

Comparison of 2007 and 2017 AIA contract documents



Architects should consider switching over to the 2017 edition sooner rather than later.

As with all form contract agreements, legal counsel should be consulted to determine whether amendments or modifications should be made for particular projects or circumstances.

Key changes in AIA A201™ and AIA B101™

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On April 27, 2017, The American Institute of Architects (AIA) issued the 2017 update to the AIA A201™ “General Conditions for the Contract for Construction and the AIA B101™ “Standard Form of Agreement Between Owner and Architect.” There are several refinements and improvements, and some significant changes. While this update is not considered by the AIA to be a major revision, some of the changes are important to understand.

The 2007 edition may continue to be used for up to 18 months following the issuance of the 2017 edition, provided the user has a license from AIA. After that date, only the 2017 edition will be authorized for use. Because there are several changes that benefit the Architect in the new B101™, Architects should consider switching over to the 2017 edition sooner rather than later. As with all form contract agreements, legal counsel should be consulted to determine whether amendments or modifications should be made for particular projects or circumstances.

An easy way to see the changes is to search the American Institute of Architects website for [A201-2017 vs. A201-2007 General Conditions](#). This document will provide a redline showing what has been added and deleted. In this briefing, “Text” is shown in the same format AIA used in its redlined version of the 2017 documents, with strike outs indicating text that was removed and underlines showing new text. “Comments” are those of the author, Kent Holland.

A201™ changes

- There is a new detailed insurance and bond exhibit that can be attached to the Owner/Contractor Agreements, such as A201 (Document A102 – 2017 Exhibit A).
- Digital data is to be transmitted pursuant to the protocols established by AIA E203™ - 2013. (§1.7). Any use of or reliance on Building Information Models without agreement to the protocols will be at the using parties’ sole risk (§1.8).

Article 11 has been significantly shortened by eliminating much of its content and moving it into a new insurance and bonds exhibit.

- Evidence of Owner's Financial Arrangements: Teeth have been added to this provision whereby the Contractor may require the Owner to furnish evidence of its financial arrangements to pay for the initial scope of work and then for changes to the work that materially change the contract sum. Prior to commencement, the Contractor will have no obligation to commence the work until the Owner provides the evidence of financing. Following commencement of the work, the Contractor may stop work if the Owner fails to provide satisfactory evidence within 14 days of a request because the Owner is late in making payments; the Contractor has raised a reasonable concern about the ability of the Owner to pay; or the scope of work has been changed such that it materially changes the contract sum (§2.2).
- Confidential Information: Contractor now may disclose confidential information after seven (7) days notice to the Owner, where the disclosure is required by law. This exception allowing disclosure previously had to be hand-drafted into the contracts (§2.2.4).
- Means, Methods and Techniques: If the contract documents give specific instructions of means and methods, then the Contractor must evaluate the jobsite safety of the same. If it determines they may not be safe, the Contractor must notify the Owner and Architect and propose different means and methods. Those will be reviewed by the Architect solely for conformance with the design intent for the completed construction. This puts responsibility on the Contractor to come up with the approach in the event that it determines the means and methods specified by the Architect are not safe. It relieves the Architect of responsibility for the Contractor's means and methods. Under the 2007 edition, if the Contractor determined that the means and methods specified by the Owner's Architect were not safe and it gave timely notification to the Owner who then instructed it to proceed without accepting changes proposed by the Contractor, the Owner would be responsible for any loss resulting from the means and methods required by the Owner. This revised section appears to eliminate that affirmative assumption of the risk by the Owner. (§3.3.1).
- Shop Drawings, Product Data and Samples: If the Contractor is to provide design services related to systems, materials or equipment, language has been added stating that it is "entitled to rely upon the adequacy and accuracy of performance and design criteria provided by the contract documents" (§3.12.10.1).
- Contract Administration: Communications between Owner and Contractor now must include the Architect if it affects the Architect's services or responsibilities, and the Owner must notify the Architect of the substance of any direct communications between Owner and Contractor relating to the project (§4.2.4).
- Minor Changes in the Work: If the Contractor believes a minor change in the work will affect the contract sum or contract time, it must notify the Architect and not perform the change in the work, otherwise it waives the right to adjustment (§7.4).
- Insurance and Bonds: Article 11 has been significantly shortened by eliminating much of its content and moving it into a new insurance and bonds exhibit. More detailed requirements for Owner's insurance have been added. If the Owner fails to purchase and maintain the required insurance, the Contractor has the right to delay commencement of the work. If the Owner fails to maintain the required insurance, it waives all rights against the Contractor and Subcontractors to the extent the Owner's loss would have been covered by the required insurance (§11.2.2). Owner must notify the Contractor of impending cancellation or expiration of an Owner policy within three (3) business days or the Contractor has the right to stop work (§11.2.3).
- Termination by the Owner for Convenience. § 14.4.3 has been revised such that the Contractor is not longer entitled to "reasonable overhead and profit on the work not executed" but is instead to receive a "termination fee" if any has been established during negotiation of the contract originally.

Some of these changes to A201™ are shown below by redlining changes between the 2007 and 2017 editions. Following the quoted text, additional comments are provided on that provision.

A201™ 2017

This section of the briefing redlines some of the more significant changes made in the A201™ Agreement. Commentary is provided above on these changes, and additional comments are made below concerning the changes in the specific sections.

[§ 1.2.1.1 The invalidity of any provision of the contract documents shall not invalidate the contract or its remaining provisions. If it is determined that any provision of the contract documents violates any law, or is otherwise invalid or unenforceable, then that provision shall be revised to the extent necessary to make that provision legal and enforceable. In such case the contract documents shall be construed, to the fullest extent permitted by law, to give effect to the parties' intentions and purposes in executing the contract.](#)

Comment: This is a classic “savings” clause that has been added. It means that if a court finds a provision of the Agreement to be void or unenforceable, the court is to nevertheless enforce the balance of the terms and conditions of the Agreement. In addition, if a provision such as a limitation of liability clause that was added to the Agreement contains terms that violate a state statute, the court is to apply the clause to the maximum extent permitted by law instead of throwing out the entire clause. In other words, revise the clause to delete the offending term, but then enforce the clause once that offending term is removed, so as to give effect to the parties’ intentions.

§ 1.7 Digital Data Use and Transmission. ~~The parties intend to transmit shall agree upon protocols governing the transmission and use of~~ Instruments of Service or any other information or documentation in digital form, ~~they shall endeavor. The parties will use AIA Document E203™ - 2013, Building Information Modeling and Digital Data Exhibit, to establish necessary protocols and governing such transmissions, unless otherwise already provided in the Agreement or the contract documents~~ the protocols for the development, use, transmission and exchange of digital data.

§ 1.8 Building Information Models Use and Reliance. ~~Any use of, or reliance on, all or a portion of a building information model without agreement to protocols governing the use of, and reliance on, the information contained in the model and without having those protocols set forth in AIA Document E203™ - 2013, Building Information Modeling and Digital Data Exhibit, and the requisite AIA Document G202™ - 2013, Project Building Information Modeling Protocol Form, shall be at the using or relying party's sole risk and without liability to the other party and its contractors or consultants, the authors or, or contributors to, the building information model, and each of their agents and employees.~~

Comment: Use of the AIA forms for digital transfer is specified rather than allowing the parties to devise their own forms that might not be as robust. The language allocates the risk of reliance if they use the data without also using the AIA-specified protocols.

§ 2.2.2 ~~Following commencement of the work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract only if (1) the Owner fails to make payments to the contractor as the contract documents require; (2) a change in the Work materially changes the contract sum; or (3) the Contractor identifies in writing a reasonable concern regarding the Owner's~~

~~ability to make payment when due; or (3) a change in the work material changes the contract sum. If the Owner fails to provide such evidence, as required, within fourteen days of the Contractor's request, the Contractor may immediately stop the work and, in that event, shall notify the Owner that the work has stopped. However, if the request is made because a change in the work materially changes the contract sum under (3) above, the Contractor may immediately stop only that portion of the work affected by the change until reasonable evidence is provided. If the work is stopped under this Section 2.2.2, the contract time shall be extended appropriately and the contract sum shall be increased by the amount of the Contractor's reasonable costs of shutdown, delay and start-up, plus interest as provided in the contract documents.~~

Comment: This section revision gives the Contractor significant rights, including stopping work in the event the Owner does not provide the required financial information.

§ 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 propose alternative~~ means, methods, techniques, sequences or procedures. ~~without acceptance of changes. The Architect shall evaluate the proposed by the Contractor, the Owner shall be alternative~~ solely responsible for ~~any loss or damage arising solely from those Owner required conformance with the design intent for the completed construction. Unless the Architect objects to the Contractor's proposed alternative, the Contractor shall perform the work using its alternative~~ means, methods techniques, sequences or procedures.

Comment: The Contractor must now come up with the new approach and it relieves the Architect of responsibility it might otherwise have for issues associated with the changes implemented by the contractor.

Use of the AIA forms for digital transfer is specified rather than allowing the parties to devise their own forms that might not be as robust. The language allocates the risk of reliance if they use the data without also using the AIA-specified protocols.

The requirement that the Owner includes the Architect in all substantive communications with the Contractor and also notifies the Architect of communications it may have had with the Contractor outside of the Architect's presence is surprisingly broad and could be difficult for an Owner to manage and comply with.

§ 4.2.4 Communications. ~~The Owner and Contractor shall endeavor to communicate with each other through~~ include the Architect about matters arising out in all communications that relate to or affect the Architect's services or professional responsibilities. The Owner shall promptly notify the Architect of or the substance of any direct communications between the Owner and the Contractor otherwise relating to the ~~Contract project.~~ Communications by and with the Architect's Consultants shall be through the Architect. Communications by and with Subcontractor and material suppliers shall be through the Contractor. Communications by and with separate contractors shall be through the Owner. The contract documents may specify other communication protocols.

Comment: The requirement that the Owner includes the Architect in all substantive communications with the Contractor and also notifies the Architect of communications it may have had with the Contractor outside of the Architect's presence is surprisingly broad and could be difficult for an Owner to manage and comply with.

§ 7.4 The Architect ~~has authority to~~ may order changes in the work that are consistent with the intent of the contract documents and do not involving involve an adjustment in the contract sum or an extension of the contract time. ~~and not inconsistent with the intent of the contract documents.~~ The Architect's order for minor changes shall be in writing. If the Contractor believes that the proposed minor change in the work will be affected by written order signed by affect the contract sum or contract time, the Contractor shall notify the Architect and shall ~~be binding on the Owner and Contractor~~ not proceed to implement the change in the work. If the Contractor performs the works set forth in the Architect's order for a minor change without prior notice of the Architect that such change will affect the contract sum or contract time, the Contractor waives any adjustment to the contract sum or extension of the contract time.

Comment: When the Contractor believes the change that is directed is not "minor," it must advise the Owner. Otherwise it may waive its right to any adjustment to the contract sum or for additional time.

Article 11 – Insurance and Bonds

§ 11.2.3 Notice of Cancellation or Expiration of Owner's Required Property Insurance. Within three (3) business days of the date the Owner becomes aware of an impending or actual cancellation or expiration of any property insurance required by the contract documents, the Owner shall provided notice to the Contractor of such impending or actual cancellation or expiration. Unless the lapse in coverage arises from an act or omission of the Contractor: (1) the Contractor, upon receipt of

notice from the Owner, shall have the right to stop the work until the lapse in coverage has been cured by the procurement of replacement coverage by either the Owner or the Contractor; (2) the contract time and contract sum shall be equitably adjusted; and (3) the Owner waives all rights against the Contractor, Subcontractors, and Sub-subcontractors to the extent any loss to the Owner would have been covered by the insurance had it not expired or been cancelled. If the Contractor purchases replacement coverage, the cost of the insurance shall be charged to the Owner by an appropriate change order. The furnishing of notice by the Owner shall not relieve the Owner of any contractual obligation to provide required insurance.

Comment: Section 11.2.3 provides the Contractor the right to stop work if the Owner does not maintain the required insurance and includes a broad waiver provision of Owner's rights against the Contractor.

§ 14.4.3 In the case of such termination for the Owner's convenience, the Owner shall pay the Contractor ~~shall be entitled to receive payment~~ for work properly executed, and costs incurred by reason of ~~such the~~ termination, along with reasonable overhead and profit on the work not executed including costs attributable to termination of subcontracts; and the termination fee, if any, set forth in the Agreement.

Comment: This could be a significant change in that the Contractor is no longer entitled to its anticipated profit on the work that was not performed, but instead will receive a termination fee if one was included in the Agreement when it was negotiated. Owners may be advised by their attorneys either not to include any termination fee at all, or if they include a fee, not to include anticipated profit.

B101™ changes

- The insurance section of the Agreement includes a more detailed description of insurance in the B101 2017. The Architect is required to maintain the insurance for a minimum of one year following substantial completion (§2.5).
- New sustainable project exhibit (AIA E 204-2017): Sustainable project services can be added as a supplemental service under Section 4.1. This exhibit eliminates the need to have a sustainable project version of each contract document. The requirement that the Architect discuss with the Owner the feasibility of incorporating environmentally responsible design approaches has been deleted from the basic agreement form (§3.2.3), but a requirement that the Architect consider sustainable design alternatives is added (§3.2.5.1).
- Architect will be paid for reviewing Contractor requests for substitutions (§3.5.2.3 and 3.5.3.3).

Section 11.2.3 provides the Contractor the right to stop work if the Owner does not maintain the required insurance and includes a broad waiver provision of Owner's rights against the Contractor.

- Changing previously prepared Instruments of Service due to official interpretations of codes that are contrary to the requirements existing will be paid for as additional service (§4.2.1).
 - In all communications with the Contractor that relate to or affect the Architect's services or professional responsibilities, the Owner must include the Architect. The Owner must also notify the Architect of the substance of and communications with the Contractor that "relate to the project" (§5.12).
 - Architect is no longer required to re-design with no compensation if bids exceeded the budget due to changes in market conditions that could not have been reasonably anticipated (§6.7).
 - Owner's license to use the Instruments of Service is no longer created upon execution of the Agreement, but will instead be granted only after the Owner substantially performs its obligations under the Agreement, including payment to the Architect (§7.3).
 - Termination expenses will no longer be paid as part of a termination for convenience; instead there will be a termination fee that is established in advance in the Agreement. This means the Architect will no longer receive payment for anticipated profit on the terminated portion of the work since that was one element of what had been defined as "termination expenses." (§9.7);
 - Assignment of the Agreement by Owner to a different entity, such as a lender, is made expressly conditional upon payment to the Architect of all amounts due prior to the assignment (§10.3).
- Owner's budget (§1.1.3)
 - Anticipated design and construction milestone dates (§1.1.4)
 - Description of procurement and delivery method for the project (§1.1.5)
 - Sustainable project objective, if any (§1.1.6)
 - Names of Owner representatives (§1.1.7)
 - Names of Consultants and Contractors retained by Owner (§1.1.9)
 - Architect's representatives (§1.1.10)
 - Subconsultants to be retained by Architect (§1.1.11)
 - Acknowledgment that budget will be adjusted to accommodate material changes in initial information (§1.2)
 - Protocols governing transmission and use of Instruments of Service -- including the use of BIM (§1.3)
 - Disclaimer of liability if others rely on BIM without agreement to protocols (§1.3.1)

One reason given for including this information directly in the Agreement instead of what was previously an exhibit is that it will be front and center and result in more individuals reading the information and becoming knowledgeable with the content. This serves to improve communication, which is certainly a vital element of good risk management and project management.

The Architect will no longer receive payment for anticipated profit on the terminated portion of the work since that was one element of what had been defined as "termination expenses." (§9.7);

Article 2 – Architect's Responsibilities

§ 2.1 The Architect shall provide ~~the~~ professional services as set forth in this Agreement. The Architect represents that it is properly licensed in the jurisdiction where the project is located to provide the services required by this Agreement, or shall cause such services to be performed by appropriately licensed design professionals.

Comment: In order to provide architectural services, a firm itself must generally be licensed in a state. But because Architects may have engineering firms performing engineering services under subcontract, the intent of this provision is that the engineering subconsultants must be licensed to perform their services.

§ 2.5 - The Architect shall maintain the following insurance ~~for the duration until termination~~ of this Agreement. If any of the requirements set forth below ~~exceed are in addition to~~ the types and limits the Architect normally maintains, the Owner shall ~~reimburse pay~~ the Architect ~~for any additional cost:~~ as set forth in Section 11.9.

Comment: Section 2.5 previously included this parenthetical: "(Identify types and limits of insurance coverage, and other insurance requirements applicable to the Agreement, if any.)" That has been replaced with a

Some of these changes to B101™ are shown below by redlining the changes between the 2007 and 2017 editions. Following the quoted text, additional comments are offered on that provision.

B101™ 2017

In this part of the briefing, we highlight with redlining some of the more significant changes made in the B101™ Agreement. Commentary is provided above on these changes, and additional comments are made below concerning the changes in the specific sections.

Article 1 – Initial Information for the Project

This section is almost entirely new. It deletes the previous reference to an "optional Exhibit A, Initial Information," and instead inserts all the relevant information directly into the Agreement. This includes:

- Owner's program for the project (§1.1.1)
- Project's physical characteristics (§1.1.2)

more detailed description of the insurance that is required. The section is sufficiently descriptive that once the blanks are filled in with the desired coverage amounts, it could be deemed adequate by some firms without further addition of an insurance attachment. Of particular note are the following new insurance subsections:

§ 2.5.3 The Architect may achieve the required limits of coverage for Commercial General Liability and Automobile Liability through a combination of primary and excess or umbrella liability insurance, provided such primary and excess or umbrella insurance policies result in the same or greater coverage as the coverages required under Sections 2.5.1 and 2.5.2, and in no event shall any excess or umbrella liability insurance provide narrower coverage than the primary policy. The excess policy shall not require the exhaustion of the underlying limits only through the actual payment of the underlying insurers.

§ 2.5.7 To the fullest extent permitted by law, the Architect shall cause the primary and excess or umbrella policies for Commercial Liability and Automobile Liability to include the Owner as an additional insured for claims caused in whole or in part by the Architect's negligent acts or omissions. The additional insured coverage shall be primary and non-contributory to any of the Owner's insurance policies and shall apply to both ongoing and completed operations.

Comment: It is noteworthy that the Commercial General Liability additional insured coverage is for claims caused in whole or in part by the Architect's negligence and that it must include both ongoing and completed operations. Not all additional insured endorsements that are readily available from carriers include completed operations. The Architect and insurance broker will need to pay special attention to the language contained in their additional insured endorsements to assure that the contract requirements for both ongoing and completed operations are covered are satisfied by the endorsement.

§ 3.1.4 The Architect shall not be responsible for an Owner's directive or substitution, or for the Owner's acceptance of non-conforming Work, made or given without the Architect's written approval.

Comment 1: Within the 2007 edition of the B101™, the Architect obtained protection against claims where the Owner made directives or substitutions contrary to the recommendations of the Architect or that were done without the Architect's approval. This protection has also been further expanded to include damages arising out of an Owner's acceptance of non-conforming construction work. If the Owner accepts non-conforming work without the Architect's written approval, the Architect has no responsibility for problems resulting from that non-conforming work.

Only written acceptance is deemed adequate to constitute acceptance. Approval must be "written." This avoids Owners arguing that they obtained Architect consent in a manner that can't be easily proved or disproved, such as verbally, a nod of the head, or subtle acquiescence of some kind. It must be written or it does not count as approval.

§ 3.2.3 The Architect shall present its preliminary evaluation to the Owner and shall discuss with the Owner alternative approaches to design and construction of the project. ~~including the feasibility of incorporating environmentally responsible design approaches:~~ The Architect shall reach an understanding with the Owner regarding the requirements of the project.

Comment: This removes the affirmative obligation the Architect had to raise and discuss environmentally-responsible design approaches with the Owner. It appears to be more cosmetic than substantive in that §3.2.5.1 remains in the Agreement and it requires the Architect to consider "sustainable design alternatives" in lieu of what used to be the required "environmentally-responsible design alternatives." See the section below.

§ 3.4.1 The construction documents shall consist of drawings and specifications setting forth in detail the quality levels and performance criteria of materials and systems and other requirements for the construction of the work.

Comment: The Architect might consider negotiating a deletion of the performance criteria wording that has been added as shown in the underlining. Or perhaps add "If required," after the words "and performance criteria." The sentence above is the second sentence of a fairly long paragraph that is not quoted in its entirety. What has been added to the sentence is that the construction documents are required to set forth "performance criteria."

§ 3.5.2.3 The If the bidding documents permit substitutions, upon the Owner's written authorization, the Architect shall, as an additional service, consider requests for substitutions, ~~if the bidding documents permit substitutions and shall~~ and prepare and distribute addenda identifying approved substitutions to all prospective bidders.

Comment: The substantive change here is that the Architect is to be paid as an "additional service" for considering requests for substitutions during the bidding phase.

§ 3.6.2.1 The Architect shall visit the site... and promptly report to the Owner (1) known deviations from the contract documents, (2) known deviations from the most recent construction schedule submitted by the Contractor, and (3) defects and deficiencies observed in the work.

Comment: The paragraph has been changed by adding the word "promptly," and by adding the words "known deviations" a second time. The words, "known deviations," in the 2007 version of the B101 were

The Architect and insurance broker will need to pay special attention to the language contained in their additional insured endorsements to assure that the contract requirements for both ongoing and completed operations are covered are satisfied by the endorsement.

grammatically applied to both the contract documents and the most recent construction schedule.

§ 3.6.4.2 "... 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."

Comment: Deletion of the words "unless otherwise specifically stated by the Architect" clarifies that under no circumstances is the Architect taking on responsibility for the Contractor's means and methods. No option is being provided whereby the agreement can specify that the Architect will be responsible for the Contractor's means and methods.

§ 3.6.4.3 If the contract documents specifically require the Contractor to provide professional design services or certifications by a design professional related to systems, materials or equipment, the Architect shall specify the appropriate performance and design criteria that such services must satisfy. The Architect shall review and take appropriate action on shop drawings and other submittals related to the work designated or certified by the Contractor's design professional retained by, provided the Contractor that submittals bear such professional's seal and signature when submitted to the Architect. The Architect's review shall be for the limited purpose of checking for conformance with information given and the design concept expressed in the contract documents. The Architect shall be entitled to rely upon, and shall not be responsible for, the adequacy, accuracy and completeness of the services, certifications and approvals performed or provided by such design professionals.

Comment: The sentence added to the end of section 3.6.4.3 clarifies the intent of this section that the Architect may rely on the certifications and approvals of the Contractor's design professionals and is in no way responsible for the adequacy, accuracy and completeness of the same. This was the same understanding under the 2007 edition of this section. But to the extent there was any question about it, this new language may prevent a court from imposing greater responsibility or liability on the Architect than intended by the agreement.

§ 3.6.6.1 The Architect shall:

.4 issue a final certificate for payment based upon a final inspection indicating that, to the best of the Architect's knowledge, information and belief, the work complies with the requirements of the contract documents.

Comment: This new language clarifies that there is no express or implied warranty by the Architect concerning compliance of the Contractor's work with the contract documents. The words "best of" and "knowledge, information and belief" are often used as a concise way to hedge on

what is being certified and thereby avoid the potential for having someone argue that the certification is a warranty. This same type of language is recommended for other types of certifications by Architects as well.

Article 4 – Supplemental and Additional Services

§ 4.1 ~~Additional Supplemental~~ Services

§ 4.2 ~~3~~ Architect's Additional Services

Additional Services include:

§ 4.3.2.1.2 Services necessitated by the ~~Owner's request for extensive environmentally responsible design alternatives, such as unique system design, in-depth material research, energy modeling, or LEED certification~~ enactment or revision of codes, laws, or regulations, including changing or editing previously prepared Instruments of Service;

§ 4.2.1.3 Changing or editing previously prepared Instruments of Service necessitated by ~~the enactment or revision of codes, laws or regulations or~~ official interpretations of applicable codes, laws or regulations that are either (a) contrary to specific interpretations by the applicable authorities having jurisdiction made prior to the issuance of the building permit, or (b) contrary to requirements of the Instruments of Service when those Instruments of Services were prepared in accordance with the applicable standard of care;

Comment: Services necessitated by changes in code were previously addressed in section 4.2.1.3. Those services have now been moved up to section 4.2.1.2 and an entirely new provision for additional services is added to 4.2.1.3 to account for services required because of code interpretations by applicable authorities having jurisdiction. For example, a Fire Marshal who interprets the fire code requirements in a manner contrary to the requirements generally understood to apply by a design professional exercising the generally accepted standard of care. It is one thing to have to make changes because codes change after contract award. But it is quite another to have to make changes because a code official interprets the code differently than the design professional who exercised the appropriate standard of care in its own interpretation. This new provision addresses that problem.

Article 5 – Owner's Responsibilities

§ 5.10 12 ~~Except as otherwise provided in this Agreement, or when direct communications have been specially authorized, the Owner shall endeavor to communicate~~ The Owner shall include the Architect in all communications with the Contractor and that relate to or affect the Architect's ~~consultants-~~

The Architect may rely on the certifications and approvals of the Contractor's design professionals and is in no way responsible for the adequacy, accuracy and completeness of the same.

~~through the architect about matters arising out of or relating to the Contract Documents services or professional responsibilities.~~ The Owner shall promptly notify the Architect of the substance of any direct communications ~~that may affect the Architect's services between the Owner and the Contractor otherwise relating to the project.~~ Communications by and with the Architect's consultants shall be through the Architect.

Comment: This greatly expands the Owner's duty to include the Architect in communications with the Contractor where the communication relates to or affects the Architect's services or responsibilities. The "endeavor to communicate" wording has been replaced with an absolute requirement that the Owner include the Architect in all communications with the Contractor related to the Architect's services or responsibilities. In addition, a new requirement is added that the Owner must notify the Architect of substance of its communications with the Contractor in any manner "relating to the project."

This means that the Owner cannot have a substantive communication with the Contractor concerning the project without advising the Architect. A final sentence that is added to this paragraph requires that the Owner have no direct communications with Sub-consultants, but instead always communicate through the Architect.

Article 6 – Cost of the Work

§ 6.1 ...The cost of the work also includes the reasonable value of labor, materials, and equipment, donated to or otherwise furnished by, the Owner. The cost of the work does not include the compensation of the Architect.

Comment: These are new items that are added to the definition of cost of the work.

§ 6.3 ... If the Owner ~~requests detailed cost estimating services, the Architect shall provide such services as an Additional Service under Article 4;~~ requires a detailed estimate of the cost of the work, the Architect shall provide such an estimate, if identified as the Architect's responsibility in Section 4.1.1., as a supplemental service.

Comment: This provision seems to create a more objectively determined duty to provide an estimate of the cost of the work rather than the more subjective "cost estimating services." And it becomes a "supplemental service" agreed upon at the time of the contract for which the Architect is to be separately compensated.

§ 6.7 If the Owner chooses to proceed under Section 6.6.4, ~~the Architect, without additional compensation;~~ the Architect shall modify the construction documents as necessary to comply with the Owner's budget for the cost of the work at the conclusion of the construction documents phase services, or the budget as adjusted under Section 6.6.1. ~~The~~ If the Owner requires the Architect to modify the construction documents because

the lowest bona fide bid or negotiated proposal exceeds the Owner's budget for the cost of the work due to market conditions the Architect cannot reasonably anticipate, the Owner shall compensate the Architect for the modifications as an additional service pursuant to Section 11.3; otherwise the Architect's services for modifying the construction documents shall be without additional compensation. In any event, the Architect's modification of the construction documents shall be the limit of the Architect's responsibility under this Article 6.

Comment: The Architect is no longer required to redesign without being compensated when the construction budget is exceeded due to unanticipated market conditions that cause the bids or proposals to be higher than reasonably expected.

The clause maintains the limitation on the Architect's responsibility for redesign so that "in any event, the Architect's modification of the construction documents shall be the limit of the Architect's responsibility under this Article 6." The change is significant because even though the 2007 edition clause established the redesign service as the limit on the Architect's responsibilities, the cost incurred by the Architect in doing redesign of large complex projects could be quite substantial. And if the redesign was caused by market conditions beyond the Architect's control, why should the Architect be responsible to provide redesign services without compensation? This change resolves that problem.

§ 7.3 ~~Upon execution of this Agreement, the~~ The Architect grants to the Owner a nonexclusive license to use the Architect's Instruments of Service solely and exclusively for purposes of constructing using, maintaining, altering and adding to the project, provided that the Owner substantially performs its ~~obligations;~~ obligations under this agreement, including prompt payment of all sums ~~when due, under this Agreement;~~ due pursuant to Article 9 and Article 11.

Comment: This subtle change means that the license to the documents is no longer granted to the Owner immediately "upon execution of the Agreement." It is granted only after the Owner has paid the Architect. This change corrects a problem that arose in litigation where Owners that fired their Architect and then gave the Instruments of Service to a follow-on Architect were arguing that even if the original Architect had not been paid, the license to the Instruments of Service was already granted and could not be rescinded; therefore, the Architect could not sue for copyright infringement against either the Owner or new Architect. This new language clarifies that the Owner gets no rights to the Instruments of Service until the Architect has been paid.

A new requirement is added that the Owner must notify the Architect of substance of its communications with the Contractor in any manner "relating to the project."

The Architect is no longer required to redesign without being compensated when the construction budget is exceeded due to unanticipated market conditions that cause the bids or proposals to be higher than reasonably expected.

Article 9 – Termination or Suspension

~~§ 9.6 In the event of termination not the fault of the Architect, the Architect shall be compensated if the Owner terminates this Agreement for its convenience pursuant to Section 9.5, or the Architect terminates this Agreement pursuant to Section 9.3, the Owner shall compensate the Architect for services performed prior to termination, together with Reimbursable Expense then due and all Termination Expenses as defined in Section 9.7: reimbursable expenses incurred, and costs attributable to termination, including the costs attributable to the Architect's termination of consultant agreements.~~

~~§ 9.7 Termination Expenses are in addition to compensation for the Architect's services and include expenses directly attributable to termination for which the Architect is not otherwise compensated plus an amount for the Architect's anticipated profit on the value of the services not performed by the Architect.~~ In addition to any amounts paid under Section 9.6, if the Owner terminates this agreement for its convenience pursuant to Section 9.5, or the Architect terminates this agreement pursuant to Section 9.4, the Owner shall pay to the Architect the following fees:

.1 Termination Fee:

.2 Licensing Fee if the Owner intends to continue using the Architect's Instruments of Service:

Comment: The defined term, "termination expenses" has been eliminated. This is significant because the term "termination expenses" included "anticipated profit on the value of the services not performed by the Architect." The requirement in the 2007 edition of B101 that the Owner pay anticipated profit as part of a termination for convenience settlement was somewhat unique in the construction industry in which anticipated profits are rarely, if ever, included as part of termination for convenience settlements. In fact, one vital purpose of a normal termination for convenience clause is to relieve the Owner of having to pay anticipated profits in the event that the project needs to be cancelled or the contract otherwise needs to be terminated. This change, therefore, brings the AIA B101 more into line with other contract forms and the industry standard.

Note, however, that a new term, "termination fee," has been added to the clause. That "fee" is to be established when the parties enter into the contract and the parties are certainly free to include anticipated profit and anything else they agree to in that "termination fee." So instead of doing a calculation of "termination expenses" after the contract has been terminated, the parties now will

agree during contract negotiation to establish a "termination fee." It will be interesting to see whether project Owners actually agree to set a "termination fee" and, if so, whether it will continue to include something for anticipated profit on services that are not performed by the Architect. The idea of a pre-established "termination fee" is a new concept that may be difficult for Owners to accept.

Note that payment of a "licensing fee" for use of the Instruments is added to the termination section of the Agreement. It has, therefore, been deleted where it used to appear in article 11.9 under Compensation.

Article 10 – Miscellaneous Provisions

§ 10.3 ...Owner may assign this Agreement to a lender providing financing for the project if the Lender agrees to assume the Owner's rights and obligations under this Agreement, [including any payments due to the Architect by the Owner prior to the assignment.](#)

Comment: This change clarifies that there can be no assignment to the Lender unless the Lender agrees to pay all outstanding amounts that were due before the default on the loan and assignment to the Lender. It is surprising how many lender consent forms don't expressly require the lender to pay amounts owed by the Owner before the assignment. This new language resolves that issue.

§ 11.9 Architect's Insurance. [If the types and limits of coverage required in Section 2.5 are in addition to the types and limits the Architect normally maintains, the Owner shall pay the Architect for the additional costs incurred by the Architect for the additional coverages as set forth below:](#)

[\(Insert the additional coverages the Architect is required to obtain in order to satisfy the requirements set forth in Section 2.5, and for which the Owner shall reimburse the Architect.\)](#)

Comment: This revision makes it clear what exact insurance policies and limits are deemed to be "in addition to the types and limits" normally maintained. It also obligates the Owner to reimburse the Architect for its additional premium costs.

About the author

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