



AIA[®] Document B503[™] – 2017

Guide for Amendments to AIA Owner-Architect Agreements

TABLE OF CONTENTS

INTRODUCTION

- Purpose of This Guide
- How to Use This Guide
- Modifications to Owner-Architect Agreements

GUIDANCE AND MODEL LANGUAGE

A Architect's Responsibilities and Services

- A-1 Standard of Care
- A-2 Betterment
- A-3 Construction Contract Administration – Review of Multiple Submissions
- A-4 Construction Contract Administration – Multiple Site Visits
- A-5 Materials Transparency

B Owner's Responsibilities and Provided Services

- B-1 Fast-Track Construction
- B-2 Concealed or Unknown Conditions in Existing Buildings
- B-3 Owner Directed Changes and Substitutions
- B-4 Owner's Consultants
- B-5 Owner Provided Cost Control

C Claims, Liability, Termination, Insurance and Indemnifications

- C-1 Dollar Limitation Arbitration
- C-2 Venue Selection
- C-3 Electronic Discovery
- C-4 Definition of Consequential Damages
- C-5 Termination or Suspension
- C-6 Limitation of Liability
- C-7 Architect's Indemnity to the Owner
- C-8 Insurance
- C-9 Meet and Confer

D Ownership of the Architect's Instruments of Service and Professional Credit

- D-1 Ownership of the Architect's Instruments of Service
- D-2 Professional Credit

E Compensation and Payments

- E-1 Insurance Reimbursement

E-2 Compensation - Percentage Basis

E-3 Pay-If-Paid

F **Other**

F-1 Owner Requested Certifications

F-2 Hazardous Materials

F-3 Assignment of the Agreement

Purpose of This Guide

This Guide serves two purposes: it provides guidance regarding the issues covered in owner-architect agreements, and it provides model language that may be used to amend or supplement owner-architect agreements and, in some instances, architect-consultant agreements.

Because of variations in the nature of individual projects, requirements of individual owners and variations in specific legal requirements from locality to locality, standard form agreements typically require modification to tailor them to individual projects. The model language in this Guide may be used to create modifications that may be made directly within the owner-architect agreement or attached in a separate document.

The information and model language in this Guide is presented by issue, such as Insurance and Standard of Care. This Guide is not a standard form document. Model language is sometimes presented in alternative versions, and some language presented may not be appropriate for a particular situation. Because of its flexibility, this Guide is intended to be used as a working tool to help amend the Owner-Architect agreement so that it will be tailored for use for a specific project.

How to Use This Guide

This Guide is not specifically coordinated with the provisions of B101–2017 but is intended for use in modifying Owner-Architect agreements generally. Its organization assumes that amendments to the Owner-Architect agreement will be assembled as a separate document cross-referenced to the Owner-Architect agreement. Alternatively, modifications may easily be made directly within the text of the Owner-Architect agreement, typically through the use of AIA Contract Documents software.

Many of the provisions in B503–2017 require special care in their application. Some provisions, such as a limitation of liability clause, further define or limit the scope of services and responsibilities. Other provisions introduce a different approach to the Project, such as fast-track construction.

This Guide is printed in two typefaces. Times New Roman 10-point typeface (example: Architect) indented from the body text of the Guide, is used only for material that is intended as actual model language which may be used for a specific project, and represents material which may be added to, deleted or revised, and then incorporated into the Owner-Architect Agreement. Arial 10-point typeface (example: Owner) is used for explanatory notes and identifies items needing attention.

Modifications to Owner-Architect Agreements

AIA documents are drafted and coordinated with a view to avoiding overlaps and gaps in the rights and duties of the contracting parties. For this very reason, however, modifications must be made carefully. If a provision in one contract is changed, other contractual relationships on the Project may have to be modified accordingly. For example, a change in the Owner-Architect agreement may require a corresponding change in the General Conditions document to avoid conflicts and inconsistencies. Section deletions and re-numbering of sections should be avoided because they can conflict with carefully coordinated internal references and cross references to other agreements.

GUIDANCE AND MODEL LANGUAGE

A. Architect’s Responsibilities and Services

A-1. Standard of Care

The law recognizes that architects, like doctors, lawyers or accountants, are to exercise reasonable judgment and skill when performing services on behalf of clients. The law, however, does not expect architects to provide perfect or flawless services or to guarantee or warrant the results of their services. Nonetheless, architects are free to change through their conduct or in their agreements the standards governing their performance, which, in turn, will change their legal liability. Use of words or phrases such as “highest,” “best” or “most qualified” in relation to the Architect’s standard of care increases the standard of performance expected of the Architect. In fact, such statements can be construed as performance guarantees that constitute uninsurable risks. Therefore, architects should depart from their normal standard of care only after seeking advice of knowledgeable legal and insurance counsel and upon careful consideration of the additional risk and should reflect such risk in their compensation

arrangements. The language provided below states the Architect's normal or reasonable standard of care that is included in most AIA 2017 Owner-Architect agreements.

Model Language:

The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

The Architect may also wish to disclaim any implied or express warranties. This may be done by adding the following sentence to the end of the above provision.

Model Language:

The Architect makes no warranties, either express or implied, with respect to services provided under this Agreement.

Sometimes Owners will request contract language stating that the Architect's services shall be in accordance with all applicable laws, codes and rules. While the Architect will strive to be in full accordance, the fact remains that the Architect cannot warrant that its services will be in accordance with all such laws, codes and rules. The Architect's services must still be subject to the standard of care. Accordingly, if an Owner insists on addressing applicable laws, codes and rules, care should be taken to avoid creating a warranty or other higher duty on the Architect. In such an instance, the Architect may wish to use the following language to clearly establish the standard of care.

Model Language:

The Architect shall perform its services in accordance with laws, codes, rules, and regulations applicable for the location of the Project consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

A-2. Betterment

When faced with an actual design error or omission, the issue of betterment often arises. Betterment is a term used to describe the legal principle that precludes an Owner from receiving a windfall due to a design error or omission. Betterment is best illustrated by use of a basic example: if an Architect's set of design documents for a hotel neglected to include doors on all the guestroom doorways and the Owner had to issue a change order to the Contractor for the purchase and installation of those doors, betterment would preclude the Owner from recovering from the Architect the costs of the change order. This is because, even though the plans were defective, the Owner did not incur greater costs for its project because it would have had to pay for the doors regardless of whether there was a defect in the design documents. Betterment, however, would not preclude the Owner from recovering any premium the Owner had to pay to the Contractor because the missing doors had to be expedited to maintain the construction schedule. In that instance, the Owner was damaged, but only in the amount of the premium it had to pay.

While betterment is a function of the law, and a contractual provision may not be required in order for it to apply, it may be worthwhile to include language in an agreement simply to highlight the concept at the beginning of the project. Parties may want to consider the following model language:

Model Language:

For any change in the Project caused by the Architect, the Architect shall not be responsible for costs associated with the change to the extent the costs would have otherwise been incurred by the Owner had the act or omission by the Architect, resulting in the change, not occurred.

A-3. Construction Contract Administration – Review of Multiple Submissions

The Architect's review of multiple resubmittals creates unanticipated expense to the Architect that may be impossible to estimate reasonably at the outset of the Project. The following amendment may be added to an Owner-Architect agreement as a way to deal with this uncertainty. This issue is already addressed in a number of documents, including B101–2017, B103™–2017 and B201™–2017.

Model Language:

The Architect's Basic Services for review of the Contractor's submittal shall be limited to an initial submittal and () resubmittals for each required submittal. Services by the Architect for review of additional resubmittals shall be compensated as an Additional Service or Change in Services.

The Architect may wish to advise the Owner to consider the potential of recovering the cost of this service from the Contractor by placing language to that effect in the Owner-Contractor agreement. Refer to A503™–2017, Guide to Supplementary Conditions, for suggested language.

A-4. Construction Contract Administration – Multiple Site Visits

The number of site visits required to fulfill the Architect's duties is difficult to determine or estimate at the outset of the Project. For fixed or percentage-fee agreements, it may be appropriate to establish a fixed number of site visits which, once exceeded, requires the Owner to pay additional compensation to the Architect for further site visits. The following amendment may be used to modify the site visits provisions found in an AIA document. This issue is already addressed in a number of documents, including B101–2017, B103–2017 and B201–2017.

Model Language:

The Architect shall be compensated for site visits in excess of _____ () as an Additional Service or Change in Services.

The Architect may wish to advise the Owner to consider the potential of recovering the cost of this service from the Contractor by placing language to that effect in the Owner-Contractor agreement. Refer to A503–2017, Guide to Supplementary Conditions, for suggested language.

A-5. Materials Transparency

Material Transparency refers to an initiative to promote the disclosure of the contents of building materials and the related potential health and environmental impacts.

In December 2017, the AIA Board adopted the following Position Statement in support of its Public Policy that Architects should be environmentally responsible:

“The AIA advocates for programs, policies, and practices that inform a holistic approach to selecting and using building materials. Materials significantly affect human and ecosystem health, well-being, climate, and social equity. Architects' ability to understand life-cycle impacts is fundamental to the art, craft, and science of architecture and to making positive material choices that support a healthy, prosperous world. The AIA supports transparent, clear information on the content of building materials and furthermore urges manufacturers to develop materials that are free of toxic substances, minimize greenhouse gas emissions, and are environmentally and socially responsible. (approved December 2017, through December 31, 2020)

The USGBC's LEED Rating System Version 4 includes optional Materials Credits for collecting product environmental and health information. The new WELL Building Standard, a comprehensive rating system for design and operations for healthy buildings and spaces, references health product disclosures and other specific requirements around healthy environments. Accordingly, whether by virtue of the Architect advocating the Board's position on its own or the owner imposing certain requirements on the project, it is possible that the Architect will receive material disclosures information from manufacturers for the products it specifies.

In 2014 the AIA convened a Materials Knowledge Working Group (the Working Group) to develop educational curriculum, communications strategy (including the “Materials Matter” webpage), and an advocacy approach. In 2015 the Working Group held a one-day workshop to explore concerns associated with materials transparency and the use of material disclosure information. A key concern discussed throughout the workshop is that Architects, based on education, training, and licensure requirements, lack the knowledge, expertise, and ability to assess the environmental and human health impacts of varying types and quantities of substances contained in building products. Accordingly, any assessments or evaluations of this kind should be conducted by a toxicologist or other trained professional.

For more information on Materials Transparency and the Materials Knowledge Working Group please go to <http://www.aia.org/practicing/materials/>.

While contract language cannot always absolve the Architect or any other party from potential liability associated with materials transparency, such as when claims are brought by third parties (e.g. building inhabitants or visitors), well-drafted contract language can go a long way in establishing the agreed-upon roles and responsibilities of the Architect and Owner at the time services are being contracted for and rendered. Accordingly, one recommendation of the Working Group is that Architects include language in their contracts making clear the reasons for seeking disclosure of product content information and disclaiming responsibility for any detailed chemical or toxicological assessment of the product or material content information to determine actual environmental or health impacts of the materials or products.

When the Architect has adopted for itself a corporate policy and advertised itself as endeavoring to promote materials transparency in its business operations generally, but the Owner does not include an obligation to address materials transparency, the Architect should consider having language in their professional service agreements, similar to the following:

Model Language:

To the extent the Architect collects product manufacturer materials disclosing product content, the Owner acknowledges that it is not relying on the Architect for any analysis of material composition or the human or environmental health impacts of specific material selections. Any assessments or evaluations of this kind should be conducted by a toxicologist or other trained professionals retained by the Owner.

When an Owner's program includes seeking LEED Certification [or other third-party certifications such as Living Building Challenge or WELL Building], the Architect may obtain disclosure or transparency documents for building materials to earn points under required or optional credits. In these circumstances, the Architect's process would be to collect the disclosure documents, agency certifications, or other requested documents or information, review the contents of the documents obtained to determine whether the product data does or does not conform to the specific requirements of the desired rating system credit, and thus discharge their duty by that collection, determination by cursory review, and submission of the documentation to the Owner. In such circumstances, the Architect should consider adding language to its agreement similar to that set forth below:

Model Language:

By training and experience, the Architect does not possess the expertise to assess the environmental and human health impacts of varying types and quantities of substances contained in building products. To the extent the Architect collects product manufacturer materials disclosing product contents for purposes of pursuing LEED Certification [or insert the name of any other third-party certifications such as Living Building Challenge or WELL Building being pursued on the Project], the Owner acknowledges that it is not relying upon the Architect for any analysis of material composition or the human or environmental health impacts of specific material selections. The Architect shall be entitled to rely exclusively on information furnished by manufacturers and material suppliers. The Owner acknowledges that the Architect does not possess the expertise to (1) evaluate the specific chemical composition of products or materials, (2) recognize that a product includes any particular chemicals or substances, or (3) evaluate the information furnished by the manufacturers or material suppliers, in order to determine the environmental and human health impacts of varying types and quantities of substances contained in building products. To the extent the Owner requires such analysis, any assessments or evaluations of this kind shall be conducted by a toxicologist or other trained professionals retained by the Owner.

Under certain circumstances the Owner may include, as part of its program, a request that the products specified for the Project contain few or none of the substances found on one or more reported health or environmental impacts lists. In this case, the Owner and Architect should agree on a definitive list or lists of substances to be considered in the evaluation of building materials. Further, the Architect should advise the Owner to engage consultants with the necessary expertise to analyze the information included in manufacturer-provided disclosures.

Under these circumstances, the Architect is required to factor the data contained within disclosure documents into the Architect's product selection process. Therefore, in order to identify the scope of service and to clarify responsibilities, share decision-making and create risk-sharing strategies around materials transparency, contract language similar to the following should be considered:

Model Language:

The Owner has provided to the Architect specification criteria that identifies those chemicals or substances that the Owner desires the Architect to avoid when specifying products to be included in the improvements being designed for the Owner. The Architect shall endeavor to specify products from manufacturers that have made information disclosing product contents publicly available, and shall further endeavor, based solely on a review of the information furnished by the manufacturers and material suppliers, to avoid specifying products that contain the substances identified by the Owner. The Architect shall be entitled to rely exclusively on information furnished by manufacturers and material suppliers. The Owner acknowledges that the Architect does not possess the expertise to (1) evaluate the specific chemical composition of products or materials, (2) recognize that a product includes one or more of the identified chemicals or substances, or (3) evaluate the information furnished by the manufacturers or material suppliers, in order to determine the environmental and human health impacts of varying types and quantities of substances contained in building products. Accordingly, the Owner warrants that it will retain a chemist, toxicologist, or other qualified professional to determine the environmental and human health impacts of varying types and quantities of substances contained in building products or to make other assessments required by the Owner:
(Insert, or attach as an exhibit, a list of substances that the Architect shall endeavor to avoid specifying or reference a published list of such substances.)

Because the services required to factor the data contained within the disclosure documents is not a service the Architect typically provides, it is considered an Additional Service. Accordingly, language should be added to the Agreement to identify what compensation the Architect will receive for this Additional Service.

B. Owner's Responsibilities and Provided Services

B-1. Fast-Track Construction

"Fast-track" is the term applied to a process in which certain portions of the Architect's design services overlap with construction activities. One characteristic of this process is the far greater likelihood that clarifications and adjustments in the Contract Documents will be required during construction, as design and construction proceed more or less concurrently.

Good communication among all parties is vital, since construction costs will change as the documents are further refined. The cost estimating responsibilities and the responsibility to make changes to the design must be coordinated between the parties. If the documents are insufficiently coordinated or incomplete, subsequent construction work may require significant correction, and costly delays may result.

Because fast-track construction departs from the customary sequential phasing of projects, the Owner must play an active role in establishing its parameters. The Owner initiates the process by authorizing commencement of construction prior to the completion of the Contract Documents, and the Owner benefits from a shorter design and construction period if the process goes as planned. Thus, it is appropriate for the Owner to assume the risks associated with this process. The following language from B103–2017 may be inserted into an Owner-Architect agreement.

Model Language:

The Owner acknowledges that accelerated, phased or fast-track scheduling provides a benefit to the Owner, but also carries with it associated risks. Such risks to the Owner include the Owner incurring costs for the Architect to coordinate and redesign portions of the Project affected by procuring or installing elements of the Project prior to the completion of all relevant Construction Documents, and costs for the Contractor to remove and replace previously installed Work. If the Owner selects accelerated, phased or fast-track scheduling, the Owner agrees to include in the budget and schedule for the Project sufficient contingencies to cover such unanticipated costs and time increases.

B-2. Concealed or Unknown Conditions in Existing Buildings

Remodeling, rehabilitation, renovation and restoration services often involve unforeseen conditions, including conditions concealed within components of an existing structure. These concealed conditions are not always discoverable before actual construction commences or circumstances may not be

amenable to destructive materials testing. The decision of whether or not to have such testing performed is a business decision of the Owner. If the Owner undertakes the duty to investigate, the Owner's responsibilities may be clarified by using the following model language, which should be added in the section on Owner's Responsibilities:

Model Language:

The Owner shall conduct an investigation, including the use of destructive testing, if appropriate, of concealed conditions and shall provide the results of that investigation to the Architect for purposes of the Architect's preparation of the Instruments of Service. In the event documentation or information furnished by the Owner is inaccurate or incomplete, any damages, losses and expenses resulting from the inaccurate or incomplete information, including the cost of the Architect's Additional Services, shall be borne by the Owner.

In other instances, the Owner may ask the Architect to proceed using the available documentation, which may not be accurate and complete. The Architect may wish to clarify responsibilities by using the following model language:

Model Language:

The Architect shall utilize documentation regarding existing conditions furnished by the Owner in the preparation of the Architect's Instruments of Service and, in doing so, the Architect shall be entitled to rely on the accuracy and completeness of the information provided. If the existing conditions materially differ from the documentation furnished by the Owner, the Architect shall have no responsibility for any costs or expense incurred by the Owner as a result of the differing conditions. In addition, if the Architect is required to make changes to the Architect's Instruments of Service, the Owner shall compensate the Architect for such services as an Additional Service.

In other instances, the Owner may not have documentation and information for the existing facility and may not wish to engage the Architect or others to perform destructive testing or investigate concealed or unknown conditions. In such instances, the following model provision may be used to further clarify the parties' responsibilities:

Model Language:

If the Owner does not provide documentation or information beyond that which is apparent by non-intrusive observations of the existing facility and the Owner does not perform destructive testing or investigate concealed or unknown conditions, the Owner shall assume sole responsibility, including the cost of Additional Services of the Architect, if any, for all unknown or concealed conditions that are encountered during construction that require changes in the design or construction of the Project.

An indemnification clause may also be inserted, as set forth below. However, the user should verify with legal counsel the enforceability of such a provision. Many states have statutes limiting or prohibiting the enforceability of indemnity clauses.

Model Language:

The Owner shall indemnify and hold harmless the 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, which arise as a result of inaccurate or incomplete documentation or information furnished by the Owner.

If the Owner requires the Architect to investigate and document existing conditions, the Architect should consider including the following model language to clarify its responsibility.

Model Language

The Architect shall conduct a reasonable investigation of concealed conditions, including the use of reasonable destructive testing the Architect deems appropriate, and shall provide the results of that investigation to the Owner. However, the Architect cannot warrant or guarantee that the Architect's investigation will disclose all concealed conditions that may exist. The Architect shall not be liable to the Owner in the event the Architect's reasonable investigation fails to reveal existing conditions that later result in a change in the Work or other costs to the Owner.

B-3. Owner Directed Changes and Substitutions

In some instances, Owners may request changes to the Architect's Instruments of Service that the Architect objects to. To address this situation an Architect may want to include the following model language. This model language will also provide additional protection where the Owner dictates a substitution against the Architect's advice. It should be noted that the following model language includes an indemnification that could include an indemnification for the Architect's own negligence. Any indemnification language included should be reviewed closely with legal and insurance counsel as indemnification provisions often must meet specific legal requirements in order to be enforceable. In many jurisdictions, anti-indemnification statutes limit the validity and enforceability of indemnification provisions in contracts including indemnification provisions that indemnify a party for its own negligence.

Model Language:

In the event the Owner directs the Architect to make revisions to the Instruments of Service to accommodate value engineering, cost-saving measures, or substitutions proposed by the Contractor, Owner, Owner's consultants, or others, against the Architect's reasonable objections to the proposed revisions, the Owner shall indemnify and hold harmless the 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 such revisions to the Instruments of Service.

Similarly, it is not uncommon for the Owner to agree to accept non-conforming work. For that reason the Architect should consider incorporating the following language from B101–2017 Section 3.1.4:

Model Language:

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.

B-4. Owner's Consultants

For various reasons, the Owner may wish to contract separately for the services of consultants, including, in some cases, licensed professionals such as engineers. In such cases, coordination of the Architect's documentation with that of the consultants is critically important and requires careful handling. The Owner's consultants should be required to coordinate their drawings with those prepared by the Architect. The Architect's review must be limited to general conformance with design concepts. Full review by the Architect would involve duplication of the consultant's services by the Architect and thus negate any cost savings anticipated by the Owner. The Architect, on the other hand, does not have authority over the consultants' services, should not be held responsible for their adequacy, and cannot certify progress payments or Substantial Completion for the portion of the Work designed by the Owner's consultants.

The following amendment may be added as needed to the provisions dealing with the Owner's responsibilities in the Owner-Architect agreement.

Model Language:

The Owner shall contract separately for the design services listed below. Unless otherwise indicated, those services shall be performed by licensed professional consultants, who shall affix their seals on the appropriate documents prepared by them. The contracts between the Owner and Owner's consultants shall require the consultants to coordinate their drawings and other instruments of service with those of the Architect and to advise the Architect of any potential conflict. The Architect shall have no responsibility for the components of the Project designed by the Owner's consultants. Review by the Architect of the consultants' drawings and other instruments of service is solely for consistency with the Architect's design concept for the Project. The Architect shall be entitled to rely upon the technical sufficiency and timely delivery of documents and services furnished by the Owner's consultants, as well as on the computations performed by those consultants in connection with such documents and services. The Architect shall not be required to review or verify those computations or designs for compliance with applicable laws, statutes, ordinances, building codes, and rules and regulations, or certify completion or payment for the Work designed by the Owner's consultant. The Owner shall indemnify and hold harmless the 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 the services performed by the other consultants of the Owner.

In some instances, an Owner may require the Architect to use specific consultants. When this occurs, the Architect does not have control over the consultants it will use. The Architect should consider the following model language as part of its agreement with the Owner. Additionally, because this model language requires the Architect to assign rights it has regarding the consultant to the Owner, the Architect should add similar language to its consultant agreements.

Model Language:

The Owner has directed the Architect to retain [insert name of Consultant(s)] to provide professional services on this Project. With respect to the services provided by _____, the Owner agrees that (1) the Architect shall not be responsible for the technical accuracy or the compliance with applicable codes or standards of practice of the portions of the Project designed or otherwise provided by _____, and (2) the Owner shall indemnify and hold harmless the 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 the services performed by _____. If the Owner has a dispute relating to the services provided by _____, the Owner shall look solely to _____ for redress. The Architect shall assign its rights to pursue such claims against _____ to the Owner.

Typically, the Owner is the party responsible for the land on which the project will be constructed. The standard language of the AIA owner-architect agreements requires the Owner to retain the geotechnical engineer. However, there is an increasing trend whereby Owners request that the Architect retain the geotechnical engineer. If that occurs, the Architect can utilize AIA Document C401-2017 as its consultant agreement. The Architect should be mindful of its agreement with the geotechnical engineer and, as is the case with all consultants, avoid limiting the geotechnical engineer's liability unless the Architect has received a similar limitation from the Owner. Additionally, the Architect should confirm that the geotechnical engineer has adequate insurance. The AIA publishes a standard scope of services document for geotechnical services, C202-2016, for use by Owners that may be of value in defining the Architect/geotechnical engineer contractual relationship, when properly edited and used in conjunction with an Architect/Consultant agreement such as C401-2017.

B-5. Owner Provided Cost Control

AIA Documents B101–2017 and B104™–2017 require that the Cost of the Work designed and specified by the Architect not exceed the Owner's budget and that the Architect be responsible for estimating the Cost of the Work to achieve that end. In some instances, the Owner may wish to engage others, such as a cost consultant or a construction manager, to provide cost estimating services that will necessitate amending those documents. The Architect should consider incorporating the following language from B103–2017 (with appropriate renumbering) if the Owner wishes to engage others to provide cost estimating services:

Model Language:

§ 1.1.10 The Owner shall retain the following consultants and contractors:
(List name, legal status, address, and other contact information.)

.1 Cost Consultant:

§ 3.2.6 The Architect shall submit the Schematic Design Documents to the Owner and the Cost Consultant. The Architect shall meet with the Cost Consultant to review the Schematic Design Documents.

§ 3.2.7 Upon receipt of the Cost Consultant's estimate at the conclusion of the Schematic Design Phase, the Architect shall take action as required under Section 6.4, and request the Owner's approval of the Schematic Design Documents. If revisions to the Schematic Design Documents are required to comply with the Owner's budget for the Cost of the Work at the conclusion of the Schematic Design Phase, the Architect shall incorporate the required revisions in the Design Development Phase.

§ 3.3.2 Prior to the conclusion of the Design Development Phase, the Architect shall submit the Design Development Documents to the Owner and the Cost Consultant. The Architect shall meet with the Cost Consultant to review the Design Development Documents.

§ 3.3.3 Upon receipt of the Cost Consultant's estimate at the conclusion of the Design Development Phase, the Architect shall take action as required under Sections 6.5 and 6.6 and request the Owner's approval of the Design Development Documents.

§ 3.4.4 Prior to the conclusion of the Construction Documents Phase, the Architect shall submit the Construction Documents to the Owner and the Cost Consultant. The Architect shall meet with the Cost Consultant to review the Construction Documents.

§ 3.4.5 Upon receipt of the Cost Consultant's estimate at the conclusion of the Construction Documents Phase, the Architect shall take action as required under Section 6.7, and request the Owner's approval of the Construction Documents.

§ 5.3 The Owner shall furnish the services of a Cost Consultant that shall be responsible for preparing all estimates of the Cost of the Work. If the Owner significantly increases or decreases the Owner's budget for the Cost of the Work, the Owner shall notify the Architect. The Owner and the Architect shall thereafter agree to a corresponding change in the Project's scope and quality.

§ 6.3 The Owner shall require the Cost Consultant to include appropriate contingencies for design, bidding or negotiating, price escalation, and market conditions in estimates of the Cost of the Work. The Architect shall be entitled to rely on the accuracy and completeness of estimates of the Cost of the Work the Cost Consultant prepares as the Architect progresses with its Basic Services. The Architect shall prepare, as an Additional Service, revisions to the Drawings, Specifications or other documents required due to the Cost Consultant's inaccuracies or incompleteness in preparing cost estimates, or due to market conditions the Architect could not reasonably anticipate. The Architect may review the Cost Consultant's estimates solely for the Architect's guidance in completion of its services, however, the Architect shall report to the Owner any material inaccuracies and inconsistencies noted during any such review.

§ 6.4 If, prior to the conclusion of the Design Development Phase, the Cost Consultant's estimate of the Cost of the Work exceeds the Owner's budget for the Cost of the Work, the Architect, in consultation with the Cost Consultant, shall make appropriate recommendations to the Owner to adjust the Project's scope, quality or budget for the Cost of the Work, and the Owner shall cooperate with the Architect in making such adjustments.

§ 6.5 If the estimate of the Cost of the Work at the conclusion of the Design Development Phase exceeds the Owner's budget for the Cost of the Work, the Owner shall

- .1 give written approval of an increase in the budget for the Cost of the Work;
- .2 terminate in accordance with Section 9.5 [termination for the Owner's convenience];
- .3 in consultation with the Architect, revise the Project program, scope, or quality as required to reduce the Cost of the Work; or,
- .4 implement any other mutually acceptable alternative.

§ 6.6 If the Owner chooses to proceed under Section 6.5.3, the Architect, without additional compensation, shall incorporate the revisions in the Construction Documents Phase as necessary to comply with the Owner's budget for the Cost of the Work at the conclusion of the Design Development Phase Services, or the budget as adjusted under Section 6.5.1. The Architect's revisions in the Construction Documents Phase shall be the limit of the Architect's responsibility under this Article 6.

§ 6.7 After incorporation of modifications under Section 6.6, the Architect shall, as an Additional Service, make any required revisions to the Drawings, Specifications or other documents necessitated by subsequent cost estimates that exceed the Owner's budget for the Cost of the Work, except when the excess is due to changes initiated by the Architect in scope, basic systems, or the kinds and quality of materials, finishes or equipment.

Architects should also be aware that the involvement of a third party cost consultant may impact their other Basic Services and require additional modifications to their agreements. For example, the Architect may be required to submit its designs directly to the cost consultant and be available for any questions the cost consultant may have. As this will impact the scope of the Architect's services, it should be addressed and defined in the Owner/Architect agreement.

Additionally, it may be the case that the Owner will hire a third-party cost estimator but also require the Architect to provide estimates. It is possible that, at some point during design, the two estimates will diverge. Language should be added to allow for a reconciliation process.

Model Language:

If the Owner's cost consultant's estimate exceeds the Owner's budget for the Cost of the Work, or varies from the Architect's estimate by more than ___ percent, the Architect shall coordinate with the Owner's cost consultant to develop strategies to reconcile the estimates with each other and the Owner's budget for the Cost of the Work.

C. Claims, Liability, Termination, Insurance and Indemnification

C-1. Dollar Limitation on Arbitration

Arbitration provisions have been provided in AIA contract forms since 1888 to encourage alternative dispute resolution procedures and provide users with legally enforceable arbitration provisions when the parties choose to adopt arbitration into their contract. The inclusion of an arbitration provision is a business decision to be made by the parties depending upon their particular circumstances and the project. Some may choose to delete the arbitration provision in the AIA agreement or to select another method of dispute resolution. For others, arbitration is an acceptable method if a limitation is placed on the claims to be arbitrated. The model language below allows the parties to place a dollar limitation on claims subject to arbitration. Unless the parties subsequently agree otherwise, claims above that limit will have to be litigated.

The AIA does not have suggestions regarding the amount that should be inserted in the blank space. Placing a dollar limit on arbitration or any alternative dispute resolution process may tempt a claimant to make inflated claims merely to exceed the limit and force litigation. Thus, care must be exercised in reaching agreement as to the dollar limit to ensure that both parties exercise good faith efforts in applying this provision.

The following model language may be added to the arbitration provision found in most AIA Owner-Architect agreements:

Model Language:

Notwithstanding the above, of those claims, disputes or other matters in question between the parties to this Agreement that are subject to arbitration, only those that, in the aggregate, are less than or equal to _____ Dollars (\$) shall be decided by arbitration.

C-2. Venue Selection

The lack of a specific venue results in disputes over where mediation or arbitration will occur. Accordingly, the parties may wish to define the venue in their agreement with the following model language:

Model Language:

Venue for mediation and final method of dispute resolution selected in this Agreement shall be _____ or, if no location is identified, mediation shall be held in the place where the Project is located.

C-3. Electronic Discovery

As with most industries, the design and construction industry is relying more and more on electronic and digital documents to maintain project records. Additionally, technological advances have resulted in "electronic project files" that are vastly larger than a typical paper file. Accordingly, when a dispute arises, the discovery process as it relates to electronic data can be extensive and burdensome due to the sheer volume of information available. While the Federal Courts and most, if not all, State courts have developed rules of civil procedure governing electronic discovery, the parties may wish to address the issue in their agreement

to set reasonable expectations in case of a dispute. Below is model language that can be considered. However, because the electronic discovery rules tend to vary from jurisdiction to jurisdiction, users should consult with a local attorney to confirm that the language is appropriate for their particular situation.

Model Language:

In any dispute resolution proceeding, when document production is required, the electronic documents to be produced shall be limited to electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from back-up servers, tapes, or other media.

Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in native format and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata, with the exception of header fields for email correspondence.

Where the costs and burden of electronic discovery are disproportionate to the nature and gravity of the dispute or the relevance of the materials requested, the requesting party shall advance the reasonable cost of production to the producing party, subject to further allocation of costs in the final award.

C-4. Definition of Consequential Damages

Design and construction contracts, including almost all the AIA agreements, often include a waiver of consequential damages. Consequential damages are indirect and unforeseeable damages and may include loss of reputation, loss of business profits, and loss of the ability to proceed with other projects. While these are examples of the types of damages that may be considered consequential, jurisdictions may have different understandings and definitions as to what qualifies as a consequential damage versus a direct damage. There may be some risk that certain consequential damages could be classified as direct damages and thus not subject to the contractual waiver. Where the parties have agreed to a mutual waiver of consequential damages, the parties may wish to specifically define consequential damages so as to avoid later disputes on the issue. Below is model language that can be considered, but because the definition of consequential damages varies from jurisdiction to jurisdiction, users should consult with a local attorney to confirm that the language is appropriate for their particular situation.

Model Language:

Consequential damages, for purposes of the waiver in this Agreement, include damages for losses of use, income, profit, financing, business and reputation.

C-5. Termination or Suspension

When the Owner suspends or terminates the Project, the Architect incurs costs that would not have been incurred had the Project continued to completion. Most of these costs are the result of having to make changes in the staffing of the architectural practice to accommodate a terminated or suspended project. This model provision clearly sets out some of these costs so that the Owner will understand that the termination or suspension of the Project is not without economic consequence. The list contained in the provision is only a model and may be modified.

Model Language:

The equitable adjustment to the Architect's compensation as required by this Agreement shall include all reasonable costs incurred by the Architect on account of termination or suspension of the Project, for preparation of documents for storage, maintaining space and equipment pending resumption, orderly demobilization of staff, maintaining employees on a less-than-full-time basis, terminating employment of personnel because of termination or suspension, rehiring former employees or new employees because of resumption, reacquainting employees with the Project upon resumption and making revisions to comply with Project requirements at the time of resumption.

In addition to the list of costs incurred by the Architect as result of the suspension or termination, the Architect also loses profit on the services not performed in completing the Project. Determining anticipated profit, however, is a difficult matter and one that the parties are unlikely to easily agree upon

when a project is being suspended or terminated. Accordingly, the parties may wish to establish a termination fee at the time the agreement is executed to reasonably account for the Architect's lost profit and avoid an additional dispute if the project is suspended or terminated. Indeed, many of the AIA owner-architect agreements include a pre-negotiated termination fee.

The termination fee can be structured in a number of different ways, including as a flat fee or a tiered payment system based upon the stage of completion of the Project. Model language is provided below.

OPTION A

If the Owner and Architect agree to a flat termination fee, the following Model Language may be used.

Model Language:

The termination fee shall be _____ Dollars (\$ _____).

OPTION B

If the Owner and Architect agree to a tiered payment system for the termination fee, based upon the stage of completion of the Project, the following Model Language may be used. Typically parties will make use of a percentage amount of the remaining services to be provided. Whatever percentage the parties choose, it should be reasonably tied to a firm's typical profit margins so as to avoid having the fee classified as a penalty to the Owner, which may be unenforceable.

Model Language:

The termination fee shall be ____ percent of the designated compensation the Architect would have received for services scheduled to be performed by the Architect after the date of termination and if the termination had not occurred.

C-6. Limitation of Liability

Example A: Lump Sum

The enforcement of limitation of liability provisions is a rapidly developing area of the law. When this type of provision is used, care must be taken in the earliest stage of negotiation. Negotiations must clearly and plainly indicate that this provision has been agreed to by all parties. It may be advisable for the parties to specifically and separately sign this provision in the Agreement.

Because of the legally sensitive nature of limitation of liability provisions, the parties are cautioned to consult with legal counsel as to the specific application of local laws to this provision. Users are further cautioned that this provision protects the Architect only from claims by the Owner. Third parties are not bound by such a contractual provision.

Model Language:

Except for acts amounting to willful or intentional wrongs, neither the Architect, Architect's consultants, nor their agents or employees shall be jointly, severally or individually liable to the Owner in excess of the compensation to be paid pursuant to this Agreement or Dollars (\$ _____), whichever is greater.

Example B: Available Insurance

Refer to the note for Example A above, which also applies to Example B. If the Owner is not willing to agree to the limitation of liability set out in Example A, an alternative may be to limit the liability of the Architect and Architect's consultants to the amount of available insurance. This will protect the Owner and Architect without exposing the Architect and Architect's consultants to liability in excess of their insurance coverage and deductibles.

Care should be exercised, as set forth in the example outlined below, to understand that most professional liability policies have per claim and aggregate limits, both of which usually include defense costs. The actual policy amounts available for the payment of damages may not be the insured's policy coverage limits.

Model Language:

Except for acts amounting to willful or intentional wrongs, neither the Architect, Architect's Consultants, nor their agents or employees shall be jointly or individually liable to the Owner for an amount in excess of the proceeds of the available professional liability insurance coverage required under this Agreement.

Example C: Compensation Reduction

The Architect may wish to consider agreeing to reduce its compensation in consideration of a limitation of liability.

Model Language:

In consideration of a reduction represented in the Architect's compensation, the parties agree that, except for acts amounting to willful or intentional wrongs, neither the Architect, Architect's consultants, nor their agents or employees shall be jointly or individually liable to the Owner in an amount in excess of the Architect's compensation.

C-7. Architect's Indemnity to the Owner

AIA Document B103–2017, Standard Form of Agreement Between Owner and Architect for a Complex Project, contains an indemnity provision against third-party claims that provides that the Architect's duty to indemnify the Owner shall be limited to the available proceeds of insurance coverage. In order to account for coverage limitations associated with professional liability insurance, it also establishes that the obligation of indemnity is limited to the extent of the Architect's negligent acts or omissions, and that the obligation does not include a duty to defend. The other AIA owner-architect agreements do not contain an indemnity provision, other than for the architect's duty to rectify any deficient services. Many states have statutes limiting or prohibiting the enforceability of indemnity and limitation of liability clauses. The parties are cautioned to consult with legal and insurance counsel as to the specific application of local laws, and insurance coverage restrictions, to this provision.

Model Language:

The Architect shall indemnify and hold the Owner and the Owner's officers and employees harmless from and against damages, losses and judgments arising from claims by third parties, including reasonable attorneys' fees and expenses recoverable under applicable law, but only to the extent they are caused by the negligent acts or omissions of the Architect, its employees and its consultants in the performance of professional services under this Agreement. The Architect's obligation to indemnify and hold the Owner and the Owner's officers and employees harmless does not include a duty to defend. The Architect's duty to indemnify the Owner under this provision shall be limited to the available proceeds of the insurance coverage required by this Agreement.

C-8. Insurance

AIA Documents B101-2017 and B103–2017 contain the following insurance provisions. These provisions, with edits as required to align section numbers, may be used as model language to supplement or modify insurance provisions in other Owner-Architect agreements:

Model Language:

§ 2.5 The Architect shall maintain the following insurance until termination of this Agreement. If any of the requirements set forth below are in addition to the types and limits the Architect normally maintains, the Owner shall pay the Architect for the additional coverages.

§ 2.5.1 Commercial General Liability with policy limits of not less than _____ (\$___) for each occurrence and _____ (\$___) in the aggregate for bodily injury and property damage.

§ 2.5.2 Automobile Liability covering vehicles owned, and non-owned vehicles used, by the Architect with policy limits of not less than _____ (\$___) per accident for bodily injury, death of any person, and property damage arising out of the ownership, maintenance and use of those motor vehicles, along with any other statutorily required automobile coverage.

§ 2.5.3 The Architect may achieve the required limits and 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 liability 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 by the underlying insurers.

§ 2.5.4 Workers' Compensation at statutory limits.

§ 2.5.5 Employers' Liability with policy limits not less than _____ (\$____) each accident, _____ (\$____) each employee, and _____ (\$____) policy limit.

§ 2.5.6 Professional Liability covering negligent acts, errors and omissions in the performance of professional services with policy limits of not less than _____ (\$____) per claim and _____ (\$____) in the aggregate.

§ 2.5.7 Additional Insured Obligations. To the fullest extent permitted by law, the Architect shall cause the primary and excess or umbrella policies for Commercial General 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.

§ 2.5.8 The Architect shall provide certificates of insurance to the Owner that evidence compliance with the requirements in this Section 2.5.

Parties to an agreement may also want to consider including a Cyber Security Insurance requirement. The costs and damages associated with a data security and privacy breach can be extensive, especially if the Owner is required to notify a large number of people whose data or privacy was compromised. There are a number of insurance options available to address cyber-security risk, including third-party liability based policies and first-party property based policies. Parties are encouraged to discuss their cyber-security insurance needs with an insurance professional as the scope and coverage of available policies can vary greatly. The following language may be used as model language to supplement the insurance provisions in an Owner-Architect agreement where the Owner will purchase first-party cyber security insurance coverage:

Model Language:

The Owner shall maintain a Cyber Security Insurance policy to cover loss to the Owner due to data security and privacy breach, including costs of investigating a potential or actual breach of confidential or private information.

(Indicate applicable limits of coverage or other conditions in the fill point below.)

C-9. Meet and Confer

Meet and Confer as Condition Precedent to Mediation

While good business practice dictates that the parties will meet and confer in an effort to resolve disputes prior to engaging in mediation and binding dispute resolution, many parties find it useful to include this step as a contractual obligation and condition precedent to mediation and binding dispute resolution.

The following model language may be used to establish meet and confer as a condition precedent to mediation:

Model Language

Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to a meet and confer session as a condition precedent to mediation.

The meet and confer session shall be attended by members of the Owner and Architect's senior management who shall have full authority to bind their respective party with respect to the claim, dispute or other matter in question. The meet and confer session shall take place within _____ ()

days after a request by either party, unless the parties mutually agree otherwise.

If the parties reach a mutually acceptable resolution, then they shall prepare appropriate documentation memorializing the resolution. If the parties cannot reach a mutually acceptable resolution, they shall proceed to mediation in accordance with this Agreement.

D. Ownership of the Architect's Instruments of Service and Professional Credit

D-1. Ownership of the Architects Instruments of Service

When the Owner requires the Architect to transfer title to the original Drawings and Specifications, care must be exercised in transferring ownership of these Instruments of Service. In particular, the Owner should be advised that ownership does not necessarily include the right to reuse the documents, nor does it necessarily limit the Architect's right to reuse information contained therein. It should be noted that by retaining all other rights in the documents, the Architect also retains the copyright.

Should the Owner, for whatever reason, fail to honor the contractual limitations on reuse of the Drawings and Specifications, the Owner should be responsible for indemnifying the Architect against any loss caused by the Owner's misuse of these Instruments of Service.

Some state laws prohibit contractual indemnification outside of insurance. Therefore, the user should have any indemnification provision reviewed by legal counsel prior to inclusion in the Owner-Architect agreement.

Application of this amendment will require a preface indicating the deletion of the standard provisions on ownership of documents from the agreement form and substitution of this amendment, as follows:

Model Language:

Upon full payment of all sums due or anticipated to be due the Architect under this Agreement, and upon performance of all the Owner's obligations under this Agreement, the latest original Drawings and Specifications, and the latest electronic data, prepared by the Architect for the Project shall become the property of the Owner. This conveyance shall not deprive the Architect of the right to retain electronic data, or other reproducible copies of the Drawings and Specifications, or the right to reuse information contained in them in the normal course of the Architect's professional activities. The Architect shall be deemed the author of such electronic data, documents and design, and shall retain all rights not specifically conveyed, and shall be given appropriate credit in any public display of such documents.

The Owner shall not use, or authorize any other person to use, the Drawings, Specifications, electronic data, and other Instruments of Service, on other projects, for additions to this Project, or for completion of this Project by others, so long as the Architect is not adjudged to be in default under this Agreement. Reuse without the Architect's professional involvement will be at the Owner's sole risk and without liability to the Architect. The Owner shall indemnify and hold harmless the 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 unauthorized reuse of Drawings, Specifications, electronic data, or other Instruments of Service.

Under no circumstances shall the transfer of ownership of the Drawings, Specifications, electronic data or other Instruments of Service be deemed to be a sale by the Architect, and the Architect makes no warranties, express or implied, of merchantability or of fitness for a particular purpose.

Coordinate this amendment with any lower tier agreements, such as those used with the Architect's engineering consultants. For example, when using AIA Document C401™–2017, Standard Form of Agreement Between Architect and Consultant, the consultant agreement will require its own amendment as follows.

Delete Section 7.1 in C401™–2017 and substitute the following:

Model Language:

§ 7.1 Ownership of the latest original Drawings and Specifications prepared by the Consultant shall be conveyed to the Owner in the same manner and to the same extent as provided in the attached Prime Agreement, and the Consultant shall be afforded the same rights with respect to electronic data or other reproducible copies of the Drawings and Specifications, and the information contained therein, as are afforded to the Architect in the attached Prime Agreement.

The Architect should address the issue of protection from the Owner against suits and claims for copyright infringement arising from material the Owner provides the Architect, as follows:

Model Language:

The Owner represents that the Owner owns the copyright in, or holds appropriate licenses for, drawings and specifications furnished by the Owner to the Architect for use in connection with the Project and, upon reasonable request, the Owner shall furnish to the Architect evidence of such ownership or licenses. The Owner shall defend suits or claims for infringement of copyrights arising from such material furnished by the Owner shall indemnify and hold harmless the 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, on account thereof.

D-2. Professional Credit

B101 requires the Owner to provide professional credit to the Architect in its promotional materials. Often, however, the Architect does not receive professional credit in media and other publications. The following model language can be inserted into the Agreement to increase the likelihood that credit will be provided to the Architect:

Model Language:

In addition to providing professional credit to the Architect in its promotional materials, the Owner shall endeavor to provide professional credit to the Architect in all media and other publications related to the Project.

E. Compensation and Payments

E-1. Insurance Reimbursement

Example A: Lump Sum

Premium payments for professional liability insurance are typically related to the Project size and type. If the Owner requests that the Architect carry insurance in excess of the Architect's usual limits, the Architect may wish to obtain payment directly from the Owner for this expense. The AIA has no suggested amount that might be placed in the blank space provided in the model provision. This amount might be estimated on a pro-rata basis depending upon the effective date of the insurance policy and the commencement date of the Owner-Architect agreement. Either of these options, if chosen, should be incorporated into a list of Reimbursable Expenses contained in the Owner-Architect agreement, as follows.

Model Language:

If the types and limits of coverage required in by the Owner 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 the Agreement and the premium amounts for which the Owner shall reimburse the Architect.)

Example B: Project-Specific Insurance

Project-Specific insurance can have benefits for both the Owner and Architect. The Owner benefits in that the policy is dedicated to that particular Project, and claims on other projects cannot deplete the coverage available. Because the whole design team is covered, there is less reason to attempt to apportion liability among its members in the event of a loss. The Architect and Architect's consultants may be able to have

the billings for this Project removed from the ratable billings for their practice policies. The Architect should contact insurance counsel regarding the availability and approximate cost of separate Project coverage before the decision is made to obtain this type of insurance for the Project.

Model Language:

The Architect shall purchase and maintain, from an insurer lawfully authorized to do business in the jurisdiction in which the Project is located, Project-Specific professional liability insurance, covering negligent acts, errors and omissions in the performance of professional services, with policy limits of not less than _____ (\$____) per claim and _____ (\$____) in the aggregate. The Owner shall pay the expense of premiums for the Project-Specific insurance as follows:

(Insert amount of each premium or other information describing how premium payments will be made)

E-2. Compensation – Percentage Basis

When the Architect is compensated on a percentage of the Cost of the Work, there is often confusion at the conclusion of the project when the actual Cost of the Work varies significantly from the previous estimates upon which the Architect's progress payments were made. Unless the agreement explains clearly what should happen, the parties are left in a dispute as to whether previous payments made should be adjusted based on the actual Cost of the Work. Not only is there confusion, there is significant risk to both the Owner and the Architect. If the Cost of the Work comes in above the estimates, the Owner may be required to pay the Architect significant amounts of money to reconcile past payments with the higher Cost of the Work. Alternatively, the Architect may be forced to give money back to the Owner if the actual Cost of the Work comes in below budget.

B101-2017 addresses the confusion caused when the Architect is compensated based on a percentage basis by adding language describing how the parties would deal with this situation. The language in B101-2017 precludes the parties from adjusting previous progress payments based on updated estimates and the actual Cost of the Work. It also anticipates that the Owner's Budget for the Cost of the Work will be updated regularly, at appropriate intervals, over the course of design and construction of the Project. Therefore, the risks outlined above are reduced for both parties. The following model language is based on the provision added to AIA Documents B101-2017 and B103-2017:

Model Language:

When compensation for the Architect's Basic Services is on a percentage basis, progress payments for each phase of Basic Services shall be calculated by multiplying the percentage for each phase identified in this Agreement by the Owner's most recent budget for the Cost of the Work.

Compensation paid in previous progress payments shall not be adjusted based on subsequent updates to the Owner's budget for the Cost of the Work.

If, however, the parties prefer to adjust the compensation to reconcile it with the actual cost of the work when the project is completed, parties should consider the following model language:

Model Language:

When compensation for the Architect's Basic Services is on a percentage basis, progress payments for each phase of Basic Services shall be calculated by multiplying the percentage for each phase identified in this Agreement by the Owner's budget for the Cost of the Work as updated at the end of the previous phase. Compensation for Basic Services shall be adjusted as necessary to reconcile the total compensation paid to the Architect for Basic Services with the actual Cost of the Work upon Final Completion.

E-3. Pay-If-Paid

AIA Standard Architect-Consultant agreements do not contain a pay-if-paid clause. Many states have statutes limiting or prohibiting the enforceability of pay-if-paid clauses and some courts have found them to be unenforceable as a matter of public policy. The user should verify with legal counsel the enforceability of such a provision. A pay-if-paid clause must clearly establish the intent of the parties to shift the credit risk of the Owner's insolvency and should include the words "condition precedent." The following language may be inserted in C401-2017.

Model Language:

It is specifically understood and agreed that the payment to the Consultant is dependent, as a condition precedent, upon the Architect’s receipt of payment from the Owner. Consultant acknowledges the risk of non-payment to the Architect by the Owner which may result in non-payment to the Consultant by the Architect.

F. Other

F-1. Owner Requested Certifications

The Architect’s certifications required by many AIA documents are limited to the extent that the information contained in the certified statement is within the “knowledge, information or belief” of the Architect. This limitation is necessary because all relevant information may not be available to the Architect when the certification is required.

Because owners and others might not be aware of the difference between a limited and an unlimited certification, AIA documents, such as B101–2017 Section 10.4 contain a requirement that the Owner submit the “proposed language of such certificates...to the Architect for review at least 14 days prior to the requested dates of execution.” The following amendment may be added to the provisions dealing with the Owner’s responsibilities that are found in most AIA documents.

Model Language:

Subject to the approval of the Architect, the certificate or certification requested by the Owner of the Architect shall utilize AIA forms or follow the format below.

ARCHITECT’S STATEMENT AND CERTIFICATION

With respect to the Project:
(Name and Address)

The following statement is made by the Architect:
(Insert the appropriate statement. See the list of examples below.)

With respect to the above statement, the Architect provides the following:

CERTIFICATION:

Based upon the Architect’s knowledge, information and belief, the Architect certifies that the above statement is true and correct in the Architect’s professional opinion. This certification is only intended for the benefit of the Recipient. Unless otherwise specifically agreed to by the Architect in writing, other persons or entities, including assigns and successors of the Recipient, shall not be considered beneficiaries and shall not be entitled to rely upon this certification.

The Recipient is:

(Signature)

(Date)

The Architect is:

(Signature)

(Date)

Some examples of the possible certification statements that might be used in the above certification are as follows:

Model Language:

Example 1

The Drawings and Specifications of the Architect, as identified below, are in substantial compliance with applicable zoning and building code requirements. Those Drawings and Specifications are:
(Either list the documents here or refer to an exhibit to this certification.)

Example 2

Based upon the geotechnical report prepared by:
(Insert name of geotechnical firm or engineer.)

dated _____, and upon the Drawings and Specifications of the licensed professional engineer, as identified below:
(Insert a list identifying the Drawings and Specifications.)

_____, the designs for the foundations of the buildings and improvements for this Project should be adequate to support them when constructed.

Example 3

Based upon the Architect's site visits during the progress of the Work and the Contractor's representations made to the Architect, the construction of the building and other improvements to the Project, to the best of the Architect's knowledge, information and belief, have been completed in general compliance with the requirements of the Contract Documents that constitute the Agreement between the Owner and Contractor.

Example 4

The required certificates of occupancy for the Project have been issued by the appropriate local governmental agencies having jurisdiction over the Project.

Example 5

The gross square feet of enclosed floor area of the building constructed for this Project are:

Example 6

Based upon the certified survey prepared by:
(Insert name of surveyor.)

dated _____, the building and other improvements to the Project depicted by that survey are located within the property boundaries, and reflect easements, rights-of-way and encroachments in force relative to the land upon which the Project is built. All specific and general exceptions shown on the Owner's title insurance policy are expressly excluded from this certification.

Example 7

The Architect, in the design of the Project, has exercised reasonable professional effort and judgment to interpret and include Architectural Guidelines authorized under the Americans with Disabilities Act (ADA) published as of _____.

Agreement forms generally require the Architect to execute certificates. The information or facts requiring certification should be within the Architect's knowledge, services provided on the Project, or responsibilities within the scope of the services for the Project. Such certifications are usually requested at the culmination of all or a portion of the Architect's services, and it is appropriate that the Architect receive payment in full for all completed services prior to being required to provide certifications.

Model Language:

If the Owner requires the Architect to provide certifications, the Owner shall pay the Architect's full compensation for all services provided prior to the date when the Architect is required to execute such certificates.

Before applying any of these statements to a specific situation, the Architect should have them reviewed by legal and insurance counsel.

F-2. Hazardous Materials

When and if the Owner and Architect agree that the Architect will assist the Owner in dealing with a mold or hazardous materials problem, this model provision may be appropriate. Because of the threat of indeterminate claims, insurance of any kind for claims related to hazardous materials may be difficult or expensive to obtain in today's marketplace. As a substitute, the Owner becomes a personal insurer for the Architect through the indemnification provision of this model section. Such a provision may be worthwhile if the Owner has sufficient assets, but may be illusory if the Owner is later found to be insolvent. The Owner's financial capacity to handle any loss under this provision is crucial to its implementation.

Some states have enacted anti-indemnification statutes specifically targeted at construction contracts. Many of these states forbid transfer of the Architect's liability based upon the Architect's sole negligence or willful misconduct. Thus an exception relating to the Architect's sole negligence or willful misconduct has been included in the model provision.

Model Language:

If the Architect is required to perform services related to mold or hazardous materials, the Owner agrees to indemnify and hold harmless the Architect, Architect's consultants, and their agents and employees from and against any and all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of such services by the Architect, Architect's consultants, or their agents or employees, except where liability arises from the sole negligence or willful misconduct of the person or entity seeking indemnification.

F-3. Assignment of the Agreement

Some owners may wish to assign the Owner-Architect agreement to another party. This model provision deals mainly with financial arrangements. If other issues are of concern, such as ownership of Instruments of Service and timely payment of amounts due and outstanding to the Architect, they should be addressed within the provision with the assistance of legal counsel.

Model Language:

In lieu of any provision in this Agreement against assignment, the Owner may assign its rights and responsibilities under this Agreement to a third party if, as conditions precedent to such assignment (1) the Owner pays the Architect all sums due for services provided by the Architect as of the date of the assignment, (2) the Owner and the Owner's proposed assignee furnish to the Architect reasonable evidence that arrangements have been made by the proposed assignee to fulfill the Owner's obligations, including financial obligations, under this Agreement, and (3) the Architect has no reasonable objection to the proposed assignment. Any expense incurred by the Architect as a result of the assignment shall be considered as an Additional Service and compensated in accordance with this Agreement.