Documents.

**7.1.2** A Change Order shall be based upon agreement among the Owner, Contractor and Architect; a Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor; an order for a minor change in the Work may be issued by the Architect alone.

**7.1.3** Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive or order for a minor change in the Work.

### **7.2 CHANGE ORDERS**

**7.2.1** A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect, stating their agreement upon all of the following:

- .1 change in the Work;**
- .2 the amount of the adjustment, if any, in the Contract Sum; and**
- .3 the extent of the adjustment, if any, in the Contract Time.**

**7.2.2** Methods used in determining adjustments to the Contract Sum may include those listed in Subparagraph 7.3.3.

### **7.3 CONSTRUCTION CHANGE DIRECTIVES**

**7.3.1** A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and

## DOCUMENT TEXT

Architect, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work **within the general scope of the Contract** consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

**7.3.2** A Construction Change Directive shall be used **in the absence of total agreement on the terms of a Change Order**.

**7.3.3** If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

- .1 mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
- .2 unit prices stated in the Contract Documents or subsequently agreed upon;
- .3 cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or
- .4 as provided in Subparagraph 7.3.6.

**7.3.4** Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change

## COMMENTS

Absent a separate modification signed by the owner and contractor, changes in the work that are beyond the general scope of the contract need not be performed by the contractor. Modifications that materially alter the scope of the contract should be submitted for approval of the surety to ensure that the surety will not be released from its obligations by such changes.

The construction change directive is the mechanism by which the owner exercises a unilateral right to order changes in the work without invalidating the contract. It is used when a change order cannot be obtained due to limited time or disagreement between the parties with regard to associated changes in the contract sum or contract time.

AIA Document G714, Construction Change Directive, can be used to document the change.

## COMMENTS

This might include invoices with similar breakdowns from subcontractors, slips from material suppliers and similar data. The architect may request the assistance of the owner's accountant in reviewing the adequacy of such financial data.

It is appropriate to identify in the supplementary conditions the basis for determining the rental values (e.g., the contractor's normal rates, the Associated General Contractors' published rates or others) applicable to contractor-owned equipment. Retail rental rates may include elements of overhead and profit. Duplication of these cost items should be avoided.

Where the change results in a credit, the amount of the credit is determined by the cost that would have been incurred in executing the change by the contractor without decreasing the contractor's overhead and profit.

## DOCUMENT TEXT

Directive for determining the proposed adjustment in the Contract Sum or

**7.3.6** If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the method and the adjustment shall be determined by the Architect on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, a reasonable allowance for overhead and profit. In such case, and also under Clause 7.3.3.3, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with **appropriate supporting data**. Unless otherwise provided in the Contract Documents, costs for the purposes of this Subparagraph 7.3.6 shall be limited to the following:

**.1** costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance;

**.2** costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;

**.3** **rental costs** of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;

**.4** costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work; and

**.5** additional costs of supervision and field office personnel directly attributable to the change.

**7.3.7** The amount of credit to be allowed by the Contractor to the Owner for a deletion or **change which results in a net decrease in the Contract Sum** shall

## DOCUMENT TEXT

be actual net cost as confirmed by the Architect. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

**7.3.8** Pending final determination of the total cost of a Construction Change Directive to the Owner, amounts not in dispute for such changes in the Work shall be included in Applications for Payment accompanied by a Change Order indicating the parties' agreement with part or all of such costs. For any portion of such cost that remains in dispute, **the Architect will make an interim determination for purposes of monthly certification for payment for those costs.** That determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a claim in accordance with Article 4.

**7.3.9** When the Owner and Contractor agree with the determination made by the Architect concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and shall be recorded by preparation and execution of an appropriate Change Order.

## **7.4 MINOR CHANGES IN THE WORK**

**7.4.1** The Architect will have authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes shall

## COMMENTS

When work required by a construction change directive spans several payment periods, the contractor is paid on the basis of work performed during each such period. If the parties disagree about the amount due the contractor for any payment period, the matter is referred to the architect, who makes an interim determination. The owner then compensates the contractor on the basis of the architect's interim determination. If either party disagrees with that determination, that party may assert a claim.

Evidence of the costs must be assembled by the contractor and submitted to the architect as part of the contractor's application for payment. The architect is under no obligation to audit these costs, but is only required to exercise reasonable professional judgment in reviewing the submitted information.

AIA Document G710, Architect's Supplemental Instructions, may be used to document minor changes. A change that is inconsistent with the intent of the contract documents must be documented as a change order or construction change directive rather than as a minor change in the work, even if the contract sum and contract time are unaffected.

Problems often arise when the parties disagree as to what constitutes a minor change. Therefore, before a minor change order is issued, the contractor's agreement that the proposed minor change will not affect the contract sum or contract time should be documented.

## COMMENTS

The work must be *substantially* complete within the contract time (as adjusted). Final completion will occur after this period. This distinction may be important if there are provisions for liquidated damages in the event the date for substantial completion is not met. Liquidated damages are only assessed until date of actual substantial completion.

The contract time starts to run as of the date specified in the owner-contractor agreement, whether or not the contractor begins work on that date.

“Time is of the essence” means that timely performance is an express condition of the contract, and any delay in the owner’s or contractor’s performance will constitute a breach of contract.

The contractor is precluded from contending that the contract documents were defective because the time allowed for construction was not sufficient to perform the work.

## DOCUMENT TEXT

be effected by written order and shall be binding on the Owner and Contractor. The Contractor shall carry out such written orders promptly.

### **ARTICLE 8 TIME**

#### **8.1 DEFINITIONS**

**8.1.1** Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Contract Documents for **Substantial Completion** of the Work.

**8.1.2** The date of commencement of the Work is **the date established in the Agreement**.

**8.1.3** The date of Substantial Completion is the date certified by the Architect in accordance with Paragraph 9.8.

**8.1.4** The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

#### **8.2 PROGRESS AND COMPLETION**

**8.2.1** Time limits stated in the Contract Documents **are of the essence** of the Contract. **By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.**

**8.2.2** The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence operations on the site or elsewhere prior to the effective date of insurance required by Article 11 to be furnished by the Contractor and Owner. The date of commencement of the Work shall

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## COMMENTS

not be changed by the effective date of such insurance. Unless the date of commencement is established by the Contract Documents or a notice to proceed given by the Owner, the Contractor shall notify the Owner in writing not less than five days or other agreed period before commencing the Work to permit the timely filing of mortgages, mechanic's liens and other security interests.

**8.2.3** The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

### **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 **an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control, or by delay authorized by the Owner pending mediation and arbitration, or by other causes which the Architect determines may justify delay**, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

**8.3.2** Claims relating to time shall be made in accordance with applicable provisions of Paragraph 4.3.

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

Circumstances beyond the contractor's control can result in an excusable delay, justifying an extension of the contract time. If an extension is justified, the architect determines its extent and prepares a change order to reflect the extension.

So-called "no damages for delay" clauses are sometimes suggested or required by the owner. The advice of the owner's attorney should be sought by the owner before such a clause is included in the supplementary conditions. Such a clause may now be less desirable or needed in view of the contractor's waiver of consequential damages in Subparagraph 4.3.10.

## COMMENTS

The schedule of values is the basis for review of the contractor's applications for payment. The architect can request changes in the proposed schedule, but the accounting accuracy of the schedule is the contractor's responsibility.

The form of the schedule and the type and level of detail of required supporting data may be described in division 1 of the specifications. One reason that the architect may want to see supporting data is to verify that the schedule is not being "front loaded." Verification normally is required only when the contractor assigns obviously inflated values to work that will be done early in the construction process. "Front loading" accelerates cash flow to the contractor, resulting in overpayments that can be particularly troublesome in the event of a contractor default.

AIA Document G703, Continuation Sheet (for AIA Document G702, Application and Certificate for Payment), is often used to record the submitted schedule of values.

Procedures for applications, including format, data required to support accuracy and completeness, and specific voucher or lien requirements may be described in detail in division 1 of the specifications. If applicable, provisions for retainage may be specified in the owner-contractor agreement and in the supplementary conditions. The date on which payment is due is specified in the owner-contractor agreement.

## DOCUMENT TEXT

### **ARTICLE 9 PAYMENTS AND COMPLETION**

#### **9.1 CONTRACT SUM**

**9.1.1** The Contract Sum is stated in the Agreement and, including authorized adjustments, is the total amount payable by the Owner to the Contractor for performance of the Work under the Contract Documents.

#### **9.2 SCHEDULE OF VALUES**

**9.2.1** Before the first Application for Payment, the Contractor shall submit to the Architect a schedule of values allocated to various portions of the Work, **prepared in such form and supported by such data to substantiate its accuracy as the Architect may require.** This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment.

#### **9.3 APPLICATIONS FOR PAYMENT**

**9.3.1** At least ten days before the date established for each progress payment, the Contractor shall submit to the Architect an itemized Application for Payment for operations completed **in accordance with the schedule of values.** Such application shall be notarized, if required, and supported by such data substantiating the Contractor's right to payment as the Owner or Architect may require, such as copies of requisitions from Subcontractors and material suppliers, and reflecting retainage if provided for in the Contract Documents.

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## COMMENTS

**9.3.1.1** As provided in Subparagraph 7.3.8, such applications **may include** requests for payment on account of changes in the Work which have been properly authorized by Construction Change Directives, or by interim determinations of the Architect, but not yet included in Change Orders.

Payment of such amounts, if applied for under this clause, is mandatory under Subparagraph 7.3.8.

**9.3.1.2** Such applications may not include requests for payment for portions of the Work for which the Contractor does not intend to pay to a Subcontractor or material supplier, unless such Work has been performed by others whom the Contractor intends to pay.

Applications for payment may only include amounts for work that the contractor intends to make payment. In the event of a dispute with a subcontractor or supplier, amounts for work by a replacement subcontractor or supplier or the contractor's own forces may be included.

**9.3.2** Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner **to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest**, and shall include the costs of applicable insurance, storage and transportation to the site for such materials and equipment stored off the site.

Before payment is made for stored materials and equipment, the contractor must provide evidence establishing the owner's title to stored materials and equipment or otherwise safeguarding the owner's interest in them. For example, bills of sale or other documentation may establish that the owner has clear title to such materials and equipment. If other than the usual retainage is required, that should also be specified.

Subparagraph 11.4.1 has provisions covering property insurance. Clause 11.4.1.4, in particular, addresses materials and equipment stored off site.

**9.3.3** The Contractor warrants that **title** to all Work covered by an Application for Payment will pass to the Owner no

Questions regarding clear title involve legal issues and should be referred to the owner's legal counsel.

## COMMENTS

Upon receipt of an application for payment, the architect has three options: (1) certify the amount the contractor has applied for and forward the certificate to the owner, (2) certify a lesser amount and forward the certificate to the owner, or (3) reject the contractor's application. Actions described in (2) and (3) may be taken for any of the reasons described in Subparagraph 9.5.1.

Subparagraph 9.4.2 is extremely important. It spells out what the architect's certificate represents, what it does not represent and the basis of the architect's actions. Certification for payment of amounts not yet due can cost the owner unnecessary interest on construction funds, and can result in further loss by the owner if the contractor later defaults. Overpayment may also cause slow or misdirected payment to subcontractors.

Certificates for payment do not constitute acceptance of work for which payment is to be made.

## DOCUMENT TEXT

later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work.

### **9.4 CERTIFICATES FOR PAYMENT**

**9.4.1** The Architect will, within seven days after receipt of the Contractor's Application for Payment, either **issue to the Owner a Certificate for Payment, with a copy to the Contractor, for such amount as the Architect determines is properly due, or notify the Contractor and Owner in writing of the Architect's reasons for withholding certification in whole or in part** as provided in Subparagraph 9.5.1.

**9.4.2** The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on the Architect's evaluation of the Work and the data comprising the Application for Payment, that the Work has progressed to the point indicated and that, to the best of the Architect's knowledge, information and belief, the quality of the Work is in accordance with the Contract Documents. **The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent**

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## COMMENTS

**tests and inspections, to correction of minor deviations from the Contract Documents prior to completion and to specific qualifications expressed by the Architect.** The issuance of a Certificate for Payment will further constitute a representation that the Contractor is entitled to payment in the amount certified. However, the issuance of a Certificate for Payment will not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

Because many of the reasons for nullifying or withholding a certificate for payment have substantial legal components, the architect may obtain assistance from the owner's legal counsel in order to decide legal questions.

### **9.5 DECISIONS TO WITHHOLD CERTIFICATION**

**9.5.1** The Architect may **withhold** a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Architect's opinion the representations to the Owner required by Subparagraph 9.4.2 cannot be made. If the Architect is unable to certify payment in the amount of the Application, the Architect will notify the Contractor and Owner as provided in Subparagraph 9.4.1. If the Contractor and Architect cannot agree on a revised amount, the Architect will promptly issue a Certificate for Payment for the amount for which the Architect is able to make such representations to the Owner. The Architect may also withhold a Certificate for Payment or, because of

Decisions to certify applications for payment, other than for final payment, may be reconsidered and reversed in the architect's subsequent evaluations of the work.

## COMMENTS

If a subcontractor or supplier notifies the owner of an intent to place a lien on the project, the contractor may choose to post a bond or provide other security to protect the owner against loss, rather than have its payments interrupted. When a payment bond has already been provided, the owner may request confirmation from the surety that the bond applies to the claim, or may request some additional bond or security commitment.

The contractor can wait until ten days before the date when payment is due before submitting the application for payment. The architect then has up to seven days to review the application and take action. Thus, the owner may have as little as three days within which to make payment. If the owner needs more time to make payment, this should be covered in the supplementary conditions and in the owner-contractor agreement.

Subparagraph 13.6.1 establishes the requirements for interest on late payments; interest begins to accrue on the date payment is due.

## DOCUMENT TEXT

subsequently discovered evidence, **may nullify the whole or a part of a Certificate for Payment previously issued**, to such extent as may be necessary in the Architect's opinion to protect the Owner from loss for which the Contractor is responsible, including loss resulting from acts and omissions described in Subparagraph 3.3.2, because of:

- .1 defective Work not remedied;
- .2 third party claims filed or reasonable evidence indicating probable filing of such claims unless **security** acceptable to the Owner is provided by the Contractor;
- .3 failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment;
- .4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
- .5 damage to the Owner or another contractor;
- .6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or
- .7 persistent failure to carry out the Work in accordance with the Contract Documents.

**9.5.2** When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.

### **9.6 PROGRESS PAYMENTS**

**9.6.1** After the Architect has issued a Certificate for Payment, the Owner shall make payment in the manner and **within the time provided in the Contract**

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**Documents**, and shall so notify the Architect.

**9.6.2** The Contractor shall promptly pay each Subcontractor, upon receipt of payment from the Owner, out of the amount paid to the Contractor on account of such Subcontractor's portion of the Work, the amount to which said Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of such Subcontractor's portion of the Work. The Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to Sub-subcontractors in a similar manner.

**9.6.3** The Architect will, on request, furnish to a Subcontractor, if practicable, information regarding percentages of completion or amounts applied for by the Contractor and action taken thereon by the Architect and Owner on account of portions of the Work done by such Subcontractor.

**9.6.4** Neither the Owner nor Architect shall have an obligation to pay or to see to the payment of money to a Subcontractor except as **may otherwise be required by law**.

**9.6.5** Payment to material suppliers shall be treated in a manner similar to that provided in Subparagraphs 9.6.2, 9.6.3 and 9.6.4.

## COMMENTS

This precludes the contractor from using money received for subcontractors' work for other purposes. It does not, however, imply that a subcontractor's right to be paid for completed work is contingent upon the contractor's receipt of payment from the owner.

If the contractor has a legitimate question about the quality of a subcontractor's work, the proper action would be for the contractor to adjust the application for payment submitted to the owner with regard to that subcontractor for that period. Funds already paid by the owner to the contractor for such subcontractors should either be paid to the subcontractor or returned to the owner.

Unless otherwise provided in the subcontract agreement, the contractor may not retain from payments due to subcontractors more than the owner retains from payments due to the contractor relative to that subcontractor's work.

This is one of very few direct contacts between the architect and subcontractors contemplated by AIA Document A201-1997.

Lien laws and other state or local law outside of the contract documents may apply.

## COMMENTS

The mistaken inclusion of, and payment for, an item of work on one certificate does not preclude the architect from adjusting that item in a subsequent certificate.

This requirement establishes a trust in favor of subcontractors and suppliers of monies received by the contractor by reason of work and materials of its subcontractors and suppliers. This subparagraph gives subcontractors and suppliers a preference in the event of the contractor's bankruptcy and thereby protects the owner from lien claims which could have been asserted by those entities had they not been furnished with this preference. As the recipient of trust funds, the contractor is under an obligation to properly apply the funds for the account of the subcontractors and suppliers.

Absent this provision, the contractor would not be able to co-mingle monies received for the benefit of subcontractors or suppliers with the contractor's own funds. Such a result would create accounting and book-keeping complexities unnecessary to the accomplishment of the purpose of this provision.

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**9.6.6** A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute **acceptance of Work** not in accordance with the Contract Documents.

**9.6.7** Unless the Contractor provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor for Work properly performed by Subcontractors and suppliers shall be held by the Contractor for those Subcontractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor for which payment was made by the Owner. **Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor**, shall create any fiduciary liability or tort liability on the part of the Contractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the Contractor for breach of the requirements of this provision.

## **9.7 FAILURE OF PAYMENT**

**9.7.1** If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents the amount certified by the Architect or awarded by arbitration, then the Contractor may, upon seven additional days' written notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall

## COMMENTS

The architect determines the date of substantial completion by establishing the point at which the work or a designated portion thereof *can* be occupied or used as intended. This issue is not affected by the dollar value of the uncompleted work; the absence of a one-dollar part in the only elevator serving a hospital operating room could delay substantial completion.

It often happens that an occupancy permit is issued by the appropriate authority at approximately the same time as the date of substantial completion. These times *are not* interchangeable. The criteria upon which an occupancy permit is issued may vary from jurisdiction to jurisdiction, while the criteria for establishing the date of substantial completion is fixed by contract.

Because the contract time is tolled at substantial completion, contractors sometimes tend to see the work as substantially complete sooner than would more objective observers. As an independent adviser, the architect makes the final decision on this matter.

## COMMENTS

Paragraph 9.8 contemplates substantial completion of the entire work. Earlier substantial completion of a portion of the work requires the owner's agreement to designate such portion separately from the rest of the work.

Typically, it is the contractor who initially proposes that the work is substantially complete. The contractor does this by submitting to the architect a list of items that must be completed before the work is finally complete. This list is commonly referred to as the punch list. It constitutes an acknowledgment by the contractor that work remains to be done after substantial completion, and is often supplemented by the architect as a result of the architect's inspection. Some of the items may affect substantial completion; others may not.

This is one of only two inspections by the architect contemplated under AIA Document A201-1997. The other inspection takes place prior to final payment.

If the architect does not agree with the contractor that the work is substantially complete, the contractor must complete or correct the items noted by the architect and request another inspection.

This process, if repeated over and over, may entitle the architect to additional compensation. In that case, the owner may be justified in filing a claim against the contractor for this additional expense.

## DOCUMENT TEXT

be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, plus interest as provided for in the Contract Documents.

### **9.8 SUBSTANTIAL COMPLETION**

**9.8.1** Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.

**9.8.2** When the Contractor considers that the Work, **or a portion thereof which the Owner agrees to accept separately**, is substantially complete, **the Contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected prior to final payment**. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.

**9.8.3** Upon receipt of the Contractor's list, the Architect **will make an inspection** to determine whether the Work or designated portion thereof is substantially complete. If the Architect's inspection discloses any item, whether or not included on the Contractor's list, which is not sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work or designated portion thereof for its intended use, **the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Architect**. In such case, the Contractor **shall then submit a request**

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for another inspection by the Architect to determine Substantial Completion.

**9.8.4** When the Work or designated portion thereof is substantially complete, **the Architect will prepare a Certificate of Substantial Completion** which shall establish the date of Substantial Completion, **shall establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance**, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.

**9.8.5** The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate. Upon such acceptance and consent of surety, if any, **the Owner shall make payment of retainage applying to such Work or designated portion thereof**. Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents.

## **9.9 PARTIAL OCCUPANCY OR USE**

**9.9.1** The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer as required under

## COMMENTS

When the architect determines that the work is substantially complete, the architect prepares a certificate of substantial completion, with the final punch list attached, establishing the date of substantial completion and the other matters described here.

Construction workers may still need to work in occupied spaces following substantial completion. It is important that the certificate be clear about the responsibilities of the owner and contractor for the items mentioned. Both the owner and contractor should sign the certificate to indicate their understanding of and agreement with their assigned responsibilities.

This provision contemplates full release of retainage at substantial completion, excepting only retainage for work that is incomplete or not in accordance with the contract documents.

The owner may wish to occupy or use part of the work before it is substantially complete. Paragraph 9.9 establishes the ground rules under which this can occur. A separate agreement between the owner and contractor is required, and the property insurer must consent.

Moving into a building frequently causes damage to finished and unfinished work. The parties should document the status of the work before and after the moving by inspection reports, photographs, videotape or other means.

## COMMENTS

The list prepared by the contractor and supplemented by the architect makes reference to all items which are not in accordance with the contract documents. Those which do affect substantial completion must be remedied before the architect can issue the certificate of substantial completion; the others are to be corrected or completed before final payment.

This provision is aimed at reducing future disputes by establishing a baseline against which to measure damage to the work that may occur after the owner begins to occupy or use part of the work but prior to final payment.

The contractor initially decides that the work is complete and is ready for final inspection by the architect and owner. The final application for payment, along with the appropriate supporting data, must accompany the contractor's request for final inspection. If the stated conditions are met, the architect issues a final application for payment. By signing the certificate, the architect also represents that the conditions listed in Subparagraph 9.10.2 have been fulfilled, making it unnecessary to issue a separate certificate for final completion. Because the contractor continues to be obligated to correct work and to perform under warranty obligations, no specific certificate of final completion is issued by the architect.

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Clause 11.4.1.5 and authorized by public authorities having jurisdiction over the Work. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. **When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Architect as provided under Subparagraph 9.8.2.** Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, by decision of the Architect.

**9.9.2** Immediately prior to such partial occupancy or use, **the Owner, Contractor and Architect shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.**

**9.9.3** Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

### **9.10 FINAL COMPLETION AND FINAL PAYMENT**

**9.10.1** Upon receipt of written notice

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that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make such inspection and, when the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's on-site visits and inspections, the Work has been completed in accordance with terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions listed in Subparagraph 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled.

**9.10.2** Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an **affidavit** that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner, (3) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period

## COMMENTS

AIA Documents G706, Contractor's Affidavit of Payment of Debts and Claims, and G706A, Contractor's Affidavit of Release of Liens, may be used for this purpose.

Because the surety is entitled to use the retainage to complete the work in the event of a contractor's default, the surety's consent is required so that the surety does not have grounds to avoid obligations it would otherwise have under applicable bonds. AIA Document G707, Consent of Surety Company to Final Payment, is available for this purpose.

All of these items may be requested at the owner's discretion. While the architect may offer comments based on past experience in such matters, the owner and owner's legal counsel should determine what is desired or necessary.

## COMMENTS

Because it may be impossible to obtain lien releases or waivers for reasons other than nonpayment, this provision allows the contractor to post a bond against unfulfilled requirements such as unreleased liens, manufacturers' warranties not yet obtained, etc. Thus, the project can be closed out without releasing the contractor from these obligations to the owner.

In the event final completion is delayed by causes beyond the contractor's control, Subparagraph 9.10.3 allows for payment and release of retainage on work completed and accepted.

Consent of surety is required in situations where the surety's interest is affected.

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required by the Contract Documents, (4) **consent of surety**, if any, to final payment and (5), **if required by the Owner**, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, **the Contractor may furnish a bond** satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

**9.10.3** If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, and the Architect so confirms, the Owner shall, upon application by the Contractor and certification by the Architect, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, **the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted** shall be submitted by the Contractor to the Architect prior to certification of such payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiv-

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## COMMENTS

The contractor and owner may, under some circumstances, be held strictly liable for harm resulting from use or storage of such hazardous materials—that is, liable even if they are not negligent.

.2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors; and

.3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

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

**10.2.3** The Contractor shall 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 owners and users of adjacent sites and utilities.

**10.2.4** When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, **the Contractor shall exercise utmost care** and carry on such activities under supervision of properly qualified personnel.

**10.2.5** The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Clauses 10.2.1.2 and 10.2.1.3 caused in

## **COMMENTS**

er of claims.

**9.10.4** The making of final payment shall constitute a waiver of Claims by the Owner **except those arising from:**

**.1** liens, Claims, security interests or encumbrances arising out of the Contract and unsettled;

**.2** **failure of the Work to comply with the requirements of the Contract Documents;** or

**.3** terms of special warranties required by the Contract Documents.

**9.10.5** Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a **waiver of claims** by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

## **ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY**

### **10.1 SAFETY PRECAUTIONS AND PROGRAMS**

**10.1.1** The **Contractor** shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.

### **10.2 SAFETY OF PERSONS AND PROPERTY**

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

**.1** employees on the Work and other persons who may be affected thereby;

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The owner waives all except the designated claims by making final payment to the contractor. While final payment is a milestone, it does not terminate certain important rights of the owner. The exceptions preserve these rights.

Subparagraph 9.10.4 preserves rights of the owner that survive final payment including, in this case, rights under the warranty contained in Paragraph 3.5 and during the correction period described in Paragraph 12.2.

This provision requires each payee to restate specifically, in writing, unsettled claims if they are to remain valid. This precludes subsequent presentation of claims that were believed to have been settled, and also new claims relating back to events prior to the date of the final application for payment. This provision has no effect on claims that might arise after final payment.

Construction safety is the responsibility of the contractor. Subcontractors, in turn, are responsible to the contractor for the safe performance of their portions of the work. The owner (when performing work with its own forces) and separate contractors have similar responsibilities under laws and regulations related to safety.

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whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Clauses 10.2.1.2 and 10.2.1.3, except damage or loss attributable to acts or omissions of the Owner or Architect or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Paragraph 3.18.

The superintendent is the contractor's principal representative at the site and is responsible for site safety, unless someone else is specifically designated to have this responsibility.

**10.2.6** The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's **superintendent** unless otherwise designated by the Contractor in writing to the Owner and Architect.

This includes temporary loads required by construction means and methods.

**10.2.7** The Contractor shall not load or permit **any part of the construction or site** to be loaded so as to endanger its safety.

A practical standard is used instead of the term "hazardous materials," which has no uniform definition and could be interpreted to include numerous substances commonly used in construction—for example, paint or gasoline.

### **10.3 HAZARDOUS MATERIALS**

**10.3.1** If reasonable precautions will be inadequate to prevent foreseeable **bodily injury or death** to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, **the Contractor shall, upon recognizing the condition, immediately stop Work** in the affected area and report the condition to the Owner and Architect in writing.

It is important for the health of those workers and others who may be exposed to hazardous materials that work stop promptly upon their discovery. Once it is deemed safe to do so, work may resume according to the written agreement of the owner and contractor.

## COMMENTS

If the contractor has notified the owner that a hazardous material is present, the owner must retain a qualified laboratory to verify whether such material is present. If hazardous materials do exist, the owner must arrange for their removal or remediation. The owner cannot require the contractor to perform this service.

The owner and contractor may choose to negotiate an appropriate adjustment in contract price and time or the contractor may assert a claim if no negotiated agreement can be reached. Unlike most other claims, claims relating to hazardous materials are not referred to the architect for initial determination, but proceed directly to mediation and then to arbitration.

This subparagraph, like other indemnification provisions, should be reviewed by legal counsel before the agreement is executed. Numerous state statutes affect the enforceability of such provisions.

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**10.3.2** The Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Contractor and, in the event such material or substance is found to be present, to verify that it has been rendered harmless. Unless otherwise required by the Contract Documents, the Owner shall furnish in writing to the Contractor and Architect the names and qualifications of persons or entities who are to perform tests verifying the presence or absence of such material or substance or who are to perform the task of removal or safe containment of such material or substance. The Contractor and the Architect will promptly reply to the Owner in writing stating whether or not either has reasonable objection to the persons or entities proposed by the Owner. If either the Contractor or Architect has an objection to a person or entity proposed by the Owner, the Owner shall propose another to whom the Contractor and the Architect have no reasonable objection. When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Contractor. **The Contract Time shall be extended appropriately and the Contract Sum shall be increased in the amount of the Contractor's reasonable additional costs of shut-down, delay and start-up, which adjustments shall be accomplished as provided in Article 7.**

**10.3.3** To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Subcontractors, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limit-

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ed to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Subparagraph 10.3.1 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) and provided that such damage, loss or expense is not due to the sole negligence of a party seeking indemnity.

**10.4** The Owner shall not be responsible under Paragraph 10.3 for materials and substances brought to the site by the Contractor unless such materials or substances were required by the Contract Documents.

**10.5** If, without negligence on the part of the Contractor, the Contractor is held liable for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, the Owner shall indemnify the Contractor for all cost and expense thereby incurred.

### **10.6 EMERGENCIES**

**10.6.1** In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Paragraph 4.3 and Article 7.

Some federal or state statutes may impose liability on persons who perform work on property which was previously contaminated, even though that person was not responsible for the initial contamination and properly and safely performed the required work. This provision makes the owner financially responsible for costs and expenses incurred by a non-negligent contractor who by law becomes responsible for remediation costs. Like other indemnification provisions, this paragraph should be reviewed by legal counsel.

As part of the contractor's responsibility for construction means and methods and for jobsite safety, the contractor has the authority to act without prior authorization in an emergency.

## COMMENTS

The provisions of this article commonly require expansion in the supplementary conditions. Insurance coverages that the contractor is required to carry should be clearly stated in the contract documents so that the contractor can accurately calculate its costs. The owner's legal counsel and insurance adviser should make appropriate recommendations to the owner on insurance and bonds. The architect should obtain information from the owner on the necessary or desirable limits and coverage; AIA Document G612, Owner's Instructions Regarding Insurance and Bonds, has been designed for this purpose.

In an insurance context, personal injury is different from bodily injury. Personal injury includes libel, slander and false arrest. For example, someone detained at the construction site could claim false arrest, or a material supplier could claim that comments made by the contractor or a subcontractor constituted slander. Bodily injury involves physical harm to a person.

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### **ARTICLE 11 INSURANCE AND BONDS**

#### **11.1 CONTRACTOR'S LIABILITY INSURANCE**

**11.1.1** The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

.1 claims under workers' compensation, disability benefit and other similar employee benefit acts which are applicable to the Work to be performed;

.2 claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;

.3 claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;

.4 claims for damages insured by usual **personal injury** liability coverage;

.5 claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;

.6 claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle;

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.7 claims for bodily injury or property damage arising out of **completed operations**; and

In an insurance context, the term “completed operations” refers to property damage or bodily injury occurring after the contractor has completed all work at the site. For example, drywall might be damaged as a result of a roof leak occurring after final completion.

.8 claims involving contractual liability insurance applicable to the Contractor's obligations under Paragraph 3.18.

The contractor agrees to hold the owner, architect and others harmless under certain circumstances. This provision requires insurance to fulfill that requirement.

**11.1.2** The insurance required by Subparagraph 11.1.1 shall be written for not less than **limits of liability specified in the Contract Documents or required by law, whichever coverage is greater**. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from date of commencement of the Work until date of final payment and termination of any coverage required to be maintained after final payment.

*Coverage* refers to the types of claims to which the insurance is applicable. Subparagraph 11.1.1 specifies required coverages. *Limits of liability* refers to the maximum dollar figure that the insurance company will potentially pay. Required limits of liability are either specified by law or in the contract documents.

Subparagraph 8.2.2 states that the contractor may not begin work prior to the effective date of the insurance required here. Subparagraph 9.10.2 discusses insurance requirements in relation to final payment.

**11.1.3** Certificates of insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work. These certificates and the insurance policies required by this Paragraph 11.1 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until **at least 30 days' prior written notice** has been given to the Owner. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final Application for Payment as required by Subparagraph 9.10.2.

This 30-day period gives the owner an opportunity to purchase replacement coverage or take other actions prior to the date on which the contractor's insurance expires. Insurance companies commonly agree to provide such notice.

## **COMMENTS**

Many insurance policies have aggregate limits of liability that limit the amount payable by the insurer on all claims against the insured (in this case, the contractor) during the policy period. Aggregate insurance limits required by the contract documents may be reduced or exhausted altogether by claims against the contractor on other projects. If this occurs, the contractor is obligated to promptly notify the owner.

Project Management Protective Liability insurance (PMPL) is similar to Owners and Contractors Protective Liability insurance (OCP), but broader in that the architect and construction manager are also covered as insureds. This policy affords the coverage for claims arising out of the acts or omissions of persons for whom the insureds are alleged to be responsible. For example, if the architect or contractor were sued because of the negligence of a subcontractor, contractor or a consultant of the architect, this policy would afford primary coverage. The other insurance carried by the insureds would be secondary coverage to respond to such claims if the insurance afforded by this policy were exhausted. Because PMPL insurance covers a number of the principal participants on the project, it is anticipated that it will reduce the frequency of disputes that arise from these insured risks.

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Information concerning reduction of coverage on account of revised limits or claims paid under the **General Aggregate**, or both, shall be furnished by the Contractor with reasonable promptness in accordance with the Contractor's information and belief.

### **11.2 OWNER'S LIABILITY INSURANCE**

**11.2.1** The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance.

### **11.3 PROJECT MANAGEMENT PROTECTIVE LIABILITY INSURANCE**

**11.3.1** Optionally, the Owner may require the Contractor to purchase and maintain Project Management Protective Liability insurance from the Contractor's usual sources as primary coverage for the Owner's, Contractor's and Architect's vicarious liability for construction operations under the Contract. Unless otherwise required by the Contract Documents, the Owner shall reimburse the Contractor by increasing the Contract Sum to pay the cost of purchasing and maintaining such optional insurance coverage, and the Contractor shall not be responsible for purchasing any other liability insurance on behalf of the Owner. The minimum limits of liability purchased with such coverage shall be equal to the aggregate of the limits required for Contractor's Liability Insurance under Clauses 11.1.1.2 through 11.1.1.5.

**11.3.2** To the extent damages are covered by Project Management Protective Liability insurance, the Owner, Contractor and Architect waive all rights against each other for damages, except

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such rights as they may have to the proceeds of such insurance. The policy shall provide for such waivers of subrogation by endorsement or otherwise.

**11.3.3** The Owner shall not require the Contractor to include the Owner, Architect or other persons or entities as additional insureds on the Contractor's Liability Insurance coverage under Paragraph 11.1.

## **11.4 PROPERTY INSURANCE**

**11.4.1 Unless otherwise provided,** the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Paragraph 9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Paragraph 11.4 to be covered, whichever is later. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Project.

**11.4.1.1** Property insurance shall be on an "all-risk" or equivalent policy form and shall include, without limitation,

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Some owners have required contractors to name them as additional insureds under the contractor's liability policy. While some additional protection may be gained in this way, it ultimately increases the cost of insurance to the contractor without measurably reducing the risk of disputes on the project. This practice has been precluded by this provision, whether or not the Owner elects to require Project Management Protective Liability insurance.

If the contractor, rather than the owner, is required to provide property insurance, substantial modification to Paragraph 11.4 will be needed so that proper coverages are obtained to protect the interests of all parties, including those of the owner (who may be doing work with the owner's own forces) and of separate contractors.

"All-risk" coverage is usually contrasted with *named-peril* coverage. "All-risk" coverage includes everything but specifically excluded risks. Named-peril coverage, on the other hand, names those perils that are insured against and excludes all other risks. Both types of policies should be reviewed carefully by the owner's insurance adviser.

## COMMENTS

The owner must either purchase the insurance required by the general conditions or inform the contractor that it does not intend to do so. The contractor then has the opportunity to purchase equivalent insurance and is entitled to a change order to cover the costs. If the owner neither buys the insurance nor notifies the contractor, the owner effectively becomes the insurer and will be responsible for costs attributable to losses which would have been covered had the required insurance been purchased.

In the 1987 edition of AIA Document A201, the contractor bore costs not covered because of deductibles. In A201-1997, these costs are assigned to the owner, who directly obtains the benefit of the lower premiums associated with the deductibles.

## DOCUMENT TEXT

insurance against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and start-up, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Architect's and Contractor's services and expenses required as a result of such insured loss.

**11.4.1.2 If the Owner does not intend to purchase such property insurance required by the Contract** and with all of the coverages in the amount described above, the Owner shall so inform the Contractor in writing prior to commencement of the Work. The Contractor may then effect insurance which will protect the interests of the Contractor, Subcontractors and Sub-subcontractors in the Work, and by appropriate Change Order the cost thereof shall be charged to the Owner. If the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain insurance as described above, without so notifying the Contractor in writing, then the Owner shall bear all reasonable costs properly attributable thereto.

**11.4.1.3** If the property insurance requires deductibles, **the Owner shall pay costs not covered because of such deductibles.**

**11.4.1.4** This property insurance shall cover portions of the Work stored off the site, and also portions of the Work in transit.

**11.4.1.5** Partial occupancy or use in

## DOCUMENT TEXT

accordance with Paragraph 9.9 shall not commence until the insurance company or companies providing property insurance have consented to such partial occupancy or use by endorsement or otherwise. The Owner and the Contractor shall take reasonable steps to obtain consent of the insurance company or companies and shall, without mutual written consent, take no action with respect to partial occupancy or use that would cause cancellation, lapse or reduction of insurance.

**11.4.2 Boiler and Machinery Insurance.** The Owner shall purchase and maintain boiler and machinery insurance required by the Contract Documents or by law, which shall specifically cover such insured objects during installation and until final acceptance by the Owner; this insurance shall include interests of the Owner, Contractor, Subcontractors and Sub-subcontractors in the Work, and the Owner and Contractor shall be named insureds.

**11.4.3 Loss of Use Insurance.** The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. The Owner waives all rights of action against the Contractor for loss of use of the Owner's property, including consequential losses due to fire or other hazards however caused.

**11.4.4** If the Contractor requests in writing that insurance for risks other than those described herein or other special causes of loss **be included in the property insurance policy**, the Owner shall, if possible, include such insurance, and

## COMMENTS

The contractor may wish to have certain coverages in place in addition to those required by the standard provisions. It may be more efficient and cost-effective to have these coverages included in the project's property insurance policy. Costs associated with the contractor's request must be borne by the contractor and reflected in a change order reducing the contract sum.

## COMMENTS

This subparagraph extends the provisions for waiver of subrogation to other property insurance the owner may purchase. Such policies may cover property at or adjacent to the project site, or they may replace the property insurance that was in effect on the work during construction.

Subparagraph 11.1.3 contains very similar requirements regarding the contractor's liability insurance. However, the contractor need only supply the owner with *certificates* of insurance under that provision. Here the owner must supply the contractor with a copy of each policy, including all conditions, definitions, exclusions and endorsements relating to the project. The actual policies are required because numerous details contained in a property insurance policy would not be reflected in a certificate.

## DOCUMENT TEXT

the cost thereof shall be charged to the Contractor by appropriate Change Order.

**11.4.5** If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Subparagraph 11.4.7 for damages caused by fire or other causes of loss covered by this separate property insurance. All **separate policies** shall provide this waiver of subrogation by endorsement or otherwise.

**11.4.6** Before an exposure to loss may occur, the Owner shall file with the Contractor **a copy of each policy** that includes insurance coverages required by this Paragraph 11.4. Each policy shall contain all generally applicable conditions, definitions, exclusions and endorsements related to this Project. Each policy shall contain a provision that the policy will not be canceled or allowed to expire, and that its limits will not be reduced, until at least 30 days' prior written notice has been given to the Contractor.

## DOCUMENT TEXT

**11.4.7 Waivers of Subrogation.** The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Paragraph 11.4 or other property insurance applicable to the Work, **except such rights as they have to proceeds of such insurance held by the Owner as fiduciary.** The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

**11.4.8** A loss insured under Owner's property insurance shall be adjusted by the Owner as fiduciary and made payable to **the Owner as fiduciary** for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Subparagraph 11.4.10. The Contractor

## COMMENTS

Subrogation is the right to “stand in the shoes” of another and to claim whatever rights the original person or entity had. The purpose of the required property insurance is to transfer the risk of insured losses from the owner and contractor to the insurance company. It would defeat this purpose if the insurance company were allowed to sue either party to recover such losses.

In general, it is possible to waive rights of subrogation as long as this is done before any loss occurs. The owner should disclose the waiver of subrogation provision to the insurer before purchasing the property insurance.

If the contractor or a subcontractor has rights to insurance proceeds being held by the owner as a fiduciary under Subparagraph 11.4.8, such rights are not affected by this waiver.

As a fiduciary, the owner holds the insurance proceeds in trust for those persons who sustained an insured loss. This normally includes the contractor, subcontractors and may include the project architect. A mortgagee, such as the construction lender, may also have rights that appear in the *mortgagee clause* of the insurance. Once the contractor receives payment, it is required to pay its subcontractors and suppliers their allocable share of the proceeds.

## COMMENTS

After an insured loss, the owner generally has two choices: (1) terminate the contract for convenience and keep the insurance proceeds (less amounts payable to the contractor and others) or (2) issue a change order under which the contractor is compensated for reconstructing damaged or destroyed work. The amount payable to the contractor is not limited to or determined by the insurance proceeds.

## DOCUMENT TEXT

shall pay Subcontractors their just shares of insurance proceeds received by the Contractor, and by appropriate agreements, written where legally required for validity, shall require Subcontractors to make payments to their Sub-subcontractors in similar manner.

**11.4.9** If required in writing by a party in interest, the Owner as fiduciary shall, upon occurrence of an insured loss, give bond for proper performance of the Owner's duties. The cost of required bonds shall be charged against proceeds received as fiduciary. The Owner shall deposit in a separate account proceeds so received, which the Owner shall distribute in accordance with such agreement as the parties in interest may reach, or in accordance with an arbitration award in which case the procedure shall be as provided in Paragraph 4.6. **If after such loss no other special agreement is made and unless the Owner terminates the Contract for convenience, replacement of damaged property shall be performed by the Contractor after notification of a Change in the Work in accordance with Article 7.**

**11.4.10** The Owner as fiduciary shall have power to adjust and settle a loss with insurers unless one of the parties in interest shall object in writing within five days after occurrence of loss to the Owner's exercise of this power; if such objection is made, the dispute shall be resolved as provided in Paragraphs 4.5 and 4.6. The Owner as fiduciary shall, in the case of arbitration, make settlement with insurers in accordance with directions of the arbitrators. If distribution of insurance proceeds by arbitration is required, the arbitrators will direct such distribution.

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### **11.5 PERFORMANCE BOND AND PAYMENT BOND**

**11.5.1** The Owner shall have the right to require the Contractor to **furnish bonds** covering faithful performance of the Contract and payment of obligations arising thereunder as stipulated in bidding requirements or specifically required in the Contract Documents on the date of execution of the Contract.

**11.5.2** Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall permit a copy to be made.

If the owner wants the contractor to provide a performance bond and payment bond, that fact and the appropriate conditions of the bonds must be included in the bidding requirements or in the contract documents *prior* to the time the contract is signed so that their costs can be considered in determining the contract sum.

The owner's legal counsel and insurance adviser should advise on the need for bonds.

AIA Document A701, Instructions to Bidders, addresses the topic of bonds. AIA Document A312, Performance Bond and Payment Bond, is available for use if such bonds are required.

## **ARTICLE 12 UNCOVERING AND CORRECTION OF WORK**

### **12.1 UNCOVERING OF WORK**

**12.1.1** If a portion of the Work is covered contrary to the Architect's request or to **requirements specifically expressed in the Contract Documents**, it must, if required in writing by the Architect, be uncovered for the Architect's examination and be replaced at the Contractor's expense without change in the Contract Time.

**12.1.2** If a portion of the Work has been covered which the Architect has not specifically requested to examine prior to its being covered, the Architect may request to see such Work and it shall be uncovered by the Contractor. **If such Work is in accordance with the Contract Documents, costs of uncovering and replacement shall, by appropriate Change Order, be at the Owner's expense. If such Work is not in accordance with the Contract**

The contract documents should list clearly those items the architect expects to examine before they are covered.

Ultimate responsibility for the cost of uncovering, testing and replacing questioned work under this subparagraph depends upon whether the uncovered work complies with the contract documents.

## COMMENTS

Work that does not meet the requirements of the contract documents may be rejected even if it has not yet been installed or is only partially completed. The architect also has the option of advising the contractor that work in process, if continued, will not produce acceptable results.

The contractor must correct work that does not conform to the requirements of the contract documents even if such work has not been rejected by the architect.

Under Subparagraph 12.2.4, such costs include costs of removing, replacing and repairing other work or construction of the owner or separate contractors as needed to correct rejected or nonconforming work.

The contractor's warranty extends until the expiration of the applicable statute of limitations period. The correction period described in Subparagraph 12.2.2 is a separate remedy for nonconforming work. To avoid misunderstandings, the introductory language makes it clear that the one-year correction period is in addition to, and not in lieu of, the contractor's warranty obligations. During the correction period, the owner must give the contractor prompt notice of and the opportunity to correct work discovered not to have been performed in accordance with the contract documents. Thereafter, the owner may have the corrective work performed by anyone selected by the owner.

During the one-year correction period, the contractor has the right to be notified about defective work. If the owner discovers nonconforming work and fails to notify the contractor, the owner waives its right against the contractor to require correction of that work and its warranty right with respect to that work.

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**Documents, correction shall be at the Contractor's expense unless the condition was caused by the Owner or a separate contractor in which event the Owner shall be responsible for payment of such costs.**

### **12.2 CORRECTION OF WORK**

#### **12.2.1 BEFORE OR AFTER SUBSTANTIAL COMPLETION**

**12.2.1.1** The Contractor shall promptly correct Work **rejected by the Architect or failing to conform to the requirements of the Contract Documents**, whether discovered before or after Substantial Completion and whether or not fabricated, installed or completed. **Costs of correcting such rejected Work**, including additional testing and inspections and compensation for the Architect's services and expenses made necessary thereby, shall be at the Contractor's expense.

#### **12.2.2 AFTER SUBSTANTIAL COMPLETION**

**12.2.2.1** **In addition to the Contractor's obligations under Paragraph 3.5**, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Subparagraph 9.9.1, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously

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given the Contractor a written acceptance of such condition. **The Owner shall give such notice promptly after discovery of the condition. During the one-year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty.** If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or Architect, **the Owner may correct it in accordance with Paragraph 2.4.**

The contractor must act to correct work within a reasonable time.

Work first performed after substantial completion is also subject to a one-year correction period, in effect extending the correction period with respect to that work.

**12.2.2.2** The one-year period for correction of Work shall be extended with respect to portions of **Work first performed** after Substantial Completion by the period of time between Substantial Completion and the actual performance of the Work.

When work corrected by the contractor during the correction period needs further correction more than one year after substantial completion, the owner is not obligated to notify the contractor again, but may have the work performed by others.

**12.2.2.3** **The one-year period for correction of Work shall not be extended by corrective Work** performed by the Contractor pursuant to this Paragraph 12.2.

The contractor's activities in correcting work do not extend the correction period.

**12.2.3** The Contractor shall remove from the site portions of the Work which are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.

**12.2.4** The Contractor shall bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of the Owner or separate contractors caused by the Contractor's correction or removal of

## COMMENTS

Only the owner can accept nonconforming work because such acceptance constitutes a change in the contract. If the contract sum is to be reduced, this must be done by a change order.

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Work which is not in accordance with the requirements of the Contract Documents.

**12.2.5** Nothing contained in this Paragraph 12.2 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. Establishment of the one-year period for correction of Work as described in Subparagraph 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

### **12.3 ACCEPTANCE OF NONCONFORMING WORK**

**12.3.1** If the Owner prefers to accept Work which is not in accordance with the requirements of the Contract Documents, **the Owner may do so** instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

## **ARTICLE 13 MISCELLANEOUS PROVISIONS**

### **13.1 GOVERNING LAW**

**13.1.1** The Contract shall be governed by the law of the place where the Project is located.

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### 13.2 SUCCESSORS AND ASSIGNS

**13.2.1** The Owner and Contractor respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contract Documents. Except as provided in Subparagraph 13.2.2, neither party to the Contract shall assign **the Contract as a whole** without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

At times, a contractor may want to assign to a major creditor money due or to become due under the contract. This is not prohibited by this provision since it is only an assignment of the right to receive money and not an assignment of the contract as a whole. However, state or federal law may affect a contractor's right to assign money due under a public contract.

**13.2.2** The Owner may, without consent of the Contractor, **assign the Contract to an institutional lender** providing construction financing for the Project. In such event, the lender shall assume the Owner's rights and obligations under the Contract Documents. The Contractor shall execute all consents reasonably required to facilitate such assignment.

This is an exception to prohibition of assignment of the contract as a whole, as discussed in Subparagraph 13.2.1. Institutional lenders often require contingent assignment of the contract as a condition of the construction loan. Without this provision, the project might have to be terminated by the owner, who may not be able to finance the project without such an assignment. On the other hand, the lender cannot condition the assignment on any waiver of rights on the part of the contractor, such as the right to be paid by the lender for pre-default sums due and owing the contractor.

### 13.3 WRITTEN NOTICE

**13.3.1** **Written notice shall be deemed to have been duly served** if delivered in person to the individual or a member of the firm or entity or to an officer of the corporation for which it was intended, or if delivered at or sent by registered or certified mail to the last business address known to the party giving notice.

If these requirements are met, notice will have been effectively given, whether or not actually received.

## COMMENTS

This is to avoid having the contract modified by a party's action or failure to act.

Normally, the contractor may not conduct tests and inspections or grant approvals of its own work.

This subparagraph covers special tests, inspections or approvals determined to be necessary due to developments in the course of construction. For example, tests on one part of the work may call into question the integrity of other parts.

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### **13.4 RIGHTS AND REMEDIES**

**13.4.1** Duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.

**13.4.2** No action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

### **13.5 TESTS AND INSPECTIONS**

**13.5.1** Tests, inspections and approvals of portions of the Work required by the Contract Documents or by laws, ordinances, rules, regulations or orders of public authorities having jurisdiction shall be made at an appropriate time. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections and approvals **with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority**, and shall bear all related costs of tests, inspections and approvals. The Contractor shall give the Architect timely notice of when and where tests and inspections are to be made so that the Architect may be present for such procedures. The Owner shall bear costs of tests, inspections or approvals which do not become requirements until after bids are received or negotiations concluded.

**13.5.2** If the Architect, Owner or public authorities having jurisdiction determine that portions of the Work **require additional testing, inspection or approval**

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not included under Subparagraph 13.5.1, the Architect will, upon written authorization from the Owner, instruct the Contractor to make arrangements for such additional testing, inspection or approval by an entity acceptable to the Owner, and the Contractor shall give timely notice to the Architect of when and where tests and inspections are to be made so that the Architect may be present for such procedures. Such costs, except as provided in Subparagraph 13.5.3, shall be at the Owner's expense.

**13.5.3** If such procedures for testing, inspection or approval under Subparagraphs 13.5.1 and 13.5.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, all costs made necessary by such failure including those of repeated procedures and compensation for the Architect's services and expenses shall be at the Contractor's expense.

**13.5.4** Required certificates of testing, inspection or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the Architect.

**13.5.5** If the Architect is to observe tests, inspections or approvals required by the Contract Documents, the Architect will do so promptly and, where practicable, at the normal place of testing.

**13.5.6** Tests or inspections conducted pursuant to the Contract Documents shall be made promptly to avoid unreasonable delay in the Work.

## COMMENTS

To avoid confusion as to what the “rate prevailing from time to time” is, an agreed-upon rate of interest may be stated in the agreement. The parties should consult legal counsel regarding usury laws and other federal and state requirements that may apply.

The agreed-upon rate may be entered in Paragraph 7.2 of AIA Document A101, Owner-Contractor Agreement Form, Stipulated Sum, if it is used.

The statute of limitations in all jurisdictions starts when a claim has accrued. In many jurisdictions, a claim “accrues” when the harm caused has been discovered by the innocent party. This is called the “discovery rule.” These provisions eliminate the discovery rule by providing that the statute of limitations begins on the date of the contractually specified occurrence. For example, the statute of limitations begins to run on the date of substantial completion for nonconforming work performed before substantial completion, even though the nonconforming work may not be discovered until years later.

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### **13.6 INTEREST**

**13.6.1** Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at such rate as the parties may agree upon in writing or, in the absence thereof, at the **legal rate** prevailing from time to time at the place where the Project is located.

### **13.7 COMMENCEMENT OF STATUTORY LIMITATION PERIOD**

**13.7.1** As between the Owner and Contractor:

**.1 Before Substantial Completion.** As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion;

**.2 Between Substantial Completion and Final Certificate for Payment.** As to acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of issuance of the final Certificate for Payment; and

**.3 After Final Certificate for Payment.** As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed

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to have accrued in any and all events not later than the date of any act or failure to act by the Contractor pursuant to any Warranty provided under Paragraph 3.5, the date of any correction of the Work or failure to correct the Work by the Contractor under Paragraph 12.2, or the date of actual commission of any other act or failure to perform any duty or obligation by the Contractor or Owner, whichever occurs last.

### **ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT**

#### **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 or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor**, for any of the following reasons:

- .1** issuance of an order of a court or **other public authority** having jurisdiction which requires all Work to be stopped;
- .2** an act of government, such as a declaration of national emergency which requires all Work to be stopped;
- .3** because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Subparagraph 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or
- .4** the Owner has failed to furnish to the Contractor promptly, upon the

If the contractor or any of the other entities described here are responsible for the work stoppage, the contractor has no right to terminate the contract under this subparagraph. Even when the contractor is blameless, one of the four reasons listed must apply in order to justify termination by the contractor under this subparagraph.

The local building department and fire marshal are examples of "other public authority."

If the contractor stops work in accordance with Subparagraph 9.7.1, the contractor must wait an additional 30 days before terminating the contract.

## COMMENTS

The contractor must give seven days' written notice (in addition to the 30-day period during which the work was stopped) to the owner and architect before terminating the contract.

The seven days are in addition to the 60 days during which the work is stopped.

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Contractor's request, reasonable evidence as required by Subparagraph 2.2.1.

**14.1.2** The Contractor may terminate the Contract if, through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, repeated suspensions, delays or interruptions of the entire Work by the Owner as described in Paragraph 14.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

**14.1.3** If one of the reasons described in Subparagraph 14.1.1 or 14.1.2 exists, the Contractor may, upon **seven days' written notice** to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.

**14.1.4** If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has persistently failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon **seven additional days'** written notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided

**DOCUMENT TEXT**

**COMMENTS**

in Subparagraph 14.1.3.

**14.2 TERMINATION BY THE OWNER FOR CAUSE**

**14.2.1** The Owner may terminate the Contract if the Contractor:

**.1 persistently or repeatedly** refuses or fails to supply enough properly skilled workers or proper materials;

**.2** fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;

**.3 persistently** disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction; or

**.4** otherwise is guilty of substantial breach of a provision of the Contract Documents.

**14.2.2** When any of the above reasons exist, the Owner, **upon certification by the Architect that sufficient cause exists** to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and **the Contractor's surety**, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

**.1** take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;

**.2** accept assignment of subcontracts pursuant to Paragraph 5.4; and

**.3** finish the Work by whatever reasonable method the Owner may deem expedient. Upon request of the Contractor, the Owner shall furnish to the Contractor a detailed **accounting** of

Isolated instances of insufficient numbers of workers or improper materials will not justify termination under this clause.

Such conduct must be persistent. Isolated infractions will not justify termination under this clause.

The architect must exercise professional judgment to decide in good faith if sufficient cause exists to terminate the contract with the contractor. This serves to protect the contractor against unreasonable action by the owner and serves to protect the owner from the consequences of acting prematurely.

The bonds should be carefully reviewed by the owner's legal counsel so that proper action will be taken to preserve the owner's rights.

This accounting affords evidence of the amount to be deducted from the contract sum on account of the contractor's default.

## COMMENTS

The damages mentioned in this subparagraph are subject to the mutual waiver of consequential damages contained in Subparagraph 4.3.10.

Such orders may be given as the owner deems prudent, though they are required to be in writing. Note that repeated suspensions, delays or interruptions may be grounds for termination by the contractor under Subparagraph 14.1.2.

The contractor is entitled to an adjustment in the contract sum and contract time for increases in the cost and time needed for performance resulting from the owner's order under Subparagraph 14.3.1.

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the costs incurred by the Owner in finishing the Work.

**14.2.3** When the Owner terminates the Contract for one of the reasons stated in Subparagraph 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

**14.2.4** If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Architect, upon application, and this obligation for payment shall survive termination of the Contract.

### **14.3 SUSPENSION BY THE OWNER FOR CONVENIENCE**

**14.3.1** The Owner may, without cause, **order** the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

**14.3.2** The Contract Sum and Contract Time shall be **adjusted** for increases in the cost and time caused by suspension, delay or interruption as described in Subparagraph 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent:

.1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or

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## **COMMENTS**

.2 that an equitable adjustment is made or denied under another provision of the Contract.

### **14.4 TERMINATION BY THE OWNER FOR CONVENIENCE**

**14.4.1** The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

**14.4.2** Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Contractor shall:

- .1 cease operations as directed by the Owner in the notice;
- .2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and
- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

**14.4.3** In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.

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# **Commentary on AIA Document B141-1997**

## **Table of Contents**

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This commentary was prepared by  
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The American Institute of Architects, 1735 New York Ave., N.W., Washington, D.C. 20006.

## Introduction

B141 has long been considered the “flagship” document among the owner-architect agreements published by The American Institute of Architects. AIA Document B141-1997 represents a fundamental departure from earlier editions of B141. The 1997 Edition was drafted in response to ongoing changes in the profession and the industry, changes that have mandated a flexible and responsive contracting system. Now, the architect must be able to identify, package and communicate the value of services appropriate for each individual client and project, and the owner-architect agreement must facilitate, not impede, this process.

AIA Document B141-1997, Standard Form of Agreement Between Owner and Architect with Standard Form of Architect’s Services, reflects these new realities of architectural practice. It incorporates input from AIA members, owners and attorneys representing both groups. Additional input came in the form of AIA’s Practice and Prosperity Initiative, which mandates that architects be provided with tools to better convey to clients the breadth and value of the services they offer. The result is a document that is more complex but vastly more flexible, and readily adaptable to a wide variety of project types.

### Format

B141-1997 is really two standard forms. The agreement form, entitled Standard Form of Agreement Between Owner and Architect, contains provisions and spaces for information applicable to projects of most types. The services form is the Standard Form of Architect’s Services: Design and Contract Administration, which defines the scope of the architect’s services reflected in its title. In the coming years, the AIA will publish other services forms for use with other groupings of services.

B141-1997 can also be used in conjunction with AIA Document B352, Duties, Responsibilities and Limitations of Authority of the Architect’s Project Representative, which would be referenced in Subparagraph 1.4.1.3 and Paragraph 2.8.3. B352 is not a new document, but the “reference document” concept it represents will be expanded under B141-1997 to include other service enhancements. In the coming years, the AIA will develop and publish additional reference documents that coordinate with B141-1997.

The new, multipart format makes B141-1997 much more flexible than its predecessors. By breaking the services out in a separate form, the drafters of B141-1997 have created an agreement form that can be used for many different types of projects. This includes those that are not strictly “building projects,” such as feasibility studies, program management and other specialized undertakings. As noted above, the AIA will develop additional services forms that reflect a range of practice styles. Architects and owners also have the option of drafting their own services forms for use with the B141-1997 agreement form.

## **The Agreement Form**

Highlighted below are some of the new features of the first part of B141-1997, the Standard Form of Agreement Between Owner and Architect.

### **Initial Information**

Article 1.1, containing prompting statements and fill-in blanks, is intended to stimulate a dialogue between the owner and architect and ensure a detailed exchange of information at the outset of the project. The parties are asked to identify the physical, legal, financial and time parameters and to designate key project personnel. By establishing a baseline of information and assumptions about the project, the owner and architect can form realistic expectations and avoid surprises and misunderstandings.

### **Responsibilities of the Parties**

The overall responsibilities of the owner and architect are set out in Article 1.2, which begins with a statement of mutual cooperation between the parties. The architect's responsibilities, which reference the article incorporating the services form, also include maintaining the confidentiality of the client's information, disclosing conflicts of interests and responding to applicable laws, codes and regulations in the design of the project. Architects commonly do these things, but the new provisions underscore the professional character of the architect's relationship to the owner.

### **Terms and Conditions**

Article 1.3 contains the "ground rules" of B141, and embodies a number of notable changes from earlier editions. One such change involves the architect's drawings, specifications and other documents, now defined as "Instruments of Service," which term specifically includes documents in electronic form. The owner's right to the use of such documents (and the architect's consultants' rights in documents they have prepared) have been clarified by means of nonexclusive licenses. In place of "basic" and "additional" services, circumstances are identified that may give rise to a change in the architect's services, thereby entitling the architect to additional compensation or additional time for performance. Provisions for dispute resolution now include mediation. Provisions for dispute avoidance include a waiver of consequential damages. The waiver is intended to prevent the escalation of disputes by limiting parties to direct damages resulting from a breach. Finally, grounds for termination are clarified, and the owner is given the right to terminate for convenience.

### **Scope of Services and Other Special Terms and Conditions**

Article 1.4 provides space in which all documents comprising the Owner-Architect Agreement should be listed. Note that Subparagraph 1.4.1.2 incorporates the Standard Form of Architect's Services: Design and Contract Administration by reference unless the parties designate another scope of services document.

### **Compensation**

Earlier editions of B141 tended to reinforce the inaccurate assumption that the architect's compensation must be calculated using a single method for the whole project. In fact, different methods of compensation might be appropriate for different categories of architectural services.

To correct this misimpression, Article 1.5 was redrafted to avoid the implication that one compensation method should be preferred over another. To decide which compensation arrangement is best suited to the project, the owner and architect must assess their particular circumstances and requirements. After careful consideration of these, the parties may find that an arrangement using more than one compensation method is appropriate. It should be noted that the Instructions accompanying B141-1997 provide further illustrations and sample language that can assist the parties in selecting the appropriate calculation methods for the architect's compensation.

### **The Services Form**

The second part of B141-1997 is the Standard Form of Architect's Services: Design and Contract Administration. This is the first of several services forms the AIA will publish for use with the B141-1997 agreement form. Like the agreement form, the design and contract administration services form contains numerous changes intended to foster enhanced communication and understanding between the parties.

### **Characterization of Services**

Two ways of characterizing the architect's services have been eliminated from B141-1997. The first is the distinction between "basic" and "additional" services. Instead, services are either included or not, and changes in services (entitling the architect to an adjustment in time, compensation or both) are triggered by certain circumstances described in the agreement and services forms. Second, services under B141-1997 are no longer grouped in phases. That arrangement implied a linear model of service delivery that has limited applicability to today's projects. Instead, services are grouped by type or category, which helps the architect acquaint the client with the full spectrum of possible services, thereby assisting the client in deciding which services are desirable for the project. Services are grouped into six primary categories: project administration, planning and evaluation, design, construction procurement, contract administration, and facility operation. The level of services varies from category to category, but generally approximates the level of services in the 1987 edition of B141. The narrative descriptions of individual services are more explicit, however, in order to better convey what the client should expect from the architect.

### **Responsibility for Cost Estimates and for Meeting the Owner's Budget**

Article 2.1 deals with general project administration, and includes services relating to cost estimates. An important change relates to the architect's obligations in the event the lowest responsive bid or negotiated proposal exceeds the owner's budget (which would ordinarily be the amount stated in response to Clause 1.1.2.5.2). In this situation, at the owner's option, the architect is required to modify the drawings and specifications without additional compensation. Earlier editions only required redesign if a fixed limit of construction cost had previously been agreed to. In effect, the fixed limit (and correspondingly greater control by the architect over design and procurement) now constitute the default mode.

### **Construction Contract Procurement**

The architect's responsibilities during construction contract procurement, including both the bidding and negotiation processes, are spelled out in great detail. Few of the services described will

be new to architects. The descriptions are presented to assist the owner in understanding the value the architect brings to these processes.

### **Construction Contract Administration**

A number of minor changes have been made in the provisions governing the architect's role in construction contract administration. These include new requirements that the architect maintain records with respect to submittals, applications for payment and changes in the Work, and procedures for processing the contractor's requests for information. The 1987 provision dealing with contractor's certifications has been expanded, and now requires that the architect specify criteria that design services provided by the contractor must satisfy.

### **Facility Operation Meetings**

B141-1997 continues the owner-architect relationship well past the date of substantial completion of the project. The architect for the first time is contractually required to meet with the owner (1) promptly after the date of substantial completion to review the need for facility operation services and (2) within one year from the date of substantial completion to receive comments and feedback on the performance of the building and to offer the owner appropriate recommendations. These meetings give the owner a continued source of professional insight into the functioning of the completed building, and allow the architect the opportunity to return to the project to enhance client satisfaction.

### **Schedule of Services**

Another new feature of B141-1997 is a section in which the parties can specify the number of site visits, individual submittal reviews, and inspections for substantial completion and final completion to be performed by the architect. Actions taken beyond the prescribed number may entitle the architect to a change in services. In Paragraph 2.8.3, other services may be agreed to and described.

### **Completing B141-1997**

To complete B141-1997, the parties must identify and record a substantial amount of information. In the agreement form alone there are a total of 35 blanks to be filled in, excluding signatures. The accompanying services form contains 59 blanks: most of these are in Paragraph 2.8.3, however, and may be left blank. A listing is given below of the various blanks and their subject matter.

<b>Location</b>	<b>Description</b>
cover sheet	date, identification of the owner and the architect, description of the project
1.1.2.1	project objective or use
1.1.2.2	physical parameters
1.1.2.3	owner's program

1.1.2.4	legal parameters
1.1.2.5.1	overall project budget
1.1.2.5.2	budget for the cost of the work
1.1.2.6	time parameters
1.1.2.7	proposed procurement or delivery method
1.1.2.8	other parameters
1.1.3.1	owner's designated representative
1.1.3.2	other persons reviewing architect's submittals
1.1.3.3	owner's other consultants and contractors
1.1.3.4	architect's designated representative
1.1.3.5	architect's consultants
1.1.4	other initial information
1.1.5	general conditions of the contract for construction (if other than A201)
1.4.1.2	architect's scope of services (if other than Standard Form of Architect's Services: Design and Contract Administration)
1.4.1.3	other documents forming the agreement
1.4.2	special terms and conditions

1.5.1	compensation for architect's services
1.5.2	compensation for change in services of the architect
1.5.3	compensation for change in services of the architect's consultants
1.5.4	reimbursable expenses multiple
1.5.5	other reimbursable expenses
1.5.7	amount of initial payment
1.5.8	payment dates and interest on unpaid amounts
1.5.9	time for completion of services signature lines
2.8.1.1	number of reviews of individual submittals
2.8.1.2	number of site visits
2.8.1.3	number of inspections for substantial completion
2.8.1.4	number of inspections for final completion
2.8.3.1 - 2.8.3.25	listing and description of other included services
2.9.1	modifications to the scope of services
	signature lines

## **Modifying B141-1997**

### **Reasons to Modify**

B141-1997 will usually require some modification to adapt it to individual projects. As flexible as this document is, it is still a standard form: it cannot contain all of the terms needed on all projects, and some of its terms may be undesirable on some projects. In addition, such matters as insurance coverages and legal and regulatory requirements may require additional provisions or the deletion of existing provisions.

In modifying B141-1997, however, its advantages as a standard form should be kept in mind. This document embodies terms and conditions commonly accepted in the construction industry. Much of the language is derived from earlier editions, and has been tested repeatedly in court. Many of the provisions are linked by common definitions, parallel phrasing and other means with one another, and with other AIA documents that may be used on the same project. For these reasons, modifications should be made carefully, with a view to their effect on the agreement as a whole and on other contractual relationships on the project. Change for the sake of change, or to accommodate a personal preference for certain phraseology, is definitely not recommended. Modifications should be limited to those needed to adapt the standard document to the project at hand.

### **How to Modify**

There are many ways to modify AIA contract documents, and some work better than others. Some increase the likelihood of errors, misunderstandings and other problems. A particularly bad modification practice is the wholesale retyping of amended portions of the document, which can introduce transcription errors.

The preferred means of modifying a printed AIA standard form document like B141-1997 is to attach separate written amendments. These amendments should then refer back to the numerical sequence of the provisions in the document.

### **Electronic Documents**

The AIA offers its form documents in both printed and electronic versions. The licensed software that creates the electronic versions allows users to insert modifications directly into the standard language of the documents. As modifications are made, the software automatically underscores language that is added and strikes through language being deleted. The result is that modifications are clearly shown against the baseline of standard language, combining the benefits of standard documents with the ease of modification characteristic of the electronic format.

### **Other AIA Standard Form Owner-Architect Agreements**

Although considered the “flagship” AIA owner-architect agreement, B141 is only one of many owner-architect agreements published by the AIA. Other AIA owner-architect agreements are described briefly below.

### **B151-1997**

B151-1997, Abbreviated Standard Form of Agreement Between Owner and Architect, incorporates many of the revisions made in B141-1997. These include mediation, a mutual waiver of

consequential damages and other changes made to parallel A201-1997, General Conditions of the Contract for Construction. Generally, B151-1997 is similar to B141-1997 except that it retains the five phases of services and the characterization of services as either “Basic” or “Additional.”

### **B163**

First published in 1993, AIA Document B163, Standard Form of Agreement Between Owner and Architect for Designated Services, is a comprehensive, three-part owner-architect agreement that allows the parties to select up to 83 different services divided among nine phases, covering pre-design through supplemental services. Part One of the document deals with variables typical of many owner-architect agreements, such as compensation and scope of services. The scope of services is delimited through use of a matrix that permits the parties to designate their agreed-upon services. Part Two contains descriptions of the specific services found in Part One’s matrix. Part Three contains general descriptions of the parties’ duties and responsibilities for those services selected from Part Two.

### **B155**

AIA Document B155, Standard Form of Agreement Between Owner and Architect for a Small Project, is an owner-architect agreement intended solely for use with other Small Project documents, specifically AIA Document A105, Standard Form of Agreement Between Owner and Contractor for a Small Project, and AIA Document A205, General Conditions of the Contract for a Small Project. The small project family of documents was published to address the need for simple, straightforward documents for projects that are brief in duration (i.e., significantly less than one year) and modest in size and complexity. Ideally, the parties should have a past course of dealing with one another, and the contracts should be negotiated rather than competitively bid.

### **B727**

AIA Document B727, Standard Form of Agreement Between Owner and Architect for Special Services, is the most flexible of the AIA owner-architect agreements, in that the description of services is left entirely up to the parties. It contains basic terms and conditions covering such matters as use of the architect’s documents, arbitration, termination or suspension, payments to the architect and basis of compensation. B727 is often used for planning, feasibility studies and other specialized undertakings. Note that if extensive services are contemplated, particularly those relating to construction contract administration, the parties may wish to consider other AIA owner-architect agreements.

### **B171 and B177**

The AIA publishes two owner-architect agreements expressly for interior design services: B171, Standard Form of Agreement Between Owner and Architect for Interior Design Services, and B177, Abbreviated Form of Agreement for Interior Design Services. These documents are intended for use on projects where the architect agrees to provide an owner with design and administrative services for the procurement of interior furniture, furnishings and equipment. Both documents are coordinated with AIA Document A271, General Conditions of the Contract for Furniture, Furnishings and Equipment.

**B181**

AIA Document B181, Standard Form of Agreement Between Owner and Architect for Housing Services, is an owner-architect agreement intended for use on projects where the owner assumes responsibility for providing cost-estimating services. B181 is primarily intended for use on publicly-funded, single and multi-family housing projects, and is coordinated for use with AIA Document A201.

**B188**

A unique owner-architect agreement, B188, Standard Form of Agreement Between Owner and Architect for Limited Architectural Services for Housing Projects, anticipates that the owner will have extensive control over the management of the project, acting in a capacity similar to that of a developer or speculative builder. It does not coordinate with any other AIA standard form agreement or general conditions document.

**B141/CMa and B801/CMa**

These documents are intended for use on projects involving a separate construction manager acting as an independent adviser to the owner. AIA Document B141/CMa, Standard Form of Agreement Between Owner and Architect, Construction Manager-Adviser Edition, is coordinated for use with other Construction Manager-Adviser edition forms, including B801/CMa, Standard Form of Agreement Between Owner and Construction Manager where the Construction Manager is not a Constructor. Note that an architect acting solely in the capacity of a construction manager-adviser on a project, and having no design role, may choose B801/CMa as the basis for its agreement with the owner.

**General Principles Underlying AIA Forms**

AIA form documents are intended to benefit all who participate in the design and construction process. This includes, above all, the public, whose members are the ultimate users of the built environment. They are, in fact, the focus of the AIA's commitment to "coordinate the building industry and the profession of architecture to insure the advancement of the living standards of our people through their improved environment" as stated in AIA Bylaws. To ensure the acceptance of its standard form contracts by the construction industry, the AIA relies on a consensus-building process aimed at balancing the interests of all participants through a reasonable apportionment of risks and responsibilities. No one party's interests are allowed to dominate, including those of the architect. This is the basis for the reputation of fairness and balance that AIA forms have gained in over a century and a half of use. To learn more about the AIA's approach to drafting contract documents, write to obtain a copy of AIA Document M120, Document Drafting Principles.

**DOCUMENT TEXT**

**COMMENTS**

**STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT**

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

If the two parties are using this standard form document for the first time, the assistance of legal counsel is encouraged with respect to completion of the numerous fill-in blanks or for project-specific modifications.

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The first AIA owner-architect agreement was published in 1917.

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

This date should precede or coincide with the date when performance of each party's obligations are to actually commence.

**BETWEEN** the Architect's client identified as the **Owner:**  
*(Name, address and other information)*

The term *owner* is used to designate the architect's client. That individual or entity may be a tenant, for example, and may or may not actually have an ownership interest in the premises for which the project is commissioned.

and the **Architect:**  
*(Name, address and other information)*

Use the full legal name of the corporation, partnership or individual who will be expected to pay for the architect's services and who will be liable for performing the owner's obligations under this agreement.

The term *architect* may only be used by a person who is properly licensed to practice

## COMMENTS

architecture by the appropriate state governing board. Licensing protects the public.

The inclusion of a detailed description of the project is critically important for mutual understanding and for protection of both parties' interests. The project is generally the outcome of the parties' mutual efforts, and it may or may not be a building.

Although some of the information called for in Article 1.1 may not be readily available when the parties start discussing their agreement, such information as is known at the time of signing should be incorporated into the document. If the space allotted is insufficient, information may be included on an attachment signed or initialed by both parties and referenced in the agreement (for example, "See Attachment A"). Such an attachment is legally enforceable as part of the agreement so long as the reference is clear and definitive.

A description of the owner's purpose or goals for the project is often helpful to give a clear focus to the mutual understanding of the parties. A building's intended use may often be described by its classification under the applicable building code or zoning ordinance.

Descriptions of the size of the site, if any, and its location are necessary for a building project, but may not be needed for a non-building project, such as a feasibility study.

## DOCUMENT TEXT

**For the following Project:**

*(Include detailed description of Project)*

The Owner and Architect agree as follows.

### **ARTICLE 1.1 INITIAL INFORMATION**

**1.1.1** This Agreement is based on the following **information and assumptions**.

*(Note the disposition for the following items by inserting the requested information or a statement such as "not applicable," "unknown at time of execution" or "to be determined later by mutual agreement.")*

#### **1.1.2 PROJECT PARAMETERS**

**1.1.2.1** The objective or use is:

*(Identify or describe, if appropriate, proposed use or goals.)*

**1.1.2.2** The **physical parameters** are:

*(Identify or describe, if appropriate, size, location, dimensions, or other pertinent information, such as geotechnical reports about the site.)*

## DOCUMENT TEXT

## COMMENTS

**1.1.2.3 The Owner's Program is:**  
*(Identify documentation or state the manner in which the program will be developed.)*

A program is a written statement setting forth design objectives, constraints and criteria for a project. It is essential for any project as it elaborates on the owner's objectives or use stated in Subparagraph 1.1.2.1. A program includes space requirements and relationships, flexibility and expandability, special equipment and systems, and site requirements. If a comprehensive program is not available at the outset of the project, the owner may obtain the architect's assistance in developing one as an expansion of services.

**1.1.2.4 The legal parameters are:**  
*(Identify pertinent legal information, including, if appropriate, land surveys and legal descriptions and restrictions of the site.)*

When a project involves real property, the legal description of the property must be given to the architect. This may prevent future conflicts involving the architect's design and adjacent facilities. When the owner does not have full title to the real property (for example, if the owner is a tenant), this should be disclosed along with any constraints or restrictions on allowable improvements.

**1.1.2.5 The financial parameters are as follows.**

**.1 Amount of the Owner's overall budget for the Project, including the Architect's compensation, is:**

Fiscal responsibility begins with the owner's disclosure of an overall budget for the project. The budget may range from a single dollar figure to a detailed breakdown of anticipated line item expenses.

**.2 Amount of the Owner's **budget** for the Cost of the Work, excluding the Architect's compensation, is:**

Setting a budget for the cost of the work may require the mutual collaboration of the owner and architect. This function should not be confused with the architect's subsequent cost estimates that are based upon drawings, specifications and other documentation developed later on during the project.

## COMMENTS

Time parameters almost always impact cost. For the owner, time may be more important than money. For the architect, an inflexible time frame, such as that used for fast-track scheduling, often requires substantial expenditures of staff overtime. Thus, this information is likely to impact the calculation of the architect's compensation under this agreement.

As with other parameters, the proposed procurement method may impact project cost. Delaying or changing a decision on these methods may disrupt the timing of the architect's services.

Each project has its special characteristics and unique needs that may be listed here.

This designated representative is authorized to act on behalf of, and to bind, the owner. When the owner is an individual, that person will often serve as the designated representative. When the owner is a corporation or governmental entity, it can only act through agents. In those situations, it is very important to designate one person, such as the corporation's president or the school board's chairman, who has final authority to make firm decisions. Confusion over decision-making authority can lead to needless delays and wasted effort (e.g., redesign).

With the proliferation of review boards, internal staff committees and other oversight groups, many owners need to inform their architect about who should be expected to review the architect's submittals. By obtaining this information in advance, the architect can plan time schedules that more realistically reflect the approved process.

## DOCUMENT TEXT

### **1.1.2.6 The time parameters are:**

*(Identify, if appropriate, milestone dates, durations or fast track scheduling.)*

### **1.1.2.7 The proposed procurement or delivery method for the Project is:**

*(Identify method such as competitive bid, negotiated contract, or construction management.)*

### **1.1.2.8 Other parameters are:**

*(Identify special characteristics or needs of the Project such as energy, environmental or historic preservation requirements.)*

## **1.1.3 PROJECT TEAM**

### **1.1.3.1 The Owner's Designated Representative is:**

*(List name/ address and other information.)*

### **1.1.3.2 The persons or entities, in addition to the Owner's Designated Representative, who are required to review the Architect's submittals to the Owner are:**

*(List name, address and other information.)*

## DOCUMENT TEXT

### **1.1.3.3 The Owner's other consultants and contractors are:**

*(List discipline and, if known, identify them by name and address.)*

### **1.1.3.4 The Architect's Designated Representative is:**

*(List name, address and other information.)*

### **1.1.3.5 The consultants retained at the Architect's expense are:**

*(List discipline and, if known, identify them by name and address.)*

### **1.1.4 Other important initial information is:**

## COMMENTS

Sometimes an owner has made arrangements with other consultants or contractors whom the owner wishes to use on the project. These persons or entities should be listed here to inform the architect of their involvement. The architect can then appropriately coordinate the architect's activities with them.

This designated representative is authorized to act on behalf of, and to bind, the architect. If the architect is a sole proprietor, that person will be the designated representative. If the architect is a partnership, one of the partners will be the designated representative. If a professional corporation or limited liability company is involved, however, the designated representative may be merely an agent of such an entity. Here again, it is very important to designate one person, such as the corporation's president, who has final authority to make firm decisions. Confusion over decision-making authority can lead to needless delays and wasted effort.

Depending upon the scope of services, the architect may need to retain specialized consultants whose services will be coordinated by the architect. If the expenses from any of the architect's consultants are to be directly reimbursed by the owner, this should be noted in the provisions on compensation.

Other relevant information may be identified through discussions regarding the rest of the document and its scope of services. For instance, in Subparagraph 1.2.3.5, the architect is required to disclose any conflicts of interest to the owner. This is a good place to document that information.

## COMMENTS

Selection of the specific general conditions for the project's construction may impact the architect's scope of services. This document assumes that AIA Document A201-1997 will be used.

Most of the parameters elicited by Article 1.1 impact the further development of the project. A change in a parameter that seems insignificant to one party may have serious consequences for the other party.

Today, the complexity of most projects is such that the active, mutual participation of the owner and architect is needed to maintain a working relationship among the multitude of players whose cooperation is vital for the project's success.

An essential function of the owner is to provide a written program detailing the requirements for and limitations on the project. That program will be referenced in Subparagraph 1.1.2.3, or it may be subsequently developed after the signing of this agreement.

In some states, the architect may assert a lien on real property to secure payment of the architect's compensation. Upon the architect's request, the owner must provide relevant information to enable the architect to enforce lien rights.

## DOCUMENT TEXT

**1.1.5** When the services under this Agreement include contract administration services, the **General Conditions** of the Contract for Construction shall be the edition of AIA Document A201 current as of the date of this Agreement, or as follows:

**1.1.6** The information contained in this **Article 1.1** may be reasonably relied upon by the Owner and Architect in determining the Architect's compensation. Both parties, however, recognize that such information may change and, in that event, the Owner and the Architect shall negotiate appropriate adjustments in schedule, compensation and Change in Services in accordance with Paragraph 1.3.3.

### **ARTICLE 1.2 RESPONSIBILITIES OF THE PARTIES 1.2.1**

The Owner and the Architect shall cooperate with one another to fulfill their respective obligations under this Agreement. Both parties shall endeavor to maintain good **working relationships** among all members of the Project team.

### **1.2.2 OWNER**

**1.2.2.1** Unless otherwise provided under this Agreement, the Owner shall provide **full information** in a timely manner regarding requirements for and limitations on the Project. The Owner shall furnish to the Architect, within 15 days after receipt of a written request, information necessary and relevant for the Architect to evaluate, give notice of or enforce **lien rights**.

## DOCUMENT TEXT

## COMMENTS

**1.2.2.2** The Owner shall periodically update the **budget for the Project**, including that portion allocated for the Cost of the Work. The Owner shall not significantly increase or decrease the overall budget, the portion of the budget allocated for the Cost of the Work, or contingencies included in the overall budget or a portion of the budget, without the agreement of the Architect to a corresponding change in the Project scope and quality.

Note that the “budget for the Project” can include many categories of expenses in addition to the cost of the work and the architect’s compensation. Budgetary information required in Article 1.1 will need to be compared to the architect’s subsequent estimates for the cost of the work.

**1.2.2.3** The **Owner's Designated Representative** identified in Paragraph 1.1.3 shall be authorized to act on the Owner's behalf with respect to the Project. The Owner or the Owner's Designated Representative **shall render decisions in a timely manner** pertaining to documents submitted by the Architect in order to avoid unreasonable delay in the orderly and sequential progress of the Architect's services.

The owner’s designated representative must be clearly identified. Information must also be provided to enable the architect to contact that individual quickly and easily, otherwise, the decision-making process may be interrupted at critical times during the project.

The amount of time given for the owner’s designated representative’s various reviews of the architect’s documents should be included in the time schedule for the project.

**1.2.2.4** The Owner shall furnish the services of consultants other than those designated in Paragraph 1.1.3 or authorize the Architect to furnish them as a Change in Services when such services are requested by the Architect and are reasonably required by the scope of the Project.

**1.2.2.5** Unless otherwise provided in this Agreement, the Owner shall furnish tests, inspections and reports required by law or the Contract Documents, such as structural, mechanical, and chemical tests, tests for air and water pollution, and tests for hazardous materials.

**1.2.2.6** The Owner shall furnish all **legal, insurance and accounting services**, including auditing services, that may be reasonably necessary at any time for the Project to meet the

Neither the owner nor architect is assumed to have the expertise needed to address the project’s legal, accounting or insurance needs. If questions arise during the project’s development that pertain to the owner’s needs and interests, the owner is expected to furnish the individuals who can give the appropriate advice. If, for example, the contractor is to be compensated on the basis of the cost of the work plus a fee, the AIA owner-contractor documents give the owner the right to audit the contractor’s books. This is usually done by the owner’s accountant.

## COMMENTS

The owner's obligations under this provision do not relieve the architect of the responsibility to perform services properly. However, if the owner becomes aware of a problem, the owner is obliged to notify the architect (see the companion provision in Subparagraph 1.2.3.7).

Expeditious performance is the best that any professional can promise when dealing with matters of indeterminate nature. Requiring the architect to meet absolute time limitations by using such terms as "time is of the essence" with this contract can adversely affect the quality of the architect's services. Typically, the architect is depending upon other people's input or decisions, including the owner's, to accomplish the milestone objectives. A written schedule usually helps, but it must be adjustable when delays or factors beyond the owner's or architect's control intervene.

With the use of professional corporations and limited liability companies, it is important to designate a particular individual whom the owner can rely on to bind the architect.

## DOCUMENT TEXT

Owner's needs and interests.

**1.2.2.7** The Owner shall provide prompt written notice to the Architect if the Owner becomes aware of any **fault or defect** in the Project, including any errors, omissions or inconsistencies in the Architect's Instruments of Service.

### **1.2.3 ARCHITECT**

**1.2.3.1** The services performed by the Architect, Architect's employees and Architect's consultants shall be as enumerated in Article 1.4.

**1.2.3.2** **The Architect's services shall be performed as expeditious-ly as is consistent with professional skill and care and the orderly progress of the Project.** The Architect shall submit for the Owner's approval a schedule for the performance of the Architect's services which initially shall be consistent with the time periods established in Subparagraph 1.1.2.6 and which shall be adjusted, if necessary, as the Project proceeds. This schedule shall include allowances for periods of time required for the Owner's review, for the performance of the Owner's consultants, and for approval of submissions by authorities having jurisdiction over the Project. Time limits established by this schedule approved by the Owner shall not, except for reasonable cause, be exceeded by the Architect or Owner.

**1.2.3.3** **The Architect's Designated Representative** identified in Paragraph 1.1.3 shall be authorized to act on the Architect's behalf with respect to the Project.

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**1.2.3.4** The Architect shall maintain the confidentiality of information specifically designated as confidential by the Owner, unless withholding such information would violate the law, create the risk of significant harm to the public or prevent the Architect from establishing a claim or defense in an adjudicatory proceeding. The Architect shall require of the Architect's consultants similar agreements to maintain the confidentiality of information specifically designated as confidential by the Owner.

An essential element of a professional-client relationship is trust and the sharing of confidences. Subparagraph 1.2.3.4 establishes that the architect will not disclose the owner's confidential information unless certain enumerated exceptions apply.

**1.2.3.5** Except with the Owner's knowledge and consent, the Architect shall not engage in any activity, or accept any employment, interest or contribution that would reasonably appear to compromise the Architect's professional judgment with respect to this Project.

Subparagraph 1.2.3.5 deals with situations where the architect must disclose a conflict of interest to the owner. Parallel requirements to these obligations can be found in most professional licensing regulations and in the AIA's Code of Professional Conduct.

**1.2.3.6** The Architect shall review laws, codes, and regulations applicable to the Architect's services. The Architect shall respond in the design of the Project to requirements imposed by governmental authorities having jurisdiction over the Project.

A professional is expected to take into account the codes, regulations and laws that impact the performance of the professional's services. Since codes, regulations and laws may be subject to differing interpretations, architects will ordinarily consult at an early stage with governmental officials having jurisdiction over the project.

**1.2.3.7** The Architect shall be entitled to rely on the accuracy and completeness of services and information furnished by the Owner. The Architect shall provide prompt written notice to the Owner if the Architect becomes aware of any errors, omissions or inconsistencies in such services or information.

This provision is the companion to Subparagraph 1.2.2.7.

## COMMENTS

As the project develops from ideas into reality, various elements of cost will inevitably change and become more certain. The definition of cost of the work takes these changes into consideration. During design, for example, the barometer of cost will be the architect's estimates. Once a contractor's bid or proposal is accepted, this supersedes the architect's most recent estimate. Next, the cost of the work is as defined in the owner-contractor agreement as revised by contract modification during construction. When final completion is achieved, the cost will be the total cost paid by the owner for the work.

The definition of cost of the work is important for purposes of the owner's budget, which the architect is required to meet under Paragraph 2.1.7. It will also affect the architect's compensation if compensation is based on a percentage of the cost of the work.

Unless the definition of cost includes owner-furnished elements, an architect whose compensation is based on a percentage of the cost of the work could be unfairly penalized by certain cost saving measures employed by the owner. For example, a church might use volunteer help or a construction manager for its construction, or a hospital might receive donations of complex and costly equipment. The cost of such volunteered or donated elements should be included in the cost of the work at current market rates. In such situations, the architect is still expected to provide the professional services needed for the design, specification and contract administration using those volunteered or donated elements.

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### **ARTICLE 1.3 TERMS AND CONDITIONS**

#### **1.3.1 COST OF THE WORK**

**1.3.1.1** The Cost of the Work shall be the total cost or, to the extent the Project is not completed, the estimated cost to the Owner of all elements of the Project designed or specified by the Architect.

**1.3.1.2** The Cost of the Work shall include the cost at current market rates of labor and materials **furnished by the Owner** and equipment designed, specified, selected or specially provided for by the Architect, including the costs of management or supervision of construction or installation provided by a separate construction manager or contractor, plus a reasonable allowance for their overhead and profit. In addition, a reasonable allowance for contingencies shall be included for market conditions at the time of bidding and for changes in the Work.

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**1.3.1.3** The Cost of the Work does not include the **compensation of the Architect** and the Architect's consultants, the costs of the land, rights-of-way and financing or other costs that are the responsibility of the Owner.

### **1.3.2 INSTRUMENTS OF SERVICE**

**1.3.2.1** Drawings, specifications and other documents, including those in electronic form, prepared by the Architect and the Architect's consultants are **Instruments of Service** for use solely with respect to this Project. The Architect and the Architect's consultants shall be deemed the authors and owners of their respective Instruments of Service and shall retain all common law, statutory and other reserved rights, including copyrights.

**1.3.2.2** Upon execution of this Agreement, the Architect grants to the Owner a **nonexclusive license** to reproduce the Architect's Instruments of Service solely for purposes of constructing, using and maintaining the Project, provided that the Owner shall comply with all obligations, including prompt payment of all sums when due, under this Agreement. The Architect shall obtain similar nonexclusive licenses from the Architect's consultants consistent with this Agreement. Any termination of this Agreement prior to completion of the Project shall terminate this license. Upon such termination, the Owner shall refrain from making further reproductions of Instruments of Service and shall return to the Architect within seven days of termination all originals and reproductions in the Owner's posses-

## COMMENTS

Excluding the architect's compensation from the cost of the work avoids a situation where the architect would be paid a percentage on the architect's own services. Also excluded are items that are not direct construction costs.

Technological advances, such as computer-aided design, have and will continue to have an impact on the architect's services and the manner in which they are provided. The architect's services are reflected in instruments of service, such as drawings, specifications, electronic data and interpretive sketches which help the owner to reach the final result, a building project. Because the use or misuse of the architect's instruments of service affects specific rights and obligations of the owner, the construction team and the public, the architect as a licensed professional retains ownership of, control over and responsibility for these documents.

The owner's nonexclusive license permits the use and reproduction of the instruments of service for purposes of constructing, using and maintaining the project. An owner who receives an exclusive license or transference of ownership in the documents or their copyrights has the unfettered power to limit the architect's future creative uses of similar motifs or stylistic devices expressed in the documents.

*Caution:* Serious consequences may result if Paragraph 1.3.2 is changed to give the owner broad rights with regard to the architect's instruments of service and no change is made in Subparagraph 1.3.8.5 to eliminate the right to terminate the architect at the owner's convenience.

## COMMENTS

If the architect is adjudged in default by an arbiter or court of law, the owner not only receives the right to copy and use the documents, but also to authorize another architect to change or correct them to complete the project.

Commercial lenders providing project financing will occasionally request the owner to assign all rights in the project to the lender as a condition of the financing, in order to protect against a default on the loan. This sentence makes such assignment ineffective as to the owner's license to use the architect's drawings unless the architect has agreed to the assignment.

## DOCUMENT TEXT

sion or control. If and upon the date the **Architect is adjudged in default** of this Agreement, the foregoing license shall be deemed terminated and replaced by a second, nonexclusive license permitting the Owner to authorize other similarly credentialed design professionals to reproduce and, where permitted by law, to make changes, corrections or additions to the Instruments of Service solely for purposes of completing, using and maintaining the Project.

**1.3.2.3** Except for the licenses granted in Subparagraph 1.3.2.2, no other license or right shall be deemed granted or implied under this Agreement. **The Owner shall not assign, delegate, sublicense, pledge or otherwise transfer any license granted herein to another party without the prior written agreement of the Architect.** However, the Owner shall be permitted to authorize the Contractor, Subcontractors, Sub-subcontractors and material or equipment suppliers to reproduce applicable portions of the Instruments of Service appropriate to and for use in their execution of the Work by license granted in Subparagraph 1.3.2.2. Submission or distribution of Instruments of Service to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publication in derogation of the reserved rights of the Architect and the Architect's consultants. The Owner shall not use the Instruments of Service for future additions or alterations to this Project or for other projects, unless the Owner obtains the prior written agreement of the Architect and the Architect's consultants. Any unauthorized use of the Instruments of Service shall be at the Owner's sole risk and without liability to the Architect and the Architect's

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consultants.

**1.3.2.4** Prior to the Architect providing to the Owner any Instruments of Service in electronic form or the Owner providing to the Architect any electronic data for incorporation into the Instruments of Service, the Owner and the Architect shall by separate written agreement set forth the specific conditions governing the format of such Instruments of Service or electronic data, including any special limitations or licenses not otherwise provided in this Agreement.

Given the rapid pace of technological change, it is not practical to address all the varieties of electronic documentation in a standard form document. The parties may wish to develop a separate, written agreement on how to deal with the electronic formats they may use.

### **1.3.3 CHANGE IN SERVICES**

**1.3.3.1 Change in Services** of the Architect, including services required of the Architect's consultants, may be accomplished after execution of this Agreement, without invalidating the Agreement, if mutually agreed in writing, **if required by circumstances beyond the Architect's control**, or if the Architect's services are affected as described in Subparagraph 1.3.3.2. In the absence of mutual agreement in writing, the Architect shall notify the Owner prior to providing such services. **If the Owner deems that all or a part of such Change in Services is not required**, the Owner shall give prompt written notice to the Architect, and the Architect shall have no obligation to provide those services. Except for a change due to the fault of the Architect, Change in Services of the Architect shall entitle the Architect to an adjustment in compensation pursuant to Paragraph 1.5.2, and to any Reimbursable Expenses described in Subparagraph 1.3.9.2 and Paragraph 1.5.5.

Few projects proceed from conception to completion without changes. By necessity, a mechanism is required to provide for adjustments in the architect's services and compensation during the course of the project.

The architect is not permitted to benefit from events that are the architect's fault.

The owner ultimately has the power to stop a change in services by notifying the architect.

**1.3.3.2** If any of the following circumstances affect the Architect's services for the Project, the Architect shall be entitled to an appropriate adjustment

## COMMENTS

Introduced in the American Arbitration Association's (AAA) rules in 1978, formal mediation is relatively new to the construction industry. The AIA began incorporating mediation into its standard documents in 1991 with the publication of its construction manager-constructor documents.

## DOCUMENT TEXT

in the Architect's schedule and compensation:

- .1 change in the instructions or approvals given by the Owner that necessitate revisions in Instruments of Service;
- .2 enactment or revision of codes, laws or regulations or official interpretations which necessitate changes to previously prepared Instruments of Service;
- .3 decisions of the Owner not rendered in a timely manner;
- .4 significant change in the Project including, but not limited to, size, quality, complexity, the Owner's schedule or budget, or procurement method;
- .5 failure of performance on the part of the Owner or the Owner's consultants or contractors;
- .6 preparation for and attendance at a public hearing, a dispute resolution proceeding or a legal proceeding except where the Architect is party thereto;
- .7 change in the information contained in Article 1.1.

### **1.3.4 MEDIATION**

**1.3.4.1** Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party. If such matter relates to or is the subject of a lien arising out of the Architect's services, the Architect may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the matter by mediation or by arbitration.

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**1.3.4.2** The **Owner and Architect shall endeavor to resolve claims**, disputes and other matters in question between them by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the **Construction Industry Mediation Rules** of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

In mediation, a third party neutral is used to facilitate and assist the parties in the negotiation of a settlement of a dispute. The mediator does not make any binding decisions regarding the issues. The parties themselves create the solution to their problem in accordance with preset rules of mediation. If the parties cannot arrive at a negotiated resolution, they proceed to arbitration. However, past experience has shown mediation to be highly successful in resolving a large percentage of disputes.

The AAA's rules for construction industry mediation and arbitration are available from AAA's regional offices or from its national headquarters. The address of the latter is given in the instructions to most AIA documents.

**1.3.4.3** The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

Since 1888, arbitration provisions have been included in AIA documents. Arbitration is a formal, binding process for resolving disputes outside of litigation. It requires the selection of one or more arbiters who have judge-like powers to hear the parties' dispute and make decisions that are enforceable by a court of law. Arbitrations in the construction industry are private, and arbiters are required to be knowledgeable about the construction industry. The arbiters are usually building owners, architects, engineers, contractors or lawyers practicing in the construction industry.

### **1.3.5 ARBITRATION**

**1.3.5.1** Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with Paragraph 1.3.4.

The AIA takes the position that selection of a method of dispute resolution such as arbitration is essentially a business decision. Although arbitration is intended to be quicker, less complex and more convenient than litigation, each case has unique factors that may negate some or all of these benefits.

**1.3.5.2** Claims, disputes and other matters in question between the parties that are not resolved by mediation shall be decided by **arbitration** which, unless the parties mutually agree otherwise, shall be in accordance

## COMMENTS

Disputes involving the owner, architect and contractor are not uncommon. In a court of law, however, the architect and contractor would be held to different standards of performance. This is one reason why separate arbitrations are favored. Another reason involves the greatly increased cost and time required to resolve multi-party arbitrations.

Like court decisions, arbitration awards are fully enforceable in a court of law.

## DOCUMENT TEXT

with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association.

**1.3.5.3** A demand for arbitration shall be made within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

**1.3.5.4** No arbitration arising out of or relating to this Agreement shall include, by consolidation or joinder or in any other manner, an additional person or entity not a party to this Agreement, except by written consent containing a specific reference to this Agreement and signed by the Owner, Architect, and any other person or entity sought to be joined. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to this Agreement shall be specifically enforceable in accordance with applicable law in any court having jurisdiction thereof.

**1.3.5.5** The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction

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thereof.

### **1.3.6 CLAIMS FOR CONSEQUENTIAL DAMAGES**

The Architect and the Owner waive consequential damages for claims, disputes or other matters in question arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Paragraph 1.3.8.

In contrast to direct damages for breach of contract, consequential damages are indirect and include loss of reputation, loss of business profits and loss of the ability to proceed with other projects. By mutually waiving claims for such unanticipated and even remote damages, the parties remove a source of inflated claims and needless litigation.

### **1.3.7 MISCELLANEOUS PROVISIONS**

**1.3.7.1** This Agreement shall be governed by the **law of the principal place of business of the Architect**, unless otherwise provided in Paragraph 1.4.2.

The law in the state where the architect's principal office is located will be used in interpreting this agreement and evaluating the performance of the parties.

**1.3.7.2** **Terms in this Agreement shall have the same meaning as those in the edition of AIA Document A201**, General Conditions of the Contract for Construction, current as of the date of this Agreement.

By this cross-reference, the parties agree to adopt the terminology found in AIA Document A201-1997, including such terms as work, contract documents, drawings, contractor and substantial completion. Terms with specialized meanings are generally defined and capitalized in AIA documents.

**1.3.7.3** Causes of action between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued and the applicable **statutes of limitations** shall commence to run not later than either the date of Substantial Completion for acts or failures to act occurring prior to Substantial Completion or the date of issuance of the final Certificate for Payment for acts or failures to act occurring after Substantial Completion. In no event shall such statutes of limitations commence to run any later than the date when the Architect's services are substantially completed.

One of the purposes of standard form documents is to provide uniformity of expectations wherever used. State laws having to do with statutes of limitations, however, are diverse, particularly as to the beginning dates for the running of such statutes. This provision uses the dates of substantial completion by the contractor and final payment to the contractor as commencement dates for statutes of limitations that apply to the agreement. Because this is a private agreement, this provision will only apply to the owner and architect and not to claims by third parties.

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The owner-architect agreement must be coordinated with the owner-contractor contract, which often is executed after the signing of this agreement. For this reason, AIA Document B141-1997 is linked in several ways to AIA Document A201-1997, General Conditions of the Contract for Construction. Subparagraph 1.3.7.4 provides for a waiver of damages that are covered by property insurance *if* such insurance has been purchased and applied to such damages as a requirement of the owner-contractor contract. In the insurance industry this is known as waiver of subrogation. This provision is derived from a parallel provision found in Subparagraph 11.4.7 of AIA Document A201-1997, which requires the owner to obtain such waivers from its consultants. The waivers of subrogation prevent the insurance company from suing any of the principal participants on the project to recover what it has paid out to another principal participant for an insured loss. The owner benefits in two ways: first, disputes are avoided on the project and second, only one property insurance policy is needed to protect all principal participants on the project, including contractors, architects, subcontractors, engineers, sub-subcontractors and consultants. This saves the owner money and time, and promotes harmony on the project.

This agreement obligates the parties only to each other and not to others, such as lenders, contractors, construction workers or sureties.

Hazardous materials may require special handling and licensing procedures. Unless the owner and architect agree that the architect will deal with these matters, the architect has no responsibility for them.

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**1.3.7.4** To the extent damages are covered by property insurance during construction, the Owner and the Architect waive all rights against each other and against the contractors, consultants, agents and employees of the other for damages, except such rights as they may have to the **proceeds of such insurance as set forth in the edition of AIA Document A201, General Conditions of the Contract for Construction**, current as of the date of this Agreement. The Owner or the Architect, as appropriate, shall require of the contractors, consultants, agents and employees of any of them similar waivers in favor of the other parties enumerated herein.

**1.3.7.5** Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of **a third party** against either the Owner or Architect.

**1.3.7.6** Unless otherwise provided in this Agreement, the Architect and Architect's consultants shall have no responsibility for the discovery, presence, handling, removal or disposal of or exposure of persons to **hazardous materials** or toxic substances in any form at the Project site.

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**1.3.7.7** The Architect shall have the right to include **photographic or artistic representations of the design** of the Project among the Architect's promotional and professional materials. The Architect shall be given reasonable access to the completed Project to make such representations. However, the Architect's materials shall not include the Owner's confidential or proprietary information if the Owner has previously advised the Architect in writing of the specific information considered by the Owner to be confidential or proprietary. The Owner shall provide professional credit for the Architect in the Owner's promotional materials for the Project.

**1.3.7.8** If the Owner requests the Architect to execute **certificates**, the proposed language of such certificates shall be submitted to the Architect for review at least 14 days prior to the requested dates of execution. The Architect shall not be required to execute certificates that would require knowledge, services or responsibilities beyond the scope of this Agreement.

## COMMENTS

Unless an owner informs the architect that such matters are confidential, the architect has the right to photograph and to show the results of the design to the public and to future clients.

A request for the architect's certificate often occurs because of the owner's dealings with other entities that have indirect interests in the project, such as financial institutions and governmental authorities. For example, the owner may be required by the lender to submit an architect's certificate at the loan closing. This can result in substantial pressure on the architect to submit the certificate, even though there may be no specific contractual obligation to do so.

Note, however, that if construction contract administration services are to be provided under AIA Document A201-1997, the architect is obliged to certify the contractor's payment requests, date of substantial completion and causes permitting termination of the contractor (see AIA Document G702, Application and Certificate for Payment, for example). The language provided by some banks for such certificates may impose unwarranted liability on the architect. This provision gives the architect time to review such language with legal counsel and to suggest modifications. See AIA Document B511, Guide for Amendments to AIA Owner-Architect Agreements, for suggested language for use on such certificates.

## COMMENTS

Because the architect's professional services are often unique to that individual or firm, assignment of this agreement to third parties is only permitted with the architect's agreement. The only exception involves an assignment to the owner's lender who is providing financing for the project.

The owner-architect agreement represents a business transaction. In exchange for the owner's receipt of the benefit of the architect's services, the architect expects the benefit of timely payment of the agreed-upon compensation. Thus, nonpayment is a serious matter and may be treated as justification for suspension or even termination of services.

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**1.3.7.9** The Owner and Architect, respectively, bind themselves, their partners, successors, assigns and legal representatives to the other party to this Agreement and to the partners, successors, assigns and legal representatives of such other party with respect to all covenants of this Agreement. **Neither the Owner nor the Architect shall assign this Agreement** without the written consent of the other, except that the Owner may assign this Agreement to an institutional lender providing financing for the Project. In such event, the lender shall assume the Owner's rights and obligations under this Agreement. The Architect shall execute all consents reasonably required to facilitate such assignment.

### **1.3.8 TERMINATION OR SUSPENSION**

**1.3.8.1** If the Owner fails to make payments to the Architect in accordance with this Agreement, such failure shall be considered substantial nonperformance and cause for termination or, at the Architect's option, cause for **suspension of performance of services** under this Agreement. If the Architect elects to suspend services, prior to suspension of services, the Architect shall give seven days' written notice to the Owner. In the event of a suspension of services, the Architect shall have no liability to the Owner for delay or damage caused the Owner because of such suspension of services. Before resuming services, the Architect shall be paid all sums due prior to suspension and any expenses incurred in the interruption and resumption of the Architect's services. The Architect's fees for the remaining services and the time schedules shall be equitably adjusted.

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**1.3.8.2** If the Project is suspended by the Owner for more than 30 consecutive days, the Architect shall be compensated for services performed prior to notice of such suspension. When the Project is resumed, the **Architect shall be compensated for expenses incurred in the interruption and resumption of the Architect's services.** The Architect's fees for the remaining services and the time schedules shall be equitably adjusted.

**1.3.8.3** If the Project is suspended or the Architect's services are suspended for more than 90 consecutive days, the Architect may terminate this Agreement by giving not less than seven days' written notice.

**1.3.8.4** This Agreement may be terminated by either party upon not less than seven days' written notice should the other party fail substantially to perform in accordance with the terms of this Agreement through no fault of the party initiating the termination.

**1.3.8.5** This Agreement may be **terminated by the Owner upon not less than seven days' written notice to the Architect for the Owner's convenience** and without cause.

**1.3.8.6** In the event of termination not the fault of the Architect, the Architect shall be compensated for services performed prior to termination, together with Reimbursable Expenses then due and all Termination Expenses as defined in Subparagraph 1.3.8.7.

**1.3.8.7 Termination Expenses** are in addition to compensation for the services of the Agreement and include expenses directly attributable to termination for which the Architect is not otherwise compensated, plus an amount for the Architect's anticipated

## COMMENTS

For any number of reasons, the owner may need to suspend the project. Typically, the architect has predicated staffing and timing of services based upon a continuous process. Unless the agreement and the initial project schedule anticipated a suspension, an equitable adjustment in compensation and time schedule may be appropriate.

The owner's right to terminate for convenience is a right that should be exercised cautiously, since there are consequences for both the owner and architect. The architect will be entitled to termination expenses, since termination for the owner's convenience is not the fault of the architect. In addition, the owner forfeits the right to use the architect's documents under Subparagraph 1.3.2.2, unless some other agreement is reached.

*Caution:* If Subparagraph 1.3.2.2 is changed to give the owner broad rights in the architect's instruments of service, a corresponding change in Subparagraph 1.3.8.5 may be necessary to re-balance the rights of the parties by eliminating or abridging the owner's right to terminate the architect at the owner's convenience.

The architect's termination expenses may include the costs of terminating consultants' contracts, reducing staff and even terminating leases on office space and equipment. In addition, the architect's inducement for entering the agreement, which is profit, is expected to be paid in full.

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This provision will have to be modified if payments are to be made based upon the stage of the project's progress or based upon a time period other than that of one month.

The percentage method of compensation is especially prone to abuse when deductions are made to the cost of the work due to such things as damages caused by the contractor. No deductions in payment to the architect are allowed in such situations. If a percentage method of compensation is to be used, page 14 of the instructions contains optional text to further deal with complexities that may be caused by deductions or deletions in the project's scope which, if not foreseen, may in turn lead to unfair deductions in the architect's compensation even though services were performed on the deleted portions of the project.

The costs that fall into the reimbursable expenses category are largely outside of the architect's ability to estimate with any accuracy at the beginning of a project. Such an estimate, with a large contingency to reflect the uncertainties involved, would have to be made if these costs were included in the architect's compensation. Thus, an owner would likely pay more under such an arrangement than by reimbursing the architect for these costs as they are incurred. The list of expenses described in the agreement may be modified by addition, deduction or even placement of a limit on them. A general limitation on all of these expenses is that they must be "directly related to the project," and thus are not part of the architect's overhead costs.

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profit on the value of the services not performed by the Architect.

### **1.3.9 PAYMENTS TO THE ARCHITECT**

**1.3.9.1** Payments on account of services rendered and for Reimbursable Expenses incurred shall be made **monthly** upon presentation of the Architect's statement of services. **No deductions shall be made from the Architect's compensation on account of penalty, liquidated damages or other sums withheld from payments to contractors, or on account of the cost of changes in the Work other than those for which the Architect has been adjudged to be liable.**

**1.3.9.2 Reimbursable Expenses** are in addition to compensation for the Architect's services and include expenses incurred by the Architect and Architect's employees and consultants directly related to the Project, as identified in the following Clauses:

- .1 transportation in connection with the Project, authorized out-of-town travel and subsistence, and electronic communications;
- .2 fees paid for securing approval of authorities having jurisdiction over the Project;
- .3 reproductions, plots, standard form documents, postage, handling and delivery of Instruments of Service;
- .4 expense of overtime work requiring higher than regular rates if authorized in advance by the Owner;
- .5 renderings, models and mock-ups requested by the Owner;
- .6 expense of professional liability insurance dedicated exclusively to this Project or the expense of additional

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insurance coverage or limits requested by the Owner in excess of that normally carried by the Architect and the Architect's consultants;

.7 reimbursable expenses as designated in Paragraph 1.5.5;

.8 other similar direct Project-related expenditures.

**1.3.9.3 Records of Reimbursable Expenses**, of expenses pertaining to a Change in Services, and of services performed on the basis of hourly rates or a multiple of Direct Personnel Expense shall be available to the Owner or the Owner's authorized representative at mutually convenient times.

Because reimbursable expenses, hourly rates and direct personnel expenses are direct costs, the owner has the right to examine the architect's records with regard to them. This permission, however, does not include the right to examine other records of the architect.

**1.3.9.4 Direct Personnel Expense** is defined as the direct salaries of the Architect's personnel engaged on the Project and the portion of the cost of their mandatory and customary contributions and benefits related thereto, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, employee retirement plans and similar contributions.

If different cost-based methods are used to calculate payments to the architect, such as an hourly rate or direct salary expense, these other methods may also need to be defined. The instructions to AIA Document B141-1997 contain example text for such purposes on page 14.

## **ARTICLE 1.4 SCOPE OF SERVICES AND OTHER SPECIAL TERMS AND CONDITIONS**

**1.4.1 Enumeration of Parts of the Agreement.** This Agreement represents the **entire and integrated agreement** between the Owner and the Architect and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and Architect. This Agreement comprises the documents listed below.

Note that amendments to this agreement must be made in writing.

**1.4.1.1** Standard Form of Agreement Between Owner and Architect, AIA

## COMMENTS

Unless otherwise indicated, the scope of services for this agreement is for design and contract administration services.

An architect may be compensated using various methods. The instructions to AIA Document B141-1997 enumerate ten distinct methods of compensation and provide model text for six of them. In some situations, a combination of compensation methods may be chosen by the parties. Again, refer to the instructions for AIA Document B141-1997, which also contain worksheets for calculating compensation.

The AIA makes no representation as to the appropriateness of any of these compensation methods for a particular project. The choice of a compensation method is a business decision for the owner and architect. The AIA makes no recommendations and has no guidelines or schedules that specify the amount of compensation an architect should be paid.

As with compensation under Paragraph 1.5.1, the method of adjustment for change in services is left to the parties. Establishing such a method in the agreement removes a potential cause of disagreement.

## DOCUMENT TEXT

Document B141-1997.

**1.4.1.2 Standard Form of Architect's Services: Design and Contract Administration, AIA Document B141-1997**, or as follows:  
*(List other documents, if any, delineating Architect's scope of services.)*

**1.4.1.3** Other documents as follows:  
*(List other documents, if any, forming part of the Agreement.)*

**1.4.2** Special Terms and Conditions. Special terms and conditions that modify this Agreement are as follows:

### **ARTICLE 1.5 COMPENSATION**

**1.5.1** For the Architect's services as described under Article 1.4, **compensation** shall be computed as follows:

**1.5.2** If the services of the Architect are changed as described in Subparagraph 1.3.3.1, **the Architect's compensation shall be adjusted**. Such adjustment shall be calculated as described below or, if no method of adjustment is indicated in this Paragraph 1.5.2, in an equitable manner.

*(Insert basis of compensation, including rates and multiples of Direct Personnel Expense for Principals and employees, and identify Principals and classify employees, if required. Identify specific services to which particular methods of compensation apply.)*

## DOCUMENT TEXT

## COMMENTS

**1.5.3** For a Change in Services of the Architect's consultants, compensation shall be computed as a **multiple of** ( ) times the amounts billed to the Architect for such services.

The application of a multiplier to direct cost is sometimes used as a formula to compensate the architect for overhead, profit or both.

**1.5.4** For Reimbursable Expenses as described in Subparagraph 1.3.9.2, and any other items included in Paragraph 1.5.5 as Reimbursable Expenses, the compensation shall be computed as a **multiple of** ( ) times the expenses incurred by the Architect, and the Architect's employees and consultants.

A multiple applied to reimbursable expenses covers, among other things, the costs of advancing money on the owner's behalf and the costs of processing the bills.

**1.5.5 Other Reimbursable Expenses**, if any, are as follows:

Other reimbursable expenses are a matter of negotiation between the parties and may include the cost of special consultants, permitting fees, licenses, etc.

**1.5.6** The rates and multiples for services of the Architect and the Architect's consultants as set forth in this Agreement shall be adjusted in accordance with their normal salary review practices.

**1.5.7** An **initial payment** of Dollars (\$ ) shall be made upon execution of this Agreement and is the minimum payment under this Agreement. It shall be credited to the Owner's account at final payment. Subsequent payments for services shall be made monthly, and where applicable, shall be in proportion to services performed on the basis set forth in this Agreement.

The project's circumstances and the architect's past relationship with the owner may influence the amount, if any, of the initial payment. Remember that the owner has the right to terminate for convenience, which can be exercised before the first month has passed after the agreement was signed. Under Subparagraph 1.3.8.6, the architect is entitled to termination expenses, but may still experience difficulty in getting paid.

**1.5.8** Payments are due and payable ( ) days from the date of the Architect's invoice. Amounts unpaid ( ) days after the invoice date shall bear interest at the rate entered below, or in the absence thereof at **the legal rate** prevailing from time to time at the principal place of business of the Architect.

This rate is established by state statute and varies from state to state.

**COMMENTS**

**DOCUMENT TEXT**

*(Usury laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at the Owner's and Architect's principal places of business, the location of the Project and elsewhere may affect the validity of this provision. Specific legal advice should be obtained with respect to deletions or modifications, and also regarding requirements such as written disclosures or waivers.)*

If the completion of the project is delayed beyond the time frame anticipated when the agreement was signed, this provision requires the architect's compensation to be adjusted as it would be for a change in services.

**1.5.9** If the services covered by this Agreement **have not been completed** within (     ) months of the date hereof, through no fault of the Architect, extension of the Architect's services beyond that time shall be compensated as provided in Paragraph 1.5.2.

This Agreement entered into as of the day and year first written above.

The authorized representatives of both parties should sign, indicating their official capacity to bind the owner or architect. For corporations and governmental entities, a document showing proof of their authority should be attached.

**OWNER** (Signature)

(Printed name and title)

**ARCHITECT** (Signature)

(Printed name and title)

## DOCUMENT TEXT

## COMMENTS

### **Standard Form of Architect's Services: Design and Contract Administration**

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

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#### **ARTICLE 2.1 PROJECT ADMINISTRATION SERVICES**

**2.1.1** The Architect shall manage the Architect's services and administer the Project. The Architect **shall consult with the Owner, research applicable design criteria**, attend Project meetings, communicate with members of the Project team and issue **progress reports**. ~~The Architect shall coordinate the services provided by the Architect and the Architect's consultants~~ with those services provided by the Owner and the Owner's consultants.

A continuing dialogue with the owner regarding the development of the design and the construction effort is encouraged to avoid failed expectations and to minimize disputes.

The determination of the applicable design criteria is one of the most important, but least appreciated of the architect's services. Review of these criteria with the owner provides the owner with insight into the value added by the architect's participation in the project.

Progress reports can consist of memoranda detailing the progress of the project, copies of correspondence, minutes of meetings or any other writings that keep the owner advised as to the progress of the project.

The architect is required under Paragraph 2.4.1 to furnish normal structural, mechanical and electrical engineering services. The architect may choose to retain outside consultants to provide those services. The architect must coordinate the design services of the consultants with those of the architect's design services and with those provided by others, such as consultants of the owner.

## COMMENTS

The project schedule should not be confused with the construction schedule, which is prepared by the contractor. The project schedule identifies the periods for design and construction, allows time for approvals and may include pre-design and facility operation activities. On the other hand, the construction schedule covers the period between the date of commencement of construction and the proposed date for substantial completion. Except for identification of items needing long-lead time for their procurement, the details of the construction period are generally left to the contractor.

The identification of important milestone dates serves a dual purpose. It alerts the owner to the fact that timely completion of the project requires timely decision-making by the owner, and it enables the architect to measure the effect of delayed decisions on the overall timing of the architect's services.

The architect should alert the owner to the fact that these dates are estimates. They are not guaranteed because they are based on assumptions that may change during the course of the project.

This provision alerts the owner to a service that often goes unmentioned, but which is commonly performed by architects as part of design. Later changes, including substitutions, suggested by contractors, construction managers and others do not diminish the value of this service, but simply extend a process of analysis initiated by the architect.

A presentation can be formal or informal and may be part of an ongoing process of discussions with the owner's representatives. If multiple presentations are required, the architect can provide these as a change in services.

The timing of these submissions typically is

## DOCUMENT TEXT

**2.1.2** When Project requirements have been sufficiently identified, the Architect shall prepare, and periodically update, a **Project schedule** that shall identify **milestone dates** for decisions required of the Owner, design services furnished by the Architect, completion of documentation provided by the Architect, commencement of construction and Substantial Completion of the Work.

**2.1.3** The Architect shall consider the value of **alternative materials, building systems and equipment**, together with other considerations based on program, budget and aesthetics in developing the design for the Project.

**2.1.4** Upon request of the Owner, the Architect shall make a **presentation** to explain the design of the Project to representatives of the Owner.

## DOCUMENT TEXT

## COMMENTS

**2.1.5 The Architect shall submit design documents** to the Owner at intervals appropriate to the design process for purposes of evaluation and approval by the Owner. The Architect shall be entitled to rely on approvals received from the Owner in the further development of the design.

controlled by the schedule prepared in accordance with Paragraph 2.1.2 and submitted for the owner's approval under Subparagraph 1.2.3.2. The owner's approvals of schematic, design development and construction documents are important milestones that an architect must achieve before proceeding to the next step in the development of the design. Failing to timely approve or revoking prior approvals can seriously impact and delay the design process, which may then require a change in services to adjust the schedule and the architect's compensation. By approving submissions, however, the owner does not become a guarantor of the architect's services. The architect remains fully responsible for the professional quality of the architectural services.

**2.1.6** The Architect shall assist the Owner in connection with the **Owner's responsibility** for filing documents required for the approval of governmental authorities having jurisdiction over the Project.

This general statement covers many issues that will have to be fleshed out in more detail for each individual project. For example, the owner may obtain the building permit in some jurisdictions through a designated contractor or architect. How will that process be handled and by whom? Often, questions like this are answered by a detailed supplement to this provision that assigns to the owner or architect specific tasks and procedures involving governmental authorities in the place where the project is located.

### **2.1.7 EVALUATION OF BUDGET AND COST OF THE WORK**

**2.1.7.1** When the Project requirements have been sufficiently identified, the Architect shall prepare a **preliminary estimate** of the Cost of the Work. This estimate may be based on current area, volume or similar conceptual estimating techniques. As the design process progresses through the end of the preparation of the

The architect's cost-estimating services are ongoing and begin with the identification of project requirements. The estimated cost should be compared to the owner's budget provided in Clause 1.1.2.5.2 so that discrepancies between the two can be discussed and resolved at an early date. As design progresses, the cost estimate should be updated and refined.

## COMMENTS

Under AIA Document B141-1997, the architect is required to advise the owner and make appropriate recommendations if the architect's estimate exceeds the owner's budget for the cost of the work—that is, the amount stated in Clause 1.1.2.5.2.

If the architect becomes aware of adjustments to the preliminary estimate of the cost of the work (based on current area, volume or similar conceptual estimating techniques), the architect should inform the owner.

Even if the schematic design estimate is unchanged, the architect may wish to confirm this, in writing, with the owner.

The architect's estimate of the cost of the work represents the architect's judgment as to the price likely to be changed by another—the contractor. The architect has no control over that price and cannot guarantee it. It is particularly difficult to estimate costs on renovation projects, unusual designs and building types with which the architect is not normally involved. If greater specificity is required, detailed cost estimating services may be retained under Paragraph 2.8.3. Alternatively, the owner may wish to retain a cost consultant.

## DOCUMENT TEXT

Construction Documents, the Architect shall update and refine the preliminary estimate of the Cost of the Work. The Architect shall advise the Owner of any adjustments to previous estimates of the Cost of the Work indicated by changes in Project requirements or general market conditions. **If at any time the Architect's estimate of the Cost of the Work exceeds the Owner's budget**, the Architect shall make appropriate recommendations to the Owner to adjust the Project's size, quality or budget, and the Owner shall cooperate with the Architect in making such adjustments.

**2.1.7.2** Evaluations of the Owner's budget for the Project, the preliminary **estimate of the Cost of the Work** and updated estimates of the Cost of the Work prepared by the Architect represent the Architect's judgment as a design professional familiar with the construction industry. **It is recognized, however, that neither the Architect nor the Owner has control over the cost of labor, materials or equipment, over the Contractor's competitive bidding, market or negotiating conditions. Accordingly, the Architect cannot and does not warrant or represent that bids or negotiated prices will not vary from the Owner's budget for the Project or from any estimate of the Cost of the Work or evaluation prepared or agreed to by the Architect.**

## DOCUMENT TEXT

**2.1.7.3** In preparing estimates of the Cost of the Work, the Architect shall be permitted to include contingencies for design, bidding and price escalation; to determine what materials, equipment, component systems and types of construction are to be included in the Contract Documents; to make reasonable adjustments in the scope of the Project and to include in the Contract Documents **alternate bids** as may be necessary to adjust the estimated Cost of the Work to meet the Owner's budget for the Cost of the Work. If an increase in the Contract Sum occurring after execution of the Contract between the Owner and the Contractor causes the budget for the Cost of the Work to be exceeded, that budget shall be increased accordingly.

**2.1.7.4** If bidding or negotiation has not commenced **within 90 days** after the Architect submits the Construction Documents to the Owner, the budget for the Cost of the Work shall be adjusted to reflect changes in the general level of prices in the construction industry.

**2.1.7.5** If the budget for the Cost of the Work is exceeded by the lowest bona fide bid or negotiated proposal, the Owner shall:

- .1 give written approval of an increase in the budget for the Cost of the Work;
- .2 authorize rebidding or renegotiating of the Project within a reasonable time;
- .3 terminate in accordance with Subparagraph 1.3.8.5; or
- .4 cooperate in revising the Project scope and quality as required to reduce the Cost of the Work.

## COMMENTS

Alternate bid packages allow the architect and owner to include in the bidding documents separate items which, were they all part of a single package, might cause all bids to exceed the owner's budget. In that case, the only fair result would be the elimination of those items and the complete rebidding of the work. By use of a base bid and a separate bid on alternates, the owner and architect can compare the base bid to the owner's budget and then accept only those alternates which do not result in the total contract price exceeding the owner's budget.

Even a relatively short delay can have a significant impact on construction prices. A 90-day grace period is specified here, but a shorter or longer period may be appropriate depending upon the circumstances.

## COMMENTS

If bids or proposals come in over budget and the owner chooses to cooperate with the architect in revising the scope and quality of the project, the architect is obligated to redesign for no additional compensation.

A well-thought out program is essential for a successful start to a project. It is one of the first tasks along with establishing a budget that an owner needs to perform. Unfortunately, very few owners fully understand the discipline and detail that is involved in the development of a professional program. In many cases, the owner and architect may decide to share this task, and commission the architect to assist or actually provide the services for developing the program.

An architect will ordinarily rely on surveying services furnished by the owner, since architects seldom have surveyors on staff to verify the accuracy and completeness of such services. The architect can nevertheless assist the owner in obtaining or even coordinating such services, if the owner and architect agree to expand the role of the architect in these matters.

The architect may wish to suggest AIA Document G601, Land Survey Agreement, for the owner's review.

## DOCUMENT TEXT

**2.1.7.6** If the Owner chooses to proceed under Clause 2.1.7.5.4, the Architect, **without additional compensation**, shall modify the documents for which the Architect is responsible under this Agreement as necessary to comply with the budget for the Cost of the Work. The modification of such documents shall be the limit of the Architect's responsibility under this Paragraph 2.1.7. The Architect shall be entitled to compensation in accordance with this Agreement for all services performed whether or not construction is commenced.

### **ARTICLE 2.2 SUPPORTING SERVICES**

**2.2.1** Unless specifically designated in Paragraph 2.8.3, the services in this Article 2.2 shall be provided by the Owner or the Owner's consultants and contractors.

**2.2.1.1** The Owner shall furnish a **program** setting forth the Owner's objectives, schedule, constraints and criteria, including space requirements and relationships, special equipment, systems and site requirements.

**2.2.1.2** The Owner shall furnish **surveys** to describe physical characteristics, legal limitations and utility locations for the site of the Project, and a written legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data with respect to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and

## DOCUMENT TEXT

private, above and below grade, including inverts and depths. All the information on the survey shall be referenced to a Project benchmark.

**2.2.1.3** The Owner shall furnish services of **geotechnical engineers** which may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, ground corrosion tests and resistivity tests, including necessary operations for anticipating subsoil conditions, with reports and appropriate recommendations.

### **ARTICLE 2.3 EVALUATION AND PLANNING SERVICES**

**2.3.1** The Architect shall provide a preliminary evaluation of the information furnished by the Owner under this Agreement, including the Owner's program and schedule requirements and budget for the Cost of the Work, **each in terms of the other**. The Architect shall review such information to ascertain that it is consistent with the requirements of the Project and shall notify the Owner of any other information or consultant services that may be reasonably needed for the Project.

**2.3.2** The Architect shall provide a preliminary evaluation of the Owner's site for the Project based on the information provided by the Owner of site conditions, and the Owner's program, schedule and budget for the Cost of the Work.

## COMMENTS

Geotechnical services are ordinarily provided by the owner, though often with the administration and assistance of the architect. The architect is entitled to rely on the accuracy and completeness of such services furnished by the owner. The architect also has the option of offering geotechnical services under Paragraph 2.8.3.

The architect may wish to suggest AIA Document G602, Geotechnical Services Agreement, for the owner's review.

Quality, cost and time are the three key factors that must be balanced again and again during the development of the project. The owner and architect will discuss these factors in completing Article 1.1, but often the parties may be uncertain about one or more of these factors at that time. As the project begins, the architect is required under Paragraph 2.3.1 to once again analyze the balance and to make recommendations to the owner on any corrections or the need for other consultant services.

Every site is unique, and as such, must be evaluated against the desired quality, time and cost for the project. The site and siting of a proposed building can have a significant impact on the project's feasibility. For example, a one-story 200,000 square foot warehouse can be built on high or low ground, on a plain or a hill, and on soil or rock, but cost, delivery time and quality will vary considerably depending upon the choice of site.

## COMMENTS

Decisions such as whether to retain a construction manager, whether multiple prime contracts will be issued and whether the project will be “fast-tracked” can all affect the financial and time requirements of the project and the architect’s services. These decisions will be important in developing a project schedule, in determining the sequence of the architect’s design services and in evaluating cost. This review may be used by the architect to acquaint the owner with other services the architect can offer during construction.

Initially conceived by the owner, a project is given shape through the talents of the architect who uses the schematic design documents to show the project’s principal themes expressed in concrete terms, even though on paper, in cardboard modeling or by other representations in CAD. This is a collaborative process between the owner and architect. It is formalized in the agreement through Paragraph 2.1.5, which requires the architect to submit these design documents for the owner’s approval. An owner is not obliged to approve the scheme if it fails to match the agreed-upon program, budget or time frame for delivery. However, the owner must act in good faith and not arbitrarily reject scheme after scheme. By approving the schematic design documents, the owner does not become the guarantor of the architect’s services. The architect remains fully responsible for the professional quality of those services.

## DOCUMENT TEXT

**2.3.3** The Architect shall review the Owner's proposed method of contracting for construction services and shall notify the Owner of anticipated impacts that such method may have on the Owner's program, financial and time requirements, and the scope of the Project.

### **ARTICLE 2.4 DESIGN SERVICES**

**2.4.1** The Architect's design services shall include normal structural, mechanical and electrical engineering services.

#### **2.4.2 SCHEMATIC DESIGN DOCUMENTS**

**2.4.2.1** The Architect shall provide Schematic Design Documents based on the mutually agreed-upon program, schedule, and budget for the Cost of the Work. The documents shall establish the conceptual design of the Project illustrating the scale and relationship of the Project components. The Schematic Design Documents shall include a conceptual site plan, if appropriate, and preliminary building plans, sections and elevations. **At the Architect's option, the Schematic Design Documents may include study models, perspective sketches, electronic modeling or combinations of these media.** Preliminary selections of major building systems and construction materials shall be noted on the drawings or described in writing.

## DOCUMENT TEXT

### **2.4.3 DESIGN DEVELOPMENT DOCUMENTS**

**2.4.3.1** The Architect shall provide Design Development Documents based on the approved Schematic Design Documents and updated budget for the Cost of the Work. The Design Development Documents **shall illustrate and describe the refinement of the design of the Project, establishing the scope, relationships, forms, size and appearance of the Project by means of plans, sections and elevations, typical construction details, and equipment layouts.** The Design Development Documents shall include specifications that identify major materials and systems and establish in general their quality levels.

### **2.4.4 CONSTRUCTION DOCUMENTS**

**2.4.4.1** The Architect shall provide Construction Documents **based on the approved Design Development Documents** and updated budget for the Cost of the Work. The Construction Documents shall set forth in detail the requirements for construction of the Project. The Construction Documents shall include Drawings and Specifications that establish in detail the quality levels of materials and systems required for the Project.

## COMMENTS

Through the design development documents, the architect further refines the concepts contained in the approved schematic design documents by adding general information about the structural, mechanical and electrical systems of the building. Although the typical design development documents in some aspects may appear refined, they are still not specific enough from which to build the building. However, they often contain sufficient information to obtain a negotiated price from a contractor (but not sufficient for competitive bidding). For that reason, fast-track construction contracts or construction manager arrangements will often initially reference design development documents as part of the contract documents. This is done in combination with a provision that mandates their continued development into construction documents which, if properly done, are then later ratified by the owner and contractor to supersede the design development documents. See AIA Document B511 for provisions that deal with fast-track construction.

In accordance with Paragraph 2.1.5, the owner's approval of the design development documents is a precondition that must be achieved before the architect begins work on the construction documents. When the construction documents are completed, the project documentation will have evolved to a yet higher degree of detail. The architect's construction documents need to contain sufficient detail to obtain responsive competitive bids and to communicate to the trades and workers the actual result the owner wants to achieve.

## COMMENTS

The architect is not party to the owner-contractor agreement and should not attempt to act as the owner's lawyer. The architect can inform the owner about customary practices of the construction industry, and may provide AIA documents for the owner's review. However, the owner should understand that the architect is not providing legal advice.

The architect is a limited agent for the owner while performing these services, within the scope of the authority defined by the owner-architect agreement.

The architect may prepare a checklist for the owner to assist in the selection of an appropriately qualified contractor. Since the architect is not a party to the contract between owner and contractor, the owner must make the ultimate selection of the contractor. See AIA Document A305, Contractor's Qualification Statement, for a checklist of questions for screening potential contractors.

The determination as to whether a particular bid is responsive or a particular bidder responsible is often a legal matter which should be referred by the owner to the owner's legal counsel.

## DOCUMENT TEXT

**2.4.4.2** During the development of the Construction Documents, **the Architect shall assist the Owner** in the development and preparation of: (1) bidding and procurement information which describes the time, place and conditions of bidding; bidding or proposal forms; and the form of agreement between the Owner and the Contractor; and (2) the Conditions of the Contract for Construction (General, Supplementary and other Conditions). The Architect also shall compile the Project Manual that includes the Conditions of the Contract for Construction and Specifications and may include bidding requirements and sample forms.

### **ARTICLE 2.5 CONSTRUCTION PROCUREMENT SERVICES**

**2.5.1** The Architect **shall assist** the Owner in obtaining either competitive bids or negotiated proposals and shall assist the Owner in awarding and preparing contracts for construction.

**2.5.2** The Architect shall assist the Owner in establishing a list of **prospective bidders or contractors**.

**2.5.3** The Architect shall assist the Owner in **bid validation** or proposal evaluation and determination of the successful bid or proposal, if any. If requested by the Owner, the Architect shall notify all prospective bidders or contractors of the bid or proposal results.

## DOCUMENT TEXT

## COMMENTS

### **2.5.4 COMPETITIVE BIDDING**

**2.5.4.1** Bidding Documents shall consist of bidding requirements, proposed contract forms, General Conditions and Supplementary Conditions, Specifications and Drawings.

**2.5.4.2** If requested by the Owner, the Architect shall arrange for procuring the reproduction of Bidding Documents for distribution to prospective bidders. The Owner shall pay directly for the cost of reproduction or shall reimburse the Architect for such expenses.

**2.5.4.3** If requested by the Owner, the Architect shall distribute the Bidding Documents to prospective bidders and request their return upon completion of the bidding process. The Architect shall maintain a log of distribution and retrieval, and the amounts of deposits, if any, received from and returned to prospective bidders.

**2.5.4.4** The Architect shall consider requests for **substitutions**, if permitted by the Bidding Documents, and shall prepare and distribute addenda identifying approved substitutions to all prospective bidders.

**2.5.4.5** The Architect shall participate in or, at the Owner's direction, shall organize and conduct a pre-bid conference for prospective bidders.

**2.5.4.6** The Architect shall prepare responses to questions from prospective bidders and provide clarifications and interpretations of the Bidding Documents to all prospective bidders in the form of **addenda**.

**2.5.4.7** The Architect shall participate in or, at the Owner's direction, shall organize and conduct the opening of the bids. The Architect shall subse-

Prospective bidders may suggest substitutions in order to provide a competitive price. If the architect concludes that a particular substitution is appropriate, an addendum to the bidding documents should be issued to all prospective bidders. This gives all of them the opportunity to consider the allowed substitution in determining their respective proposed bids.

Addenda may be in written or graphic form, and may modify or interpret the bidding documents by means of additions, deletions, clarifications or corrections. Addenda should not be confused with modifications, which are issued after the contract is executed.

## COMMENTS

If, as a result of negotiations between the owner and contractor, changes are agreed upon to the scope or details of the project, the architect may have to issue an addendum revising the construction documents to reflect those changes.

Proposed contractors may suggest substitutions in order to provide a competitive price. If the architect concludes that a particular substitution is appropriate, an addendum to the bidding documents should be issued to all prospective contractors. This gives all of them the opportunity to consider the allowed substitution in determining their respective proposals. Before approval, the owner and architect need to strike a reasonable balance between the cost and quality of a proposed substitution.

## DOCUMENT TEXT

quently document and distribute the bidding results, as directed by the Owner.

### **2.5.5 NEGOTIATED PROPOSALS**

**2.5.5.1 Proposal Documents** shall consist of proposal requirements, proposed contract forms, General Conditions and Supplementary Conditions, Specifications and Drawings.

**2.5.5.2** If requested by the Owner, the Architect shall arrange for procuring the reproduction of Proposal Documents for distribution to prospective contractors. The Owner shall pay directly for the cost of reproduction or shall reimburse the Architect for such expenses.

**2.5.5.3** If requested by the Owner, the Architect shall organize and participate in selection interviews with prospective contractors.

**2.5.5.4** The Architect shall consider requests for **substitutions**, if permitted by the Proposal Documents, and shall prepare and distribute addenda identifying approved substitutions to all prospective contractors.

**2.5.5.5** If requested by the Owner, the Architect shall assist the Owner during negotiations with prospective contractors. The Architect shall subsequently prepare a summary report of the negotiation results, as directed by the Owner.

## DOCUMENT TEXT

## COMMENTS

### **ARTICLE 2.6 CONTRACT ADMINISTRATION SERVICES**

#### **2.6.1 GENERAL ADMINISTRATION**

**2.6.1.1** The Architect shall provide administration of the Contract between the Owner and the Contractor as set forth below and in the edition of **AIA Document A201**, General Conditions of the Contract for Construction, current as of the date of this Agreement. Modifications made to the General Conditions, when adopted as part of the Contract Documents, shall be enforceable under this Agreement only to the extent that they are consistent with this Agreement or approved in writing by the Architect.

**2.6.1.2** The Architect's responsibility to provide the Contract Administration Services under this Agreement commences with the award of the initial Contract for Construction and terminates at the issuance to the Owner of the final Certificate for Payment. However, **the Architect shall be entitled to a Change in Services in accordance with Paragraph 2.8.2 when Contract Administration Services extend 60 days after the date of Substantial Completion of the Work.**

**2.6.1.3** The Architect shall be a representative of and shall advise and consult with the Owner during the provision of the Contract Administration Services. The Architect shall have authority to act on behalf of the Owner only to the extent provided in this Agreement unless otherwise modified by written amendment.

**2.6.1.4** Duties, responsibilities and

On a project involving contract administration, a major factor influencing the architect's compensation proposal will be the general conditions, which establish the ground rules under which the architect must operate to administer the contract. Here, use of AIA Document A201-1997, General Conditions of the Contract for Construction, is presumed.

Use of general conditions other than AIA Document A201-1997 may create conflicts and may make it difficult for the architect to perform the obligations enumerated in Article 2.6. If the owner insists on using other general conditions and this was not indicated in response to Paragraph 1.1.5, the architect would be entitled to a change in services.

The architect's obligation to administer the contract for construction is subject to the time limits stated here. These time limits do not affect the architect's obligations under Article 2.7, however, or other post-construction services that might be agreed to under Paragraph 2.8.3.

## COMMENTS

During construction, the contractor may be confronted with ambiguities, omissions or conflicts within the drawings and specifications. The contractor is then obliged to bring these matters to the attention of the architect. The procedure outlined here enables the parties to address these issues in a timely fashion and avoid additional costs.

Note that Subparagraph 2.8.2.2 entitles the architect to a change in services for responding to unnecessary requests for information.

Although the architect's response may include issuance of revised drawings or specifications, no particular form of response is required. In appropriate circumstances, the architect's response may consist of selecting among alternatives presented by the contractor or a single letter specifying the design requirements. If the contractor believes that the architect's response affects the contract sum or contract time, the contractor can initiate a request for change order.

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limitations of authority of the Architect under this Article 2.6 shall not be restricted, modified or extended without written agreement of the Owner and Architect with consent of the Contractor, which consent will not be unreasonably withheld.

**2.6.1.5** The Architect shall review properly prepared, **timely requests by the Contractor for additional information about the Contract Documents**. A properly prepared request for additional information about the Contract Documents shall be in a form prepared or approved by the Architect and shall include a detailed written statement that indicates the specific Drawings or Specifications in need of clarification and the nature of the clarification requested.

**2.6.1.6** If deemed appropriate by the Architect, the Architect shall on the Owner's behalf prepare, reproduce and distribute **supplemental Drawings and Specifications** in response to requests for information by the Contractor.

**2.6.1.7** The Architect shall interpret and decide matters concerning performance of the Owner and Contractor under, and requirements of, the Contract Documents on written request of either the Owner or Contractor. The Architect's response to such requests shall be made in writing within any time limits agreed upon or otherwise with reasonable promptness.

## DOCUMENT TEXT

## COMMENTS

**2.6.1.8** Interpretations and decisions of the Architect shall be consistent with the intent of and reasonably inferable from the Contract Documents and shall be in writing or in the form of drawings. When making such interpretations and initial decisions, the Architect shall endeavor to secure faithful performance by both Owner and Contractor, shall not show partiality to either, **and shall not be liable for the results of interpretations or decisions so rendered in good faith.**

When making decisions under Article 4 of AIA Document A201-1997, the architect is entitled to the same immunity afforded to judges and other arbiters so long as the architect's decisions are made in good faith.

**2.6.1.9** The Architect shall render **initial decisions** on claims, disputes or other matters in question between the Owner and Contractor as provided in the Contract Documents. However, the Architect's decisions on matters relating to aesthetic effect shall be final if **consistent with the intent expressed in the Contract Documents.**

The architect is the initial decider of disputes between the owner and contractor. Procedures and time limits are set out in Article 4 of AIA Document A201-1997.

It is not enough for an interpretation or decision to comply with the architect's design intent in developing the contract documents. The interpretation or decision must be reasonably inferable from the documents themselves. Intentions of the architect that are not reflected in the contract documents do not bind the contractor, and may give rise to a change order if the contractor is required to perform work not reasonably contemplated at the time the agreement with the owner was executed.

## COMMENTS

The architect's role is to represent, advise and consult with the owner to the extent authorized in this agreement.

This is different from "periodic" visits, a term that implies definite and equal time intervals between visits regardless of project requirements. Sound professional judgment should determine the timing and number of visits to the site in accordance with the type and nature of the project and other contractual commitments. If the parties so choose, they may designate the number of visits under the schedule of services in Article 2.8.

The architect cannot detect every deviation from the contract documents regardless of the frequency of the architect's site visits. However, the architect is required to report deviations that are discovered to the owner.

Problems can arise when site visits are limited without regard to project requirements. As a general matter, it is in the best interest of both parties for the architect to be retained and compensated to make what is, in the architect's judgment, an adequate number of site visits.

The architect has no duty to be at the site full-time (unless full-time project representation is specifically contracted for), to make detailed inspections (unless special inspections of subsystems are mandated by the agreement) or to direct the contractor's workers. An important goal of the architect's services during construction is to represent the owner's interests by reviewing the contractor's efforts with due professional care and reporting what has been observed. This enables the owner to enforce the owner's rights under the contract for construction.

## DOCUMENT TEXT

### **2.6.2 EVALUATIONS OF THE WORK**

**2.6.2.1** The Architect, as a representative of the Owner, shall visit the site at intervals appropriate to the stage of the Contractor's operations, or as otherwise agreed by the Owner and the Architect in Article 2.8, (1) to become generally familiar with and to keep the Owner informed about the progress and quality of the portion of the Work completed, (2) to endeavor to guard the Owner against defects and deficiencies in the Work, and (3) to determine in general if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work.

The Architect shall neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents.

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## COMMENTS

**2.6.2.2 The Architect shall report to the Owner known deviations from the Contract Documents and from the most recent construction schedule submitted by the Contractor. However, the Architect shall not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents.** The Architect shall be responsible for the Architect's negligent acts or omissions, but shall not have control over or charge of and shall not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other persons or entities performing portions of the Work.

The architect would be well-advised to prepare written reports of site visits and give copies to the owner and, as necessary, the contractor.

This helps establish the dividing line between the architect's responsibilities and those of the contractor. This clear allocation of responsibility will help a court or arbiter assess legal responsibility for accidents or construction deficiencies, thus protecting the interests of all participants on the project.

**2.6.2.3** The Architect shall at all times have access to the Work wherever it is in preparation or progress.

**2.6.2.4** Except as otherwise provided in this Agreement or when direct communications have been specially authorized, the Owner shall endeavor to communicate with the Contractor through the Architect about matters arising out of or relating to the Contract Documents. Communications by and with the Architect's consultants shall be through the Architect.

Clear channels of communication greatly facilitate contract administration. The owner should not give instructions to the contractor without getting the architect's advice on the consequences these instructions may have on the design, time and cost. Similarly, the owner and contractor should not communicate directly with the architect's consultants without the architect's knowledge and permission.

## COMMENTS

While the architect has the express authority to reject non-conforming work, the architect does not have the authority to accept such work. Only the owner has the authority to change the contract requirements by accepting non-conforming work. If the owner chooses to accept non-conforming work, that decision should either be documented as a change order or noted at the time of final payment to avoid later misunderstandings as to the nature and scope of the acceptance.

For example, additional testing of concrete core samples, roof plug samples or any other items may be critical to implementing the intent of the contract documents.

Because the architect cannot inspect every facet of the contractor's work, it often becomes desirable to test work which has been covered or enclosed without previous inspection. The ability to order inspections includes the ability to require that work be removed to allow for inspection. The decision whether the owner or contractor is to bear the expense for the testing or inspection is determined by the results.

It is not the architect's responsibility to instruct the contractor with regard to means, methods, techniques, sequences or procedures. The architect's focus is on the results (or probable results) of the contractor's efforts rather than on the contractor's way of achieving them.

## DOCUMENT TEXT

**2.6.2.5** The Architect shall have **authority to reject Work** that does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect will have **authority to require inspection or testing of the Work** in accordance with the provisions of the Contract Documents, whether or not such Work is fabricated, installed or completed. However, **neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor**, Subcontractors, material and equipment suppliers, their agents or employees or other persons or entities performing portions of the Work.

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### **2.6.3 CERTIFICATION OF PAYMENTS TO CONTRACTOR**

**2.6.3.1** The Architect shall review and **certify the amounts due the Contractor** and shall issue **Certificates for Payment** in such amounts. The Architect's certification for payment shall constitute a representation to the Owner, based on the Architect's evaluation of the Work as provided in Paragraph 2.6.2 and on the data comprising the Contractor's Application for Payment, that the Work has progressed to the point indicated and that, to the best of the Architect's knowledge, information and belief, the quality of the **Work is in accordance with the Contract Documents**. The foregoing representations are subject (1) to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, (2) to results of subsequent tests and inspections, (3) to correction of minor deviations from the Contract Documents prior to completion, and (4) to **specific qualifications expressed by the Architect**.

**2.6.3.2** The issuance of a Certificate for Payment shall not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) ascertained how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

**2.6.3.3** The Architect shall maintain a record of the Contractor's Applications

## COMMENTS

This certification is based upon the architect's professional judgment. In exercising that judgment, the architect may consider the extent of completion, the quality of the work and the architect's evaluations of the contractor's application for payment.

The certificates required here are qualified as described in this subparagraph (i.e., "to the best of the Architect's knowledge, information and belief") and in the language found in AIA Document G702, Application and Certificate for Payment. This language is quite explicit about what the certificate does and does not cover. See AIA Document B511 for model text for a variety of certificates.

If the work is later found not to conform to the requirements of the contract documents, the architect may withdraw or revise a previous certificate as necessary to reflect the current status of that work.

In a parallel provision in AIA Document A201-1997, the word is *all*. In AIA Document B141-1997, the word *appropriate* is used because other consultants retained by the owner may be involved in specifying these criteria.

## COMMENTS

If shop drawings meet the requirements expressed here, it is appropriate for the architect to approve them in those same terms. Under AIA Document A201-1997, the contractor must obtain such approval before performing the work. Many fabricators and manufacturers refuse to proceed without the architect's approval.

Note that this approval is limited. Also note the requirements in AIA Document A201-1997 requiring the contractor to review and approve shop drawings before submitting them to the architect. The word *approve*, when used in this carefully defined context, is appropriate. For the architect, the key to managing liability in this context is to perform the architect's duties carefully and to require that the contractor perform the contractor's duties just as carefully.

Paragraph 3.12 of AIA Document A201-1997 deals with shop drawings, product data and samples. A more detailed treatment of this very complex subject can be found in the Architect's Handbook of Professional Practice. The Handbook discussion includes sample language for the architect's shop drawing stamp.

The architect must act promptly and diligently, but is not expected to act under duress or to pass on matters without sufficient time for professional review.

## DOCUMENT TEXT

for Payment.

### **2.6.4 SUBMITTALS**

**2.6.4.1 The Architect shall review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect's action shall be taken with such reasonable promptness as to cause no delay in the Work or in the activities of the Owner, Contractor or separate contractors, while allowing sufficient time in the Architect's professional judgment to permit adequate review.** Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

**2.6.4.2 The Architect shall maintain a record of submittals and copies of submittals supplied by the Contractor in accordance with the requirements of the Contract Documents.**

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## COMMENTS

**2.6.4.3** If professional design services or **certifications** by a design professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, the Architect shall specify **appropriate** performance and design criteria that such services must satisfy. Shop Drawings and other submittals related to the Work designed or certified by the design professional retained by the Contractor shall bear such professional's written approval when submitted to the Architect. The Architect shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such design professionals.

These certifications may be required when parts of the project are being provided by the contractor on a design/build basis. To cite two examples, mechanical systems and pre-engineered roof trusses are often provided in this fashion. This sentence makes it clear that once the contractor has submitted proper professional certificates to the effect that performance criteria are being met, the architect can rely on these certifications.

In AIA Document A201-1997, the word is *all*. In the context of AIA Document B141-1997, however, it is recognized that the owner may have retained other consultants whose efforts must be taken into consideration and included in the design and performance criteria given to the contractor.

### **2.6.5 CHANGES IN THE WORK**

**2.6.5.1** The Architect shall **prepare Change Orders and Construction Change Directives** for the Owner's approval and execution in accordance with the Contract Documents. The Architect may authorize **minor changes in the Work** not involving an adjustment in Contract Sum or an extension of the Contract Time which are consistent with the intent of the Contract Documents. If necessary, the Architect shall prepare, reproduce and distribute Drawings and Specifications to describe Work to be added, deleted or modified, as provided in Paragraph 2.8.2.

Preparing the actual change order or construction change directive form is part of the architect's typical administrative services. However, supporting documentation and data (such as new or revised drawings or specifications) may constitute a change in services under Subparagraph 2.8.2.3.

It is generally preferable to have a written agreement from the owner, stating agreement with the intended order, and a similar written agreement from the contractor to the effect that no change in contract sum or contract time is required.

**2.6.5.2** The Architect shall review properly prepared, timely requests by the Owner or Contractor for changes in the Work, including adjustments to the Contract Sum or Contract Time. A properly prepared request for a change in the Work shall be accompanied by sufficient supporting data and information to permit the Architect to make a reasonable determination without

## COMMENTS

When the owner and contractor do not agree on the adjustment to the contract sum or contract time, the owner and architect may either abandon the proposed change or issue a construction change directive. The adjustment to the contract sum or contract time will be calculated based upon the actual additional time or cost incurred by the contractor in carrying out the work required.

Unless otherwise specified, the architect makes only two inspections—one to determine the date of substantial completion and one to determine the date of final completion of the project.

## DOCUMENT TEXT

extensive investigation or preparation of additional drawings or specifications. If the Architect determines that requested changes in the Work are not materially different from the requirements of the Contract Documents, the Architect may issue an order for a minor change in the Work or recommend to the Owner that the requested change be denied.

**2.6.5.3** If the Architect determines that implementation of the requested changes would result in a material change to the Contract that may cause an adjustment in the Contract Time or Contract Sum, the Architect shall make a recommendation to the Owner, who may authorize further investigation of such change. Upon such authorization, and based upon information furnished by the Contractor, if any, the Architect shall estimate the additional cost and time that might result from such change, including any additional costs attributable to a Change in Services of the Architect. With the Owner's approval, the Architect shall incorporate those estimates into a **Change Order** or other appropriate documentation for the Owner's execution or negotiation with the Contractor.

**2.6.5.4** The Architect shall maintain records relative to changes in the Work.

### **2.6.6 PROJECT COMPLETION**

**2.6.6.1** The Architect shall conduct **inspections** to determine the date or dates of Substantial Completion and the date of final completion, shall receive from the Contractor and forward to the Owner, for the Owner's review and records, written warranties and related documents required by the Contract Documents and assembled by the Contractor, and shall issue a

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## COMMENTS

final Certificate for Payment based upon a final inspection indicating the Work complies with the requirements of the Contract Documents.

**2.6.6.2** The Architect's **inspection** shall be conducted with the Owner's Designated Representative to check conformance of the Work with the requirements of the Contract Documents and to verify the accuracy and completeness of the **list** submitted by the Contractor of Work to be completed or corrected.

**2.6.6.3** When the Work is found to be substantially complete, the Architect shall inform the Owner about the balance of the Contract Sum remaining to be paid the Contractor, including any **amounts needed to pay for final completion or correction of the Work**.

**2.6.6.4** The Architect shall receive from the Contractor and forward to the Owner: **(1) consent of surety or sureties, if any, to reduction in or partial release of retainage or the making of final payment and (2) affidavits, receipts, releases and waivers of liens or bonds indemnifying the Owner against liens**.

### **ARTICLE 2.7 FACILITY OPERATION SERVICES**

**2.7.1** The Architect shall meet with the Owner or the Owner's Designated Representative promptly after Substantial Completion to review the need for **facility operation services**.

**2.7.2** Upon request of the Owner, and

Inspections are more thorough and comprehensive than the services provided during normal site visits. The word *inspection* does not inherently create liability problems, but it does imply a more detailed evaluation. Inspections of special components or sub-systems have become more common as the complexity of such items has increased.

Note that this list, sometimes called a "punchlist," is prepared by the contractor and is only supplemented by the architect.

Such amounts do not become due at substantial completion. Ordinarily, they become due at final completion.

Under Subparagraph 9.10.2 of AIA Document A201-1997, the architect is entitled to receive these documents from the contractor. The contractor is responsible for obtaining the documents from the originators of them.

Often the architect can play an important role in the owner's actual use or operation of the facility comprising the project. The communication inherent in this service may lead to a decision by the owner to retain the architect to provide post-occupancy services in addition to those described in Paragraph 2.7.2.

## COMMENTS

No design can contemplate every conceivable problem inherent in the actual use or operation of the facility. Often the architect can address operational difficulties by suggesting minor design or construction changes that will enhance the owner's satisfaction with the project. Here again, the recommendations may lead to other services which may be offered by the architect.

Experience has shown that certain contract administration services are a potential drain on the architect's resources. Limiting the number of these services can permit more accurate pricing of these services for the benefit of both parties. If the architect is required by conditions outside of the architect's control to provide more frequent services than listed, the architect is entitled to a change in services. Specifying the frequency of services eliminates the need to include contingencies in the architect's compensation.

Architects often incur extra expense when required submittals are not furnished by the contractor in the agreed-upon sequence.

## DOCUMENT TEXT

prior to the expiration of one year from the date of Substantial Completion, the Architect shall conduct a meeting with the Owner and the Owner's Designated Representative to **review the facility operations** and performance and to make appropriate recommendations to the Owner.

### **ARTICLE 2.8 SCHEDULE OF SERVICES**

**2.8.1 Design and Contract Administration Services** beyond the following limits shall be provided by the Architect as a Change in Services in accordance with Paragraph 1.3.3:

.1 up to ( ) reviews of each Shop Drawing, Product Data item, sample and similar submittal of the Contractor.

.2 up to ( ) visits to the site by the Architect over the duration of the Project during construction.

.3 up to ( ) inspections for any portion of the Work to determine whether such portion of the Work is substantially complete in accordance with the requirements of the Contract Documents.

.4 up to ( ) inspections for any portion of the Work to determine final completion.

**2.8.2** The following Design and Contract Administration Services shall be provided by the Architect as a Change in Services in accordance with Paragraph 1.3.3:

.1 review of a Contractor's **submittal out of sequence** from the submittal schedule agreed to by the Architect;

.2 responses to the Contractor's requests for information where such information is available to the Contractor from a careful study and comparison of the Contract Documents, field conditions, other

**DOCUMENT TEXT**

**COMMENTS**

Owner-provided information, Contractor-prepared coordination drawings, or prior Project correspondence or documentation;

**.3 Change Orders and Construction Change Directives** requiring evaluation of proposals, including the preparation or revision of Instruments of Service;

.4 providing consultation concerning replacement of Work resulting from fire or other cause during construction;

.5 evaluation of an extensive number of claims submitted by the Owner's consultants, the Contractor or others in connection with the Work;

.6 evaluation of substitutions proposed by the Owner's consultants or contractors and making subsequent revisions to Instruments of Service resulting therefrom;

.7 preparation of design and documentation for alternate bid or proposal requests proposed by the Owner; or

**.8 Contract Administration Services** provided 60 days after the date of Substantial Completion of the Work.

**2.8.3** The Architect shall furnish or provide the following services only if specifically designated:

<u>Services</u>	<u>Responsibility</u> (Architect, Owner or Not Provided)	<u>Location of Service</u> <u>Description</u>
-----------------	---	--

- .1 Programming
- .2 Land Survey Services
- .3 Geotechnical Services
- .4 Space Schematics/Flow Diagrams
- .5 Existing Facilities Surveys
- .6 Economic Feasibility Studies
- .7 Site Analysis and Selection
- .8 Environmental Studies and Reports
- .9 Owner-Supplied Data Coordination
- .10 Schedule Development and

Many services related to change orders and construction change directives, including preparation of additional drawings, specifications and other data, are typically required due to circumstances beyond the architect's control. These services represent an additional demand on the architect's resources. Therefore, except for preparation of the actual change order or construction change directive, they are treated as a change in services, entitling the architect to additional compensation.

This subparagraph reinforces the second sentence in Subparagraph 2.6.1.2: after this point, contract administration services are to be compensated as a change in services if authorized or confirmed in writing by the owner.

It is generally in everyone's best interest to have the architect remain involved with the project until final completion.

## **COMMENTS**

## **DOCUMENT TEXT**

Monitoring  
.11 Civil Design  
.12 Landscape Design  
.13 Interior Design  
.14 Special Bidding or Negotiation  
.15 Value Analysis  
.16 Detailed Cost Estimating  
.17 On-Site Project Representation  
.18 Construction Management  
.19 Start-Up Assistance  
.20 Record Drawings  
.21 Post-Contract Evaluation  
.22 Tenant-Related Services  
.23  
.24  
.25

Description of Services.  
*(Insert descriptions of the services designated.)*

### **ARTICLE 2.9 MODIFICATIONS**

**2.9.1** Modifications to this Standard Form of Architect's Services: Design and Contract Administration, if any, are as follows:

By its execution, this Standard Form of Architect's Services: Design and Contract Administration and modifications hereto are incorporated into the Standard Form of Agreement Between the Owner and Architect, AIA Document B141-1997, that was entered into by the parties as of the date:

**OWNER** (Signature)  
(Printed name and title)

**ARCHITECT** (Signature)  
(Printed name and title)

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