



AIA[®] Document B503[™] – 2007

Guide for Amendments to AIA Owner-Architect Agreements

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INTRODUCTION

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.

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 in 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 several 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 you 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 B101–2007, 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 in the text of the Owner-Architect agreement, typically through the use of AIA Contract Documents software.

Many of the provisions in B503–2007 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.

The 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 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 General Conditions document in order to avoid conflicts and inconsistencies. Section deletions and re-numbering of sections should be avoided because they can play havoc with carefully coordinated internal references and cross references to other agreements.

GUIDANCE AND MODEL LANGUAGE

1 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. This language should be added in the section on Owner's Responsibilities.

Model Language:

The Owner shall provide information regarding the existing facility, including destructive testing and investigation of concealed conditions, in a timely manner. 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.

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:

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 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.

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.

2 REVIEW OF MULTIPLE RESUBMITTALS

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 B101–2007, B103™–2007 and B201™–2007.

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™–2007, Guide to Supplementary Conditions, for suggested language.

3 MULTIPLE SITE VISITS BY THE ARCHITECT

The number of site visits required to fulfill adequately 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 site visits provisions found in an AIA document. This issue is already addressed in a number of documents, including B101–2007, B103–2007 and B201–2007.

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 A503–2007, Guide to Supplementary Conditions, for suggested language.

4 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 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 B103–2007 may be inserted into an Owner-Architect agreement.

Model Language:

The Owner acknowledges that accelerated, phased or fast-track scheduling provides a benefit, but also carries with it associated risks. Such risks 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 for the Project sufficient contingencies to cover such costs.

5 OWNER-PROVIDED COST CONTROL

AIA Documents B101–2007 and B104™–2007 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 many 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 B103–2007 Sections 6.3 to 6.7 (with appropriate renumbering) if the Owner wishes to engage others to provide cost estimating services:

Model Language:

§ 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. 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 size, quality or budget, 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 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 in consultation with the Architect, revise the Project program, scope, or quality as required to reduce the Cost of the Work; or,
- .3 implement any other mutually acceptable alternative.

§ 6.6 If the Owner chooses to proceed under Section 6.5.2, the Architect, without additional compensation, shall incorporate the required modifications in the Construction Documents Phase as necessary to comply with the Owner’s current budget for the Cost of the Work. The Architect’s modification of the documents for which it is responsible shall be the limit of the Architect’s responsibility as a Basic Service 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.

6 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 B101–2007 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 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.

Model Language:

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.

7 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, should not be held responsible for their adequacy and cannot certify progress payments or Substantial Completion for 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.

8 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 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 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.

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 any 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, 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 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 C141™–1997, Standard Form of Agreement Between Architect and Consultant, the consultant agreement will require its own amendment as follows.

Delete Section 8.1 in C141–1997 or Section 7.1 in C401™–2007 and substitute the following:

Model Language:

§ 8.1 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 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.

9 DOLLAR LIMITATION ON 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. 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 any 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.

10 JOINDER OF ARBITRATIONS

Instances may arise in which the Architect arbitrates disputes with the Owner involving services provided by the Architect's consultants. Because some AIA Owner-Architect agreements prior to 2007 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. To avoid that outcome, the Architect may wish to modify the Owner-Architect agreement to allow joinder of the Architect's consultants.

If such modifications are made, the Architect may need to modify its consultant agreements, such as AIA Document C141–1997, Standard Form of Agreement Between Architect and Consultant. AIA Document C401–2007 would not require modification because it incorporates by reference either the dispute resolution provisions of the Prime Agreement or the arbitration section contained in B101–2007.

Model Language:

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.

11 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 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.

Termination Expenses, for example in B101–2007, 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.

Model Language:

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.

12 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 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.

13 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.

Model Language:

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.

14 REIMBURSEMENT FOR COST OF PROFESSIONAL LIABILITY INSURANCE

Example A: Lump Sum

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, as follows.

Model Language:

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

Example B: Project-Specific Insurance

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

Model Language:

Expense of premiums for Project-Specific professional liability insurance in the amount of Dollars (\$ _____), which the Architect shall secure from an insurer lawfully authorized to do business in the jurisdiction in which the Project is located, shall be paid by the Owner and 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.

15 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 to be employed, 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 only protects the Architect from claims by the Owner. Third parties are not bound by such a contractual provision.

Model Language:

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: Available Insurance

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.

Model Language:

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.

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 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.

16 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 and is included in most AIA 2007 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 made 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.

17 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 C141-1997 and C401-2007.

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.

18 ARCHITECT'S INDEMNITY TO OWNER

AIA Document B103-2007, Standard Form of Agreement Between Owner and Architect for a Large or 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. The other AIA owner-architect agreements do not contain an indemnity provision, other

than 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 counsel as to the specific application of local laws 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, including reasonable attorneys' fees and expenses recoverable under applicable law, 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 duty to indemnify the Owner under this provision shall be limited to the available proceeds of insurance coverage.

19 INSURANCE

AIA Document B103–2007, Standard Form of Agreement Between Owner and Architect for a Large or Complex Project, contains the following insurance provision which may be used as model language to supplement or modify insurance provisions in other Owner-Architect agreements:

Model Language:

The Architect shall maintain the following insurance for the duration of this Agreement. If any of the requirements set forth below exceed the types and limits the Architect normally maintains, the Owner shall reimburse the Architect for any additional cost:

(Identify types and limits of insurance coverage, and other insurance requirements applicable to the Agreement, if any.)

- .1 Comprehensive General Liability with policy limits of not less than \$_____ each occurrence and aggregate for bodily injury and property damage.
- .2 Automobile Liability covering owned and rented vehicles operated by the Architect with policy limits of not less than \$_____ combined single limit and aggregate for bodily injury and property damage.
- .3 The Architect may use umbrella or excess liability insurance to achieve the required coverage for Comprehensive General Liability and Automobile Liability, provided that such umbrella or excess insurance results in the same type of coverage as required for the individual policies.
- .4 Workers' Compensation at statutory limits and Employers Liability with a policy limit of not less than \$_____.
- .5 Professional Liability covering the Architect's negligent acts, errors and omissions in its performance of professional services with policy limits of not less than \$_____ per claim and in the aggregate.
- .6 The Architect shall provide to the Owner certificates of insurance evidencing compliance with the requirements in this Section. The certificates will show the Owner as an additional insured on the comprehensive general liability, automobile liability, umbrella or excess policies.