



AIA OWNER-ARCHITECT

AIA Document B511-2001

Guide for Amendments to AIA Owner-Architect Agreements

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

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STANDARD AND MODEL DOCUMENTS

The AIA recognizes that its standard form documents require modification to fit particular projects. Proper modifications are encouraged, with the appropriate assistance of legal and insurance counsel. However, such modifications should not be attempted without first understanding the assumptions underlying those documents.

One basic distinction to be aware of is that between standard and model documents. This Guide is a model document. The contract language it contains is intended to be retyped in creating amendments to AIA standard documents. The standard documents, on the other hand, are intended to be used as originally published by the AIA, with modifications clearly distinguished from the published text.

The reason for keeping a standard document intact is inherent in the concept of standardization. As the document is used in numerous transactions, users become familiar with its published contents. Over time, this familiarity simplifies these transactions: parties merely have to examine the proposed user modifications, assuming that the baseline established by the published standard document is left intact. This saves time and money for all concerned. For this reason, the AIA only revises its standard documents at fairly long intervals, to avoid disrupting people's familiarity with the published contents.

Standardization is especially critical on construction projects, which may involve hundreds of contractual relationships. AIA documents are drafted and coordinated with a view to avoiding overlaps and gaps in the rights and duties of the many 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 Owner-Contractor agreement, or in the General Conditions, in order to avoid serious conflicts and inconsistencies.

PURPOSE OF THIS GUIDE

The model provisions in this Guide may be used to amend most of the Owner-Architect agreements currently published by the AIA, including those listed on the cover page of the Guide.

Many of the provisions in B511-2001 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. In all cases, these provisions were chosen for this model document because they deal with unique circumstances that are not typical enough for AIA's standard documents, which have nationwide, and not just local or specialized, application.

Users are further cautioned that the careless application of these provisions may lead to results that are neither intended nor desired. To restate the warning that appears on the cover page of most AIA agreement forms: legal counsel should be consulted with regard to the incorporation of any of these provisions into a contract.

HOW TO USE THIS GUIDE

For users unfamiliar with this Guide, it will be helpful to compare it with a copy of an AIA document such as B141-1997, Standard Form of Agreement Between Owner and Architect with Standard Form of Architect's Services, to understand how the amendments discussed herein affect the document. Model language is printed in a sans serif typeface (example: Architect), and indented from the body text of the Guide. It is intended to be adapted and retyped for incorporation into Owner-Architect agreements. Specific methods for doing so are discussed in "Methods for Amending Documents" on Page 7 of this Guide.

The reader is assumed to have a basic knowledge of the AIA document that is to be modified so as to be able to apply the amendments in the proper context. For users unfamiliar with earlier editions of this Guide, please be aware that this edition is NOT specifically coordinated with the provisions of B141-1997, but is intended for use in modifying AIA Owner-Architect agreements generally.

THREE COMMON ERRORS IN AMENDING STANDARD DOCUMENTS

Many of the errors made in amending AIA documents fall into three broad categories.

The first error is to modify a document without checking to see how the modification affects other documents used on the Project. Most AIA documents are linked with other AIA documents into groups of coordinated forms called "families." Users should familiarize themselves with the document families as a first step to understanding where linkages among the documents exist. For example, one of the amendments in this Guide shows how the Architect's construction phase services can be eliminated, leaving these to be performed by the Owner. If this modification is made to the Owner-Architect agreement without a parallel change to the General Conditions, there will be serious confusion during construction as to whom the Contractor needs to consider.

The second error is to treat a standard document as if it were a model form and retype or otherwise copy the language from the document. This eliminates the benefit of standardization discussed under "Standard and Model Documents," above. It also introduces the possibility of error in retyping.

The third error comes from a misconception about legal interpretation and writing methods. It is NOT necessary to write every term of a contract into the core agreement. Other writings can be incorporated by reference. It is helpful to attach these writings to the core document, but even this may not be strictly necessary. As stated in Williston on Contracts, Third Edition, "where a writing refers to another document, that other document, or so much of it as is referred to, is to be incorporated as part of the writing."

Incorporation by reference must be complete and specific enough to indicate without ambiguity the document to be incorporated. This may be done (1) by a specific reference in the core document or (2) by cross-references in both the core document and the amending document. As an example of a reference in the core document, AIA Document B141-1997 contains two references (in Subparagraphs 1.3.7.4 and 2.6.1.1) to the terms, conditions and definitions found in AIA Document A201-1997. As an additional precaution, the parties may also initial each page and sign the final page of the amendments to indicate their mutual agreement.

A NOTE ABOUT DEFINED TERMS AND CAPITALIZATION

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When amending the Owner-Architect agreement, the parties should determine if any terms within the model language (ex. "drawings") are defined terms within the agreement being modified or within a document incorporated into the agreement. In such cases, those terms should be capitalized. For documents incorporating definitions by reference from AIA Document A201, General Conditions of the Contract for Construction, follow the guidelines as written in A201-1997, Paragraph 1.3:

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

FURTHER READING

The Architect's Handbook of Professional Practice contains many of the documents published by the AIA and includes helpful commentaries on selected AIA documents, including B141.

METHODS FOR AMENDING DOCUMENTS

There are many methods for amending AIA documents. Some of these methods require needless effort, while some may result in ambiguity. Although it is common practice to graphically delete material and insert new material in the margins of the standard form, this may create ambiguity. Further, it is not recommended that language in the standard document be graphically stricken in such a way as to render it illegible (as, for example, with blocking tape, correction fluid or Xs that completely obscures the text). The recommended method of modifying the document is to attach separate written amendments to the standard form document that refer back to the numerical sequence of provisions in that document.

The three illustrations on Pages X through X refer to AIA Document B141-1997 as an example.

ILLUSTRATION 1

This illustration shows how a single, simple and short amendment can be added to a core document. Space is provided in the last article of most AIA Owner-Architect agreement forms for insertion of short amendments. In B141, this article is Article 1.4, Scope of Services and Other Special Terms and Conditions. The following is an example of a short amendment typed into this article:

ILLUSTRATION 2

The space provided in the published AIA documents may not be sufficient to accommodate longer amendments. This illustration shows how longer amendments can be assembled using the numerical sequence of articles, paragraphs, subparagraphs and clauses of a core document. When amendments include both deletions and additions, this method is usually the most appropriate.

AIA Document B141-1997 is again used for purposes of this example. A general statement adopting an amendment into the core document is often inserted in the space provided under Article 1.4, Scope of Services and Other Special Terms and Conditions. (See discussion under "Three Common Errors in Amending Standard Documents," Page 5 of this Guide.) Such a statement could be as simple as the following:

In the case of B141-1997, the last page of Part 1 is 1-12, so the amendments begin on Page 1-13.

Next, on separate sheets show your amendments as discrete exhibits with pages numbered as described above. The introductory statement below is a cross-reference back to B141 that could be used as a heading for the first page of the exhibits, followed by the specific modifications.

When deleting an entire numbered provision of the core document, it is generally enough to say, for example, "Delete Paragraph 2.1." The imperative is customarily used because it is shorter and less legalistic than such language as "Paragraph 2.1 shall be hereby deleted."

ILLUSTRATION 3

Again assuming a longer set of amendments, this illustration shows a simple addition that uses its own numbering system instead of referencing the numbers of the articles, paragraphs, subparagraphs and clauses in the core document.

As in Illustration 2, a sentence referencing and adopting the amendments should be inserted in the last article of the AIA document. The amendments should then be attached. Again using AIA Document B141-1997 as an example, the introductory statement on the first page of the amendment would begin as follows:

Because each page of amendments is custom-made, it is often appropriate for the parties to initial each page of the amendments.

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CONCEALED OR UNKNOWN CONDITIONS IN EXISTING BUILDINGS

Remodeling, rehabilitation, renovation and restoration services often involve unforeseen conditions, including various conditions concealed within the walls and floors of an existing structure. These concealed conditions are not always discoverable before actual construction commences or 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. Moreover, the Owner may ask the Architect to proceed using the available documentation, and in turn, the Architect may wish to clarify responsibilities by using the model provisions that follow. Because this model paragraph includes an indemnification provision, the user should verify the enforceability of such a provision with legal counsel. Many states have statutes limiting or prohibiting the enforceability of such provisions.

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The Architect's services shall be provided to assist the Owner in making changes to an existing facility for which the Owner shall furnish, in a timely manner, documentation and information upon which the Architect may rely for its accuracy and completeness. Unless specifically authorized or confirmed in writing by the Owner, the Architect shall not be required to perform or to have others perform destructive testing or to investigate concealed or unknown conditions. In the event documentation or information furnished by the Owner is inaccurate or incomplete, any resulting damages, losses and expenses, including the cost of the Architect's Change in Services or Additional Services, shall be borne by the Owner.

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.

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 to investigate concealed or unknown conditions. In such instances, the following model provision may be used to further clarify the parties' responsibilities.

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 contract with the Architect or others to perform destructive testing or to investigate concealed or unknown conditions, the Owner shall assume sole responsibility, including the cost of Change in Services or 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.

REVIEW OF MULTIPLE RESUBMITTALS

The Architect's review of multiple resubmittals creates unanticipated expense to the Architect that may be impossible to reasonably estimate at the outset of the Project. The following amendment can be added to an Owner-Architect agreement as a way to deal with this uncertainty, and an appropriate preface should be drafted. This language is not applicable to B141-1997 since such language is already provided.

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 in accordance with the compensation provisions of this Agreement.

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.

MULTIPLE SITE VISITS BY THE ARCHITECT

The number of site visits required to adequately 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 any further site

visits. The following amendment may be used to modify the provisions on site visits found in an AIA document. This language is not applicable to B141-1997 since such language is already provided.

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

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, 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 work may require significant correction, and costly delays may result.

Because this process departs from the customary sequential phasing of projects, the Owner must play an active role in establishing its parameters. It is the Owner who initiates the process by authorizing commencement of construction prior to the completion of the Contract Documents, and it is the Owner who benefits if the process goes as planned. It is thus, quite properly, the Owner who assumes the risk resulting from this process.

Upon receipt of the Owner's written authorization for construction activities to commence prior to completion of the Architect's design services, the Architect shall provide construction administration services that overlap with design services in order to expedite the Owner's early occupancy of all or a portion of the Project. The Owner shall furnish to the Architect in a timely manner information obtained from all Contractors and prospective contractors regarding anticipated market conditions and construction cost; availability of labor, materials and equipment; and their proposed methods, sequences and time schedules for construction of the Work. Upon receipt of their proposed construction schedules, the Architect shall prepare a schedule for providing services. In the event of a conflict between the proposed construction schedules and the Architect's proposed schedule, the Architect shall inform the Owner of such conflict.

Documents Coordination. When corrections or adjustments to the Drawings, Specifications or other documentation become necessary because the Owner has chosen to proceed as described above, the Architect shall be compensated for such corrections or adjustments in accordance with the compensation provisions of this Agreement.

OWNER PROVIDED COST CONTROL

The Standard Form of Architect's Services: Design and Contract Administration, found in AIA Document B141-1997, requires that the Cost of the Work designed and specified by the Architect not exceed the Owner's budget and that the Architect is responsible for estimating the Cost of the Work to achieve that end. In many instances, the Owner may wish to engage others to provide cost estimating services that will necessitate amending B141. In such instances, Paragraph 2.1.7 should be deleted in its entirety and the

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1735 New York Avenue, N.W.
Washington, D.C. 20006-5292

following should be substituted:

The Owner shall furnish the necessary cost estimating services for the Project in a timely manner. The Architect shall be entitled to rely upon such cost estimating services in the performance of the Architect's obligations under this Agreement.

As the design progresses, the Architect will periodically furnish copies of the documents available to the Owner's cost estimator for the purpose of updating the Owner's estimate. Where changes in the design have caused the estimate of the Cost of the Work to exceed the Owner's budget, the Architect shall make appropriate recommendations to the Owner to adjust the Project's size, quality or budget, and the Owner shall cooperate with the Architect in making such adjustments.

Significant redesign of the Project for the purpose of reducing the Owner's estimate of the Cost of the Work, which occurs after approval of the Construction Documents and follows a previous Owner's estimate, shall be a Change in Services and compensated in accordance with Paragraph 1.5.3.

AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (ADA) requires that persons with disabilities have reasonable access to commercial and public facilities. The ADA is of particular interest to architects because owners will expect the design of new or existing projects to conform to the requirements of the ADA.

The ADA is civil rights legislation and not a building code. What this means for architects is that the courts, and not the local building department, will determine if a building is in compliance with the ADA requirements. Variances and interpretations by local building officials may not be binding for ADA purposes. Architects should also recommend that owners obtain appropriate legal counsel with respect to compliance with the ADA.

The following language is suggested.

The Architect shall use reasonable professional effort and judgment in interpreting and advising the Owner as to the necessary requirements for the Project to comply with the Americans with Disabilities Act (ADA). The Architect shall rely on the local building department for interpretations of the ADA at the time the service is rendered. The Architect does not warrant or guarantee that the Project will fully comply with interpretations of ADA requirements by regulatory or judicial bodies.

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 B141, 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.

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:

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.

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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 by 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 that are submitted for review and are within the Architect's knowledge, services or responsibilities within the scope of the Work. Such certifications are usually the culmination of the Owner's need for the Architect's services and it is appropriate that the Architect receive payment in full for all completed services prior to being required to execute certifications.

If the Owner requires the Architect to execute certification, 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.

OWNER'S CONSULTANTS

For various reasons, the Owner may wish to contract separately for the services of

consultants, including, in some cases, consultants for the engineering disciplines. 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 generally be limited to 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 and should not be held responsible for their adequacy.

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

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, and 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. 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.

CONSTRUCTION MANAGER AS CONSTRUCTOR

When the Owner has engaged a Construction Manager-Constructor (using AIA Document A121/CMc or A131/CMc) or an independent cost consultant to provide cost estimating services for the Project, this amendment may be needed to allocate responsibilities between the Architect and Construction Manager or cost consultant. Further specific modifications or amendments to an AIA document should be considered, depending upon the specific provisions of the Owner-Construction Manager-Constructor agreement. For instance, fast-track construction or design phase scheduling issues may require revisions.

Assuming the use of AIA Document B141-1997, delete Paragraph 2.1.7 and add new Paragraph 2.1.7 as follows:

At intervals agreeable to the Owner and Construction Manager or Owner's cost consultant, the Architect shall provide progress Drawings, Specifications and other documents for the Owner's and Construction Manager's or Owner's cost consultant's information and review.

The Architect shall review the Owner's Project budget, preliminary estimates of Construction Cost or detailed estimates of Construction Cost prepared by the Construction Manager or Owner's cost consultant solely for guidance in the Architect's preparation of

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the Construction Documents. Accordingly, the Architect cannot and does not warrant the accuracy of the estimates of the Construction Manager or Owner's cost consultant, or warrant or represent that bids or negotiated prices will not vary from the Owner's Project budget or from any estimate of Construction Cost or evaluation prepared by the Construction Manager or Owner's cost consultant.

No fixed limit of Construction Cost shall be established as a condition of this Agreement.

In the event that the Construction Manager's or Owner's cost consultant's estimate or the lowest bona fide bid or negotiated proposal received by the Owner exceeds the Owner's budget for reasons other than those established in this Agreement, the modification of the Contract Documents, if required, shall entitle the Architect to a Change in Services under the terms of this Agreement, whether or not the construction phase is commenced.

OWNERSHIP OF ARCHITECT'S DRAWINGS, SPECIFICATIONS AND OTHER DOCUMENTS

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 must understand that ownership does not include the right to reuse the documents, and that it does not 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, ignore the limits 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.

The user is cautioned that the law concerning indemnification and other exculpatory clauses is changing so rapidly that the enforceability of such a provision may be called into question at any time. Because of various state laws against contractual indemnification, outside of insurance, especially related to construction, 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 any of the standard provisions on ownership of documents from the agreement form and substitution of this amendment as follows.

Ownership. 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, 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.

Reuse of 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 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.

Transfer of Ownership. 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.

Be sure to coordinate this amendment with any subsidiary agreements, such as those used with the Architect's engineering consultants. For example, when using AIA Document C141-1997, Standard Form of Agreement Between Architect and Consultant, the consultant agreement will have its own amendment as follows.

Delete Paragraph 6.1 and substitute the following:

6.1 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.

Similar to the transfer of Instruments of Service in electronic form to the Owner, the Architect should address the issue of receiving information from the Owner for the Project as protection against copyright infringement as follows.

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 and shall indemnify and hold harmless the Architect, Architect's consultants, and their employees and agents of any of them from loss, including attorneys' fees, on account thereof.

MEDIATION

According to the American Arbitration Association:

Mediation consists of the effort of an individual, or several individuals, to assist the parties in reaching the settlement of a controversy or claim by direct negotiations between or among themselves. The mediator participates impartially in the negotiations, advising and consulting the various parties involved. The result of the mediation should be an agreement that the parties find acceptable. The mediator cannot impose a settlement, but can only guide the parties towards achieving their own settlement.

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The model mediation provision shown in this amendment is an adjunct to arbitration and not a substitute for it. It should also be noted that mediation provisions are already contained in the current editions of AIA Documents B141, B163, Standard Form of Agreement Between Owner and Architect for Designated Services, and B181, Standard Form of Agreement Between Owner and Architect for Housing Services. As an additional process through which the parties may go before their controversy is ultimately decided, mediation may cause added delay in reaching a conclusion, especially if the parties have hardened their positions. Yet, for parties who have worked closely together and share a good deal of trust and respect for each other, mediation may be the only dispute resolution method required to settle many disputes.

Should the user wish to substitute mediation for arbitration, legal counsel should be consulted to assist in making any appropriate changes.

Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party. If such matter relates to or is the subject of a lien arising out of the Architect's services, the Architect may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the matter by mediation or arbitration.

The Owner and Architect shall endeavor to resolve claims, disputes and other matters in question between them by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. A demand for mediation shall be made within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall the demand for mediation be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

ARBITRATION

Arbitration provisions have been provided in most AIA contract forms since 1888 in order to encourage alternative dispute resolution procedures and to provide users with legally enforceable arbitration provisions when the parties choose to adopt arbitration into their contract. The inclusion of an arbitration provision is still a business decision to be made by the parties depending upon their particular circumstances and project. For some, the wholesale deletion of arbitration provisions goes too far, and for this reason, the arbitration clause in AIA Owner-Architect agreements has been provided with a blank space for placing 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 any suggestions regarding the amount that should be inserted in the blank spaces. 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 amendment may be used as a substitute for the arbitration provision found in most AIA Owner-Architect agreements.

Claims, disputes or other matters in question between the parties to this Agreement arising out of or relating to this Agreement or breach thereof which involve, in the aggregate, monetary claims less than or equal to _____ Dollars (\$ _____) shall be subject to and decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect.

JOINDER OF ARBITRATIONS

The Architect should modify this paragraph only to allow joinder with the Architect's consultants if agreements with consultants are similarly modified. Moreover, the joinder restriction must be modified similarly in the consultant agreements, such as AIA Document C141-1997. There are instances in which the Architect arbitrates disputes with the Owner involving services provided by the Architect's consultants. Because most AIA Owner-Architect agreements have a prohibition against joinder, the Architect would be unable to join the consultant into the matter. Subsequent arbitration with the consultant may result in determinations inconsistent with those resulting from the Owner-Architect arbitration.

As an exception to this Agreement's general prohibition against joinder of arbitrations, an arbitration may be joined with another arbitration involving common issues of law or fact between the Architect and any person or entity with whom the Architect has a contractual obligation to arbitrate disputes.

PARTNERING

If a partnering arrangement is anticipated, the following language may be appropriate. Involvement of representatives of the Owner, Contractor and Architect is customary, but selected Subcontractors and design consultants may also be required to participate.

Partnering arrangements should be approached with a measure of caution. The term partnering should be avoided because it implies a contractual relationship. The term partnering has no defined meaning, and could not have one without adding to the contractual obligations of the parties. By the language given below, the parties simply agree to meet in furtherance of their common interests. Such meetings may be used to obtain interpretations of the Contract Documents, and to resolve disputes short of mediation or arbitration. It should be recognized, however, that actions taken at such meetings may modify the rights and obligations of the parties under the Contract, even though the agreement to meet does not do so.

If the participants intend to retain the use of a facilitator to further this arrangement,

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language should be added to address who shall bear the cost of the facilitator.

Representatives of the Owner, Contractor and Architect shall meet periodically at mutually agreed-upon intervals for the purpose of establishing procedures to facilitate cooperation, communication and timely responses among the participants. By participating in this arrangement, the parties do not intend to create additional contractual obligations or modify the legal relationships which may otherwise exist.

TERMINATION OR SUSPENSION

When the Project is suspended by the Owner, the Architect incurs many 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 missing project. This model provision clearly sets out some of these costs so that the Owner will not assume that the termination or suspension of the Project is without economic consequence. The list contained in the provision is only a model and may be modified.

Termination or Suspension of Services. 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.

Termination Expenses, for example in B141-1997, are described as expenses directly attributable to termination plus an amount for the Architect's anticipated profit on the value of the services not performed by the Architect. The following amendment language may be considered as an alternative to the above suggested model amendment.

Termination Expenses are defined as a lump sum of _____ (insert amount) and _____ (insert percentage) percent of the Architect's compensation for services not performed by the Architect.

HAZARDOUS MATERIALS

When and if the Owner and Architect agree that the Architect will assist the Owner in dealing with a 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 paragraph. 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.

If the Architect is required to perform services related to 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 services by the Architect, Architect's consultants, or their agents or employees related to such services, except where such liability arises from the sole negligence or willful misconduct of the person or entity seeking indemnification.

ASSIGNMENT OF THIS 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 Drawings and timely payment of amounts due and outstanding to the Architect, they should be added to the provision with the assistance of legal counsel.

In lieu of any provision in this Agreement against assignment, the Owner may propose an assignment of its rights and responsibilities under this Agreement to a third party when the following conditions have been met: prior to any assignment, the Owner and the Owner's proposed assignee shall 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. If the Architect has no reasonable objection to the proposed assignment, the Owner may then assign the Agreement. 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.

REIMBURSEMENT FOR COST OF PROFESSIONAL LIABILITY INSURANCE

EXAMPLE A. Premium payments for professional liability insurance are indirectly 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 to handle 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 anniversary 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.

EXAMPLE A

Expense of the Architect's professional liability insurance in the amount of Dollars (\$ _____).

EXAMPLE B. Project insurance can have a number of benefits for both the Owner and Architect. The Owner benefits in that the policy is dedicated to that particular Project; 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 also 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

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separate Project coverage before the decision is made to obtain this type of insurance for the Project.

EXAMPLE B

Expense of premiums for Project professional liability insurance, which the Architect shall secure from an insurer lawfully authorized to do business in the jurisdiction in which the Project is located, shall apply to claims made with respect to this Project for negligent acts, errors or omissions of the Architect, Architect's consultants, and agents and employees of any of them, subject to the standard terms and conditions of such policies.

LIMITATION OF LIABILITY

EXAMPLE A. The enforcement of limitation of liability provisions is a rapidly developing area of the law. J. Acret notes in *Architects and Engineers*, 9.29 (2nd edition, 1977), although courts historically enforce contractual provisions agreed to by the parties, "the more modern thinking is to limit [a party's] ability to gain advance consent to damaging conduct," especially if the provision is imposed upon someone with unequal bargaining power. Care must be taken in the earliest stage of negotiation when this type of provision is to be employed. Negotiations must clearly and plainly indicate that this provision has been agreed to by all parties. Indicative of this type of evenhanded bargaining is when the provision is specifically and separately signed by all parties to 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 only protects the Architect from claims by the Owner. Third parties are not necessarily bound by such a contractual provision.

EXAMPLE A

COMPENSATION. 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, by any reason of any act or omission, including breach of contract or negligence not amounting to a willful or intentional wrong.

EXAMPLE B. Refer to the note for Example A above, as it applies to Example B as well. 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 include defense costs. The actual policy amounts available for the payment of damages may not be the insured's policy coverage limits.

EXAMPLE B

INSURANCE. 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 current limits of the Architect's professional liability insurance coverage.

EXAMPLE C. The Architect may wish to consider agreeing to reduce the fee in consideration of a limitation of liability.

EXAMPLE C

The parties agree that 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.

ARCHITECT'S REASONABLE 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, to extreme levels, the standard of performance expected of the Architect. In fact, such statements may be construed as performance guarantees that constitute uninsurable risks. Therefore, architects should only depart from their normal standard of care after seeking advice of knowledgeable 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.

The Architect shall perform all services of this Agreement in a reasonably skillful and prudent manner and shall exercise that degree of professional care consistent with that exercised by members of the same profession practicing currently under the same or similar circumstances.

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

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