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The 2007 AIA Documents: New Forms, New Issues, New Strategies

**A Practical Guide to New and Controversial
Issues in AIA B101 – 2007**

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Introduction

The AIA Documents date back more than one hundred years. Although they have undergone many revisions since then, a large number of the concepts and issues as framed in the documents have remained largely unchanged, particularly during the last fifty or so years. The new B101 Owner-Architect Agreement, which was just released in November of 2007, includes many issues and concepts from prior versions of AIA Owner-Architect Agreements, plus a few new ones.

This paper focuses on the new issues and what I believe to be the less well-known “holdover” controversial issues in the new AIA B101 contract form. There have been many papers and other discussions of the issues and concepts in prior versions of the AIA Owner-Architect Agreements, and it would be duplicative to repeat their substance here. Furthermore, there have been many papers, books and other scholarly works analyzing issues that arise in contracts between owners and architects from an academic standpoint, so this paper will emphasize practical over academic considerations.

To assist the practitioner, this paper includes three appendices that I hope will prove useful. Appendix 1 is a chart analyzing the new and some more obscure “holdover” controversial issues raised by B101-2007, including a reference to paragraph numbers in the B141-1997 and B151-1997 at which the predecessor treatment of the issue can be found. The second Appendix is a Rider that I prepared for my own use when representing an architect or engineer who elects to contract for services using an AIA form contract. The second Appendix has been adapted specifically for B101-2007. The third Appendix is a Rider that I prepared for my own use when representing an owner who is willing to agree to contract for architectural services using an AIA form contract. This Rider also has been adapted to be used with B101-2007.

Problems Carried Over From the 1997 Revision

One of the primary purposes for the relatively frequent revisions of the AIA documents is to address problems or troublesome issues that have arisen from the terms or language of the prior edition. If the issue is considered sufficiently troublesome, and if different language can provide a satisfactory solution to the problem, then the language is typically revised. However, several provisions that raised questions or allowed for troublesome interpretation were carried over from the 1997 editions of B141 and B151 into the 2007 edition of B101. The following provisions in B101 mirror language in the 1997 editions of B141 and B151 and, in my opinion, continue to raise troublesome issues that should have been addressed in the 2007 revisions.

§2.4 Conflicts of Interest. This is a one sentence paragraph intended to be a covenant from the Architect to the Owner promising not to permit a conflict of interest which would compromise the Architect's judgment. The identical provision appears in the 1997 edition of B141 as paragraph 1.2.3.5 (although not in the 1997 edition of B151). It reads as follows:

“Except with the Owner's knowledge and consent, the Architect shall not engage in any activity, or accept any employment, interest or contribution that would reasonably appear to compromise the Architect's professional judgment with respect to this Project.”

In practice, this provision is too vague and too broad. It could be read to prevent an architect from accepting a commission from a client that is a competitor of the Owner. Similarly, it could be read to prevent an architect from accepting product literature or trinket-type gifts that sales representatives from product companies often give to architects. The standard set forth in this provision is one of reasonably appearing to compromise professional judgment, but if the same stringent standards applicable to conflicts of interest for attorneys were to be applied, unintended overly harsh results would likely follow.

§3.6.1.3 Duration of Construction Phase Services. This provision defines the start and finish dates for the Architect's Basic Services. Specifically, it equates the termination date with issuance of a final Certificate for Payment. The paragraph is similar to Section 2.6.1.2 of the 1997 edition of B141 and to Section 2.6.1 of the 1997 edition of B151. It reads:

“Subject to Section 4.2, the Architect's responsibility to provide Construction Phase services commences with the award of the Contract for Construction and terminates on the date the Architect issues the final Certificate for Payment.”

For most projects, this definition is adequate. But what about a project that is not completed or that terminates without a final Certificate for Payment ever being issued? For example, the Contractor may default, requiring the Owner to finish the project itself, or the Owner and Contractor could negotiate final payment arrangements without the Architect ever issuing a final Certificate for Payment, such as if a deductive Change Order is agreed deleting all of the unfinished Work.

No problem arises if the project ends early as a consequence of Contractor termination or default. But the Owner could take a position that the Architect is responsible for providing Basic Services through completion of the project by the Owner or a substitute contractor even if the duration extends far longer than originally contemplated. Although nothing in Section 3.6.1.3 explicitly states that the Construction Phase Services are Basic Services, all of Architect 3 is entitled “Scope of Architect's Basic Services,” which implies that all of the services described in Architect 3 are intended to be Basic Services.

A superficial reading of this paragraph might lead one to conclude that the implication that all architectural services prior to the issuance of a final Certificate for Payment are intended to be Basic Services is inconsistent with portions of Article 4. Section 4.2.2 defines numerous categories of Additional Services, including “Construction Phase Services sixty (60) days after:

(a) the date of Substantial Completion of the Work, or (b) the anticipated date of Substantial Completion, identified or referred to in Initial Information, whichever is earlier.” Architectural services provided more than sixty (60) days after anticipated/actual Substantial Completion but prior to the issuance of a final Certificate for Payment might be thought to be treated inconsistently: defined as Basic Services under Section 3.6.1.3, but as Additional Services under Section 4.2.2.6. A similar potential contradiction could result from Section 4.2.4, which establishes a deadline for completion of Basic Services, after which any further architectural services are to be “compensated as Additional Services.” Architectural services provided after the deadline but prior to issuance of a final Certificate for Payment might be thought to be considered Basic Services under Section 3.6.1.3 but Additional Services under Section 4.2.4.

Fortunately, Section 3.6.1.3 resolves this apparent contradiction. The introduction to the paragraph states that it is “[s]ubject to Section 4.2,” which contractually gives the Additional Services provisions priority over this paragraph. Thus, the only reasonable contractual interpretation is that architectural services performed prior to the issuance of a final Certificate for Payment are ordinarily Basic Services except when they occur more than sixty (60) days after the earlier of actual or anticipated Substantial Completion or after the deadline for completion of Basic Services set forth in Section 4.2.4.

§3.6.2.2 Rejection of Work. This provision gives the Architect the authority to reject non-conforming Work. Except for changes in verb tense, it is identical to language found at Section 2.6.2.5 of the 1997 edition of B141 and at Section 2.6.10 of the 1997 edition of B151. The pertinent portion of this paragraph reads: “The Architect has the authority to reject Work that does not conform to the Contract Documents.”

Because the word “reject” is not clearly defined, the authority granted to the Architect by this provision could encroach upon and be inconsistent with the Owner’s right to accept non-conforming Work and take a credit for the difference in value. Section 12.3.1 of the 2007 edition of the A201 General Conditions states:

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

Whether a contradiction exists depends on the meaning of the term “reject.” As generally used on the construction site, rejection of Work is equivalent to an order requiring the Contractor to remove or repair the existing Work so that the finished product conforms with the Contract Documents. A typical contractor, upon being told that certain Work was defective and rejected, would not expect to need any further approvals or permission from the Owner or Architect before removing and replacing it. Under this definition of the term “reject,” there is a true contradiction. The concept of “authority,” combined with the statement in Section 3.6.1.2 that the Architect is “a representative of . . . the Owner during the Construction Phase Services,” implies that the Architect is speaking for the Owner when he or she rejects the Contractor’s Work. This deprives the Owner of the opportunity to accept the Work and take a credit as set forth in Section 12.3.1 of A201.

To reconcile the apparently contradictory provisions, the word “reject” must be interpreted as the stating of the Architect’s opinion that the Work is defective, but without including a requirement that it be repaired or replaced. Better language, which would avoid the contradiction, would be: “The Architect shall notify the Owner and Contractor of any Work that it determines does not conform . . .”. This accomplishes the twin construction objectives of advising the Contractor that Work does not conform to the Contract Documents so that the

Contractor can cease performing defective Work, while also advising the Owner of the defect so that the Owner can exercise its option of either rejecting the Work or else accepting it and taking a credit for the difference in value.

Note that there is nothing in this paragraph that *requires* the Architect to reject non-conforming Work. The Architect is merely given the authority to do so. This avoids a problem that is present in many less well-drafted similar provisions which states that the Architect *shall* reject defective Work. This language could impose liability on the Architect for failing to detect defective Work – even though it may have been covered up or buried when the Architect visits the site. Such a requirement could be interpreted to make the Architect the guarantor of the adequacy of the Contractor's Work, despite the fact the Architect performing periodic site visits ordinarily will not be in a position to detect all of the potential defects in the Work. At least from the Architect's standpoint, any provision that requires the Architect to reject non-conforming Work should be modified so that it is limited to Work that the Architect observes or detects as non-conforming, or alternatively Work that a reasonable Architect should have detected as non-conforming.

§4.2.3 Limitations on Repetitions of Construction Phase Services. This paragraph provides limits for the number of times that the Architect can be required to perform submittal reviews, site visits or inspections of the Work before later repetitions of such services become Additional Services. Similar concepts appear in Section 2.8.2 of the 1997 edition of B141 and in Section 3.4 of the 1997 edition of B151. The new provision is superior to the older versions because for the first time it requires the Architect to notify the Owner when the limits are reached, presumably so that the Owner can backcharge the Contractor for the cost of the resulting Additional Services.

However, the concept of Owner approval is missing both from Section 4.2.3 and its 1997 predecessors. There is no requirement that the Owner respond to the Architect's notification with a written or verbal approval. This is probably not an issue for architectural services which are necessary for life/health/safety reasons and must be performed regardless of whether or not the Owner would approve of them. However, it is likely that some services such as additional site visits, is a matter within the Owner's judgment and are not required by law. At least for those services, it would be reasonable for an Owner to require the Architect to obtain advance approval before performing the services.

New Provisions

There are numerous new provisions in the B101 (2007) contract not found in prior editions of the AIA documents. Many of these issues were treated differently in prior versions of the AIA Owner-Architect agreements, and the language has been changed in the B101. Other issues are novel, never having been included in prior editions of the B141 or B151 contracts. For a brief summary and analysis of these new and reworked issues, see Appendix 1. The issues are discussed in greater detail below.

§2.2 Standard of Care. It is long-established in American jurisprudence that absent an explicit promise to the contrary, design professionals do not impliedly warrant the outcomes of their efforts and are only responsible for adhering to the professional standard of care in the performance of their services.¹ Somewhat surprisingly, for the first time the B101 Owner-Architect Agreement makes explicit the description of the standard of care to which the architect must perform. Section 2.2 reads as follows:

“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 first sentence, which describes the standard of care, is the formulation most commonly applied by the courts.² Even though it has not previously appeared as an explicit term in AIA Owner-Architect contract forms, it nevertheless would be considered an implied term in any contract for professional design services.³

This is a provision that is often modified by lawyers negotiating the contract. Sometimes the practice niche is inserted into the clause (i.e., “. . . provided by ‘experienced healthcare’ architects practicing in the same or similar locality . . .”). Sometimes the clause is modified to reflect a higher than average standard of care (i.e., “. . . consistent with the ‘highest levels’ of professional skill and care . . .”). However, this latter change may create uninsured liabilities since architects’ professional liability insurance policies typically define errors or omissions as breaches of the usual standard of care, not the highest standard of care.

§2.5 Insurance. Previous editions of the AIA Owner-Architects Agreements did not identify or quantify the types and amounts of insurance that the Architect would be required to maintain. This has always been a major weakness in the documents, and has often resulted in the creation of Insurance Riders prepared by lawyers who represent owners, developers or architects. As a consequence, there are hundreds or thousands of differently worded Insurance Riders that have been used in architecture contracts, with subtly differing and sometimes improperly described requirements. For example, many such Insurance Riders require the Architect to carry “comprehensive general liability” insurance, which is no longer written or available, having been supplanted by “commercial general liability” policies.

The new provision is a step in the right direction toward ameliorating this confusion, but is far too general to be effective in doing so. Section 2.5 of B101 provides:

“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 costs:

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

- .1 General Liability
- .2 Automobile Liability
- .3 Workers' Compensation
- .4 Professional Liability"

This provision lists the four common categories of architectural insurance (although it does not mention valuable papers insurance), but it provides no further detail. It contemplates that the Architect will insert the necessary detail in the subparagraphs. However, when an Architect submits a B101 form to its client prior to a project for review and approval, it is unlikely to have added the necessary detail at that time. Thus, the parties will probably still resort to an Insurance Rider to provide the missing the information. The AIA could have avoided this problem by creating a standard form insurance exhibit for the B101 with blanks to be filled in for the specifics of coverage limits, durations, etc.

The phrase, "for the duration of this Agreement," at the end of the first sentence will typically need to be modified. It is a sensible duration for insurance policies that are written on an occurrence basis, which include commercial general liability, automobile liability and workers' compensation. However, professional liability insurance is written on a claims made basis, which means that it only applies to claims made during the policy period. Such insurance ordinarily needs to be maintained for a length of time after completion of the project, or else claims by the Owner for negligent design that are discovered only after Final Completion would be uninsured. The appropriate duration for professional liability insurance is a function of such factors as the statute of limitations, policy costs and the parties' bargain, but it would be

advisable for an Owner to require an Architect to maintain such insurance in full force and effect for at least a year or two after project completion.

§3.1.4 Owner Decisions. A new sentence has been added to the end of this paragraph that renders the Owner responsible for decisions made by the Owner without the involvement or over the objection of the Architect. The pertinent portion of Section 3.1.4 reads: “The Architect shall not be responsible for an Owner’s directive or substitution made without the Architect’s knowledge or evaluation, or to which the Architect makes a reasonable technical objection in writing.” The language of this provision raises some interesting questions.

The phrase “without the Architect’s knowledge or evaluation” is conjunctive, not disjunctive (because it is in the negative). Read literally, this would mean that if the Owner’s directive or substitution was made with the Architect’s knowledge but without the Architect’s evaluation, the provision would not apply. This has the effect of putting the onus on the Architect to seek to evaluate any Owner directive or substitution of which the Architect becomes aware, if the Architect desires to avail itself of the protections provided by this provision. In any dispute or litigation over the consequences of an Owner directive or substitution, such issues as notices to the Architect, imputed knowledge and constructive notice may become important.

The end of this provision requires the Architect to “make a reasonable technical objection in writing.” The requirement that the objection be “reasonable” would presumably prevent the Architect from issuing a blanket objection to any and all changes or from objecting to a directive or substitution without providing a good explanation. However, it is unlikely that the phrase requires the explanation to be made as part of the objection, rather than merely be deemed reasonable when articulated for the first time later. Furthermore, the objection must be “technical.” This presumably means that the Architect cannot avail itself of the protections of

this provision by objection on aesthetic grounds or due to business consequences. It is not clear precisely what “technical” means, but at a minimum, it appears to require that the objection be based on architectural, engineering or construction reasons.

§3.1.5 Government and Utility Requirements. This provision requires the Architect to contact any permit-issuing governmental authority and any utility servicing the project. Section 3.1.5 states:

“The Architect shall, at appropriate times, contact any governmental authorities required to approve the Construction Documents and the entities providing utility services to the Project. In designing the Project, the Architect shall respond to applicable design requirements imposed by such governmental authorities and by such entities providing utility services.”

The Architect is merely required to “respond” to the requirements, not to comply with them. Presumably, this would allow the Architect to design the Project in a manner that would require the Owner to seek a variance or other modification of the various requirements. The requirement that the Architect actually comply with these requirements is found in Section 3.4.2 (previously 1.2.3.6 of the 1997 edition of B141) and applies only to governmental requirements, not to utility requirements. However, Section 3.4.2 is stronger than its predecessor provision in the 1997 edition of B141 in that it actually obligates the Architect to incorporate the requirements into the Construction Documents, rather than merely allowing the Architect to “respond in the design of the Project” to the governmental requirements.

§3.2.3 Preliminary Evaluation. This provision is an expansion of Section 2.2.3 of the 1997 edition of B151 pursuant to which the Architect and Owner discuss alternative approaches to design and construction. New Section 3.2.3 states:

“The Architect shall present its preliminary evaluation to the Owner and shall discuss with the Owner alternative approaches to design and construction of the Project, including the feasibility of incorporating environmentally responsible design approaches. The Architect shall reach

an understanding with the Owner regarding the requirements of the Project.”

Two concepts in this paragraph are new: environmentally responsible design, and the requirement of reaching an understanding.

Awareness of environmental issues, and in particular “green design,” is a theme that runs throughout the 2007 edition of the AIA Documents. This is likely a result of the greater understanding of climatic change and other environmental issues that has become prevalent over the last ten years. Rather than being merely one of many implicit program elements, the AIA deemed environmental issues sufficiently important to list them explicitly as an element of discussion at the various stages of the Project. Although it does not bind an Owner to include environmentally responsible approaches in the design, it functions to raise owners’ awareness of environmental issues.

The last sentence requires that the Architect and Owner reach “an understanding” regarding the Project requirements. This is likely the AIA’s response to the present tendency of Project participants to postpone reaching a firm agreement as to the program elements until more information and parameters are known. Postponing reaching such an agreement often complicates the efforts of the Architect by requiring re-design to accommodate agreements on Project scope and program that are reached relatively late in the design phase. However, despite being located in a paragraph discussing preliminary evaluation, the final sentence of Section 3.2.3 does not set a time limit on when the understanding regarding Project requirements must be obtained.

§3.2.5.1 Basic Environmental Design. This provision requires the Architect to consider environmental issues as part of its Basic Services for design. Section 3.2.5.1 states:

“The Architect shall consider environmentally responsible design alternatives, such as material choices and building orientation, together

with other considerations based on program and aesthetics, in developing a design that is consistent with the Owner's program, schedule and budget for the Cost of Work. The Owner may obtain other environmentally responsible design services under Article 4."

This provision is another instance in which the theme of environmental responsibility pervades the 2007 edition of the AIA Documents.

The requirements of this provision are binding on the Architect but not on the Owner. The Architect is obliged to "consider environmentally responsible design alternatives," but the Owner is not obligated to select any such alternatives. Furthermore, although the Architect is obligated to "consider" these issues, it is not obligated to select or employ a more environmentally responsible alternative. And nothing in this provision requires even consideration of a superior environmental alternative if it has a negative impact on the Owner's program, schedule or budget.

This provision is included as one of the Architect's Basic Services. It is presumably limited to fundamental design issues, explicitly identifying "material choices and building orientation," but would presumably also include consideration of green roofs and other similar basic design issues. The last sentence of the provision refers to Article 4, of which Section 4.2.1.2 clarifies that more detailed environmental analysis, including "extensive environmentally responsible design alternatives, such as unique system designs, in-depth material research, energy modeling, or LEED® certification," are available at extra charge.

§3.4.1 Construction Documents Level of Detail. Most of this paragraph is substantively equivalent to Sections 2.4.4.1 of B141 (1997) and 2.4.1 of B151 (1997). However, a new sentence has been added to the end, which states:

"The Owner and Architect acknowledge that in order to construct the Work the Contractor will provide additional information, including Shop Drawings, Product Data, Samples and other similar submittals, which the Architect shall review in accordance with Section 3.6.4."

Although issues involving shop drawings and other submittals are dealt with in Section 3.6.4 of the 2007 edition of B101 and in all of the prior versions of the AIA Owner-Architect Agreements, this is the first time that they have been discussed in the section on Construction Documents.

There are probably two primary reasons for including the new sentence in the paragraph describing the Construction Documents. The first reason is to clarify that although the Construction Documents are supposed to set forth “in detail the . . . requirements for the construction,” a further level of detail, to be provided by the Contractor, is necessary before construction can begin. The second reason is the trend in the construction industry toward architects less fully detailing the Construction Documents than was past practice. The new sentence clarifies and codifies current architectural practice.

§3.4.2 Compliance with Laws. This paragraph relates to and supplements Section 3.1.5, discussed above. It states: “The Architect shall incorporate into the Construction Documents the design requirements of governmental authorities having jurisdiction over the Project.” This provision is similar to paragraph 1.2.3.6 of the 1997 edition of B141, but it differs in one very important respect. The earlier version of this clause merely required the Architect to “respond in the design” to governmental requirements. This former language was awkward, and its meaning was never clear. The new provision clearly requires the Architect to comply with governmental requirements by incorporating these requirements into the design.

§3.6.1.1 Administering the General Conditions. This paragraph preserves the same concept but changes the language found in paragraphs 2.6.1.1 and 2.6.1.3 of the 1997 edition of B141 and paragraphs 2.6.2 and 2.6.4 of the 1997 edition of B151. It states:

"The Architect shall provide administration of the Contract between the Owner and the Contractor as set forth below and in AIA Document A201-

2007, General Conditions of the Contract for Construction. If the Owner and Contractor modify AIA Document A201-2007, those modifications shall not affect the Architect's services under this Agreement unless the Owner and the Architect amend this Agreement."

The prior edition of this paragraph required the Architect to approve any modifications to the A201 in writing before it would become effective on the Architect. Many owners disliked and attempted to delete this provision because they did not want the architect to have approval rights over the terms in their contract with contractors. The solution in B101 is to delete all reference to architect approval rights and to instead require a modification to the Owner-Architect Agreement before a change to the A201 General Conditions effectively modifies the Architect's duties as set forth in B101.

It is advisable for both the Architect and the Owner to ensure that all provisions involving or affecting the Architect be consistent between the two documents. If the provisions are inconsistent, then the Owner is promising to the Contractor certain aspects of the Architect's performance that the Architect is not obliged to perform. This can result in the Owner being in breach of the construction contract or having to pay an increased architectural fee for what are out-of-scope services. It is at least as important for the Architect to ensure that its services are not linked to their description in the A201 General Conditions because the Owner and Contractor are able to change those terms without the Architect having the right (and sometimes the awareness) to object. Thus, any Architect who agrees to perform the services set forth for the Architect in the version of the A201 General Conditions that has been incorporated into the construction contract may find those services expanded or otherwise changed by the other parties without the Architect's knowledge or consent.

§3.6.1.2 Responsibility for Construction Means and Methods. This paragraph closely follows the language of Section 2.6.1.1 and 2.6.1.3 of the 1997 edition of B141 and Sections 2.6.2 and 2.6.4 of the 1997 edition of B151. The relevant portion of which reads:

“The Architect shall not have control over, charge of, or be responsible for, the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, nor shall the Architect be responsible for the Contractor’s failure to perform the Work in accordance with the requirements of the Contract Documents.”

However, there is a significant omission from the prior version of this paragraph: the clause, “since these [construction means, methods, etc.] are solely the Contractor’s rights and responsibilities under the Construction Documents,” is no longer in the paragraph.

This omission changes the way that the paragraph can be characterized. As currently drafted, it is an exculpatory provision, simply identifying certain duties and responsibilities as not belonging to the Architect. When the clause stating that these duties belong to the Contractor was in the paragraph, the provision could be characterized as a division of duties between the design and construction teams, which appear to be less self-serving.

This change may have some practical consequences for lawyers defending (or prosecuting) architects in construction worker accident claims. The plaintiffs may be able to claim that this provision is a self-serving exculpatory clause, which many states disfavor.⁴ Several years ago, I won an appeal on behalf of an architect in similar circumstances by being able to characterize the contractual provision as an allocation of duties between project members rather than as an exculpatory clause.⁵

§3.6.2.1 Evaluations of the Work. This paragraph is a reworking of Sections 2.6.2.1 and 2.6.2.2 of the 1997 edition of B141. The basic concept has remained the same, but the wording has been changed to the following:

"The Architect shall visit the site at intervals appropriate to the stage of construction, or as otherwise required in Section 4.2.3, to become generally familiar with the progress and quality of the portion of the Work completed, and to determine, in general, if the Work observed is being performed in a manner indicating that the Work when fully completed, will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. On the basis of the site visits, the Architect shall keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and report to the Owner (1) known deviations from the Contract Documents and from the most recent construction schedule submitted by the Contractor, and (2) defects or deficiencies observed in the Work."

The major change has been to delete the phrase, "to endeavor to guard the Owner against defects and deficiencies in the Work".

Although the Architect's purpose remains, in part, to try to detect or prevent construction defects and deviations, the promise to attempt to do so has been deleted. Many owners, as well as some courts and arbitrators, have interpreted the deleted clause to be more in the nature of a promise by the Architect to the Owner to protect the Owner against these construction problems. Although the clause only states that the Architect will "endeavor" to provide this protection, a frequently litigated issue has been whether the Architect has expended sufficient and appropriate effort to provide this protection. By deleting the clause, the AIA is apparently hoping to turn the paragraph into a more objective test: one which requires the Architect to advise the Owner of any problems actually observed, but which creates no obligations with regard to construction defects that are not detected. Consistent with this goal, the word "observed" has been added to the previously existing phrase, "if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents." The addition of the word "observed" limits the Architect's determination to the Work actually visible for review.

§3.6.2.5 Judge of Disputes. Prior versions of the AIA Owner-Architect Agreements have always designated the Architect as the initial dispute decider. For the first time, the 2007 documents allow the Owner and Contractor to designate someone else to fill this role. This provision states:

"Unless the Owner and the Contractor designate another person to serve as an Initial Decision Maker, as that term is defined in A201 – 2007, the Architect shall render initial decisions on Claims between the Owner and Contractor as provided in the Contract Documents."

The 2007 A201 General Conditions defines "Initial Decision Maker" in Section 1.1.8 as "the person identified in the Agreement to render initial decisions on Claims in accordance with Section 15.2 and certify termination of the Agreement under Section 14.2.2."

It is interesting that Section 3.6.2.5 of B101 refers to "an" Initial Decision Maker, whereas the A201 General Conditions refers to "the" Initial Decision Maker. Thus, the B101 implies that there may be more than one Initial Decision Maker for multiple decisions, whereas there is no such implication in A201. The approach in B101 seems preferable since it would permit the parties to designate Initial Decision Makers who have expertise in the specific subject matter of each disputed issue.

§3.6.3.1 Certificates for Payment. This paragraph obligates the Architect to review and certify amounts due to the Contractor and contains the Architect's representations regarding the progress and quality of the construction, as well as caveats to those representations. Only the second sentence has changed from paragraph 2.6.3.1 in the 1997 edition of B141 and paragraph 2.6.9.1 in the 1997 edition of B141. The new sentence reads:

"The Architect's certification for payment shall constitute a representation to the Owner, based on the Architect's evaluation of the Work as provided in Section 6.2 and on the data comprising the Contractor's Application for Payment, that, to the best of the Architect's knowledge, information and belief, the Work has progressed to the point indicated and that, the quality of the Work is in accordance with the Contract Documents."

The substantive language has not changed, but the sequence of the clauses has changed, which changes the nature of the Architect's representation.

In the prior version of this provision, the Architect simply represented that the Work had progressed to the point indicated. There was no limitation of this representation to the Architect's knowledge, information or belief (although the four caveats in the next sentence constituted certain limitations). In the current version, however, the limitation to knowledge, information and belief precedes and modifies the representation regarding the progress of the Work, rendering it more of a representation regarding the Architect's state of mind than a pure factual representation.

This change reflects the reality that an Architect often is not in a position to know to a fine degree of certainty what percentage completion the Project has attained. Architectural site visits for the purpose of pay request certification involve general observation of Work progress, but usually do not include a quantitative analysis of the percentage complete. For precise percentages, the Architect typically depends on the Contractor's Schedule of Values, not having access to any kind of quantity survey or analysis of materials and labor for the job.

§3.6.4.1 & §3.6.4.2 Review of Submittals. For the first time, the AIA Documents link the Architect's time for reviewing shop drawings and other submittals to a submittal schedule prepared by the Contractor. Section 3.6.4.1 states:

"The Architect shall review the Contractor's submittal schedule and shall not unreasonably delay or withhold approval. The Architect's action in reviewing submittals shall be taken in accordance with the approved submittal schedule or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time in the Architect's professional judgment to permit adequate review."

Section 3.6.4.2 echoes this concept, requiring the Architect to review shop drawings and other submittals "[i]n accordance with the Architect's approved submittal schedule".

The prior version of this paragraph was found in Section 2.6.4.1 of the 1997 edition of B141 and Section 2.6.11 of the 1997 edition of B151. The older version required that the Architect's review of shop drawings and other submittals "be taken with such reasonable promptness as to cause no delay in the Work or in the activities of the Owner, Contractor or separate contractors, while allowing sufficient time in the Architect's professional judgment to permit adequate review." Owners and Contractors frequently objected to this provision because it did not provide a firm deadline for completion of the review. Architects, on the other hand, argued that a fixed time limit for review is unrealistic for several reasons: shop drawings need to be reviewed in a logical sequence, and sometimes a predecessor drawing is missing despite a successor drawing having been submitted; Contractors sometimes submit hundreds of drawings at once; and shop drawings are sometimes submitted without adequate general contractor pre-review.

It is common for construction contracts, particularly the "front-end" documents, to require the Contractor to prepare and submit a schedule of shop drawings and other submittals. Smaller or less time-critical projects often forego this requirement, or the Contractor either neglects to provide the schedule or else doesn't treat the requirement seriously, such as by showing a single milestone date in a schedule for submittals to be delivered. The AIA Documents do not provide a specific remedy for the Contractor's failure to provide a schedule of submittals, and it is likely that the Owner would suffer no damages as a direct result of this failure. However, by linking the Architect's obligation to review submittals by a particular deadline to the existence of an approved schedule of submittals, the new B101 deprives the Contractor of the ability to make a delay claim for excessive turnaround time unless it has

prepared and obtained approval of a schedule of submittals or unless the review time is grossly unreasonable under the circumstances.

§3.6.4.4 Requests for Information. New language in this paragraph creates some subtle differences in the Architect's obligation to respond to RFI's in the current versus the previous version of this paragraph. The current version requires the Architect to "respond to requests for information about the Contract Documents . . . in writing within any time limits agreed upon, or otherwise with reasonable promptness," and to "set forth in the Contract Documents the requirements for requests for information." The prior version of this provision, Sections 2.6.1.5 and 2.6.1.6 of the 1997 edition of B141, merely required the Architect to respond to properly prepared, "timely" RFI's and contained no deadline, by formulation or otherwise, for response.

The new language represents a compromise. Owners and Contractors want a fixed time-limit for responding to RFI's. Architects object to being forced to respond to RFI's when the information requested is available somewhere in the Contract Documents. The compromise language requires the Architect to respond to the RFI even if it is improper, but does not impose a time limit other than "reasonable promptness."

§4.1 Optional Additional Services. This paragraph provides a list of Additional Services that were previously known in earlier editions of the AIA Owner-Architect Agreements as "Optional Additional Services." These are services outside the quoted scope of work that the Owner can request the Architect to provide but which are unlikely to be foisted upon the Project due to adverse circumstances. The services are arrayed in a chart which allows responsibility to be divided among the categories: "Architect", "Owner", and "Not Provided".

This Section lists several new Additional Services and deletes some services found in the previous version of this provision, Section 2.8.3 of the 1997 edition of B141. The newly added Additional Services include:

- Measured Drawings
- Building Information Modeling
- Conformed Construction Documents
- As-Designed Record Drawings
- As-Constructed Record Drawings
- Coordination of Owner's Consultants
- Telecommunications/Data Design
- Security Design
- Extensive Environmentally Responsible Design
- LEED Certification
- Fast-Track Design Services

The following Additional Services, listed in the previous version of this Section, are no longer offered or listed:

- Land Survey Services
- Geotechnical Services
- Space Schematic/Flow Diagrams
- Economic Feasibility Studies
- Environmental Studies and Reports
- Owner-Supplied Data Coordination
- Schedule Development and Monitoring
- Special Bidding or Negotiation

- Construction Management

§4.2.1 Contingent Additional Services. The Additional Services listed in this Section were previously known as “Contingent Additional Services” in earlier editions of the AIA Owner-Architect Agreement. New Additional Services including “Extensive Environmental Design Alternatives/LEED Certification, Preparing Digital Data for Transmission, Evaluating Bidders’ Qualifications, and Assisting a Third-Party Initial Decision-Maker.”

The Additional Services listed in this Section require written approval before they are provided. Paragraph 4.2.1 states: “Upon recognizing the need to perform the following Additional Services, the Architect shall notify the Owner. The Architect shall not proceed to provide the services until the Architect receives the Owner’s written authorization.” Contrast this approach to notification for the Additional Services listed in the next section.

§2.8.1 Additional Construction Administration Services. This Section lists Additional Services specifically pertaining to construction administration. The paragraph states: “To avoid a delay in the Construction Phase, the Architect shall provide the following Additional Services and shall notify the Owner with reasonable promptness.” The Architect is permitted to provide the services described even without written authorization from the Owner as long as the Owner has not notified the Architect that the services are not required.

§5.2 Budget for the Project. This provision requires the Owner to establish and update or modify the budget for the construction work. The prior version of this paragraph, Section 1.2.2.2 of the 1997 edition of B141 and Section 4.2 of the 1997 edition of B151, forbid the Owner from significantly increasing or decreasing the budget or its key components without the Architect’s approval. The B101 recognizes that the issue of budget is within the discretion of the Owner over which the Architect should not have approval rights. The new language provides: “If the Owner significantly increases or decreases the Owner’s budget for the Cost of the Work,

the Owner shall notify the Architect.” The budget change may require redesign, which may entitle the Architect to payment for Additional Services, but the Architect can no longer veto the budget change.

§5.4 Surveys. This is the paragraph that requires the Owner to furnish surveys describing the property. It is little changed from the predecessor provision, Section 2.2.1.2 of the 1997 edition of B141 and Section 4.4 of the 1997 edition of B151. The only new requirement is that the survey include “designed wetlands.”

§5.5 Geotechnical Services. This is the paragraph that requires the Owner to furnish the services of geotechnical engineers. It is virtually identical to its predecessor paragraph, Section 2.2.1.3 of the 1997 edition of B141 and Section 4.5 of the 1997 edition of B151. The only two changes are to include “seismic evaluation” among the geotechnical services and to require the reports to be in writing.

§5.6 Owner’s Consultants. This provision adds significant additional detail to the prior version of the provisions governing Owner’s consultants, Section 1.2.2.4 of the 1997 edition of B141 and Section 4.6 of the 1997 edition of B151. The new provision reads:

“The Owner shall coordinate the services of its own consultants with those services provided by the Architect. Upon the Architect’s request, the Owner shall furnish copies of the scope of services in the contracts between the Owner and the Owner’s consultants. The Owner shall furnish the services of consultants other than those designated in this Agreement or authorize the Architect to furnish them as an Additional Service, when the Architect requests such services and demonstrates that they are reasonably required by the scope of the Project. The Owner shall require that its consultants maintain professional liability insurance and other liability insurance on the same basis as required of the Architect.”

Several concepts in this paragraph are new. It is the Owner who is responsible for coordinating the consultant’s services with those of the Architect. The “scope of service” portion of the consultant’s contract must be furnished to the Architect. The Architect must “demonstrate” the

need for the Owner to hire the consultants. The Owner may authorize the Architect to hire the consultants directly. And the consultants are required to maintain the same kinds of insurance as the Architect.

Some of these provisions are likely to be controversial. It is unusual to require the Owner to coordinate professional services, and many owners may be unable to do so. And it is unusual for the Architect to be able to require particular insurance of the Owner's consultants, particularly since in many jurisdictions the economic loss rule would prevent the Architect from maintaining a direct claim against the consultants pertaining to typical design or construction defects. Note, however, that the last sentence states that the consultant's liability insurance shall be on the same "basis" as required of the Architect, but not necessarily the same coverage limits.

§5.10 Communications. This provision governs the Owner's communications with the Contractor and Architect's consultants. The predecessor provisions, Section 2.6.2.4 of the 1997 edition of B141 and Section 2.6.8 of the 1997 edition of B151, required the Owner to endeavor to communicate with the Contractor through the Architect. This requirement is retained and applied to the Architect's consultants as well. However, the new provision recognizes that there may be some direct communication between the Owner and either the Contractor or the Architect's consultants. The new language requires the Owner to "promptly notify the Architect of the direct communications that may affect the Architect's services."

§5.11 Coordination of Contracts. This provision is entirely new. It requires the Owner to make consistent the description of the Architect's services in the Owner-Architect Agreement and the construction contract, stating:

"Before executing the Contract for Construction, the Owner shall coordinate the duties and responsibilities identified in the Contract for Construction with the Architect's services set forth in this Agreement. The Owner shall provide the Architect a copy of the executed agreement between the Owner

and Contractor, including the General Conditions of the Contract for Construction.”

This is a different approach to the issue in Section 3.6.1.1, which clarifies that the Architect is not bound to any provisions in the A201 General Conditions that are inconsistent with the Owner-Architect Agreement.

This provision contains two different requirements. The first requirement is that the Owner “coordinate” the provisions of the two contracts. Presumably this means not agreeing to provide any architectural services in the construction contract that are not set forth in the Owner-Architect Agreement. The other requirement is for the Owner to provide the Architect with a copy of the construction contract. This is presumably to allow the Architect to identify any such inconsistencies and to perform its construction administration functions more accurately.

§6.1 Cost of the Work. This provision is a modification of similar predecessor provisions found in Sections 1.3.1.1, 1.3.1.2 and 1.3.1.3 of the 1997 edition of B141 and Sections 5.1.1, 5.1.2 and 5.1.3 of the 1997 edition of B151. The new paragraph provides:

“For purposes of this Agreement, the Cost of the Work shall be the total cost to the Owner to construct all elements of the Project designed or specified by the Architect and shall include Contractor’s General Conditions costs, overhead and profit. The Cost of the Work does not include the compensation of the Architect, the costs of the land, rights-of-way, financing, contingencies for changes in the Work or other costs that are the responsibility of the Owner.”

There are three new concepts in this paragraph. The definition of the Cost of the Work is limited to the purposes of this Agreement, presumably so that it cannot be used against the Owner in a dispute with the Contractor where the term is defined differently. The provision clarifies that the definition is to include General Conditions costs, overhead and profit. And it further clarifies that contingencies are not to be included in the definition of the Cost of the Work.

§6.3 *Estimates of the Costs of the Work.* This provision defines the process for the Architect to estimate the Cost of the Work and clarifies the previous provisions found at Section 2.1.7.3 of the 1997 edition of B141 and Section 5.2.2 of the 1997 edition of B151. The more significant change clarifies that the Architect's estimates are merely conceptual and that more detailed estimating would be an Additional Service:

"The Architect's estimate of the Cost of the Work shall be based on current area, volume or similar conceptual estimating techniques. If the Owner requests detailed cost estimating services, the Architect shall provide such services as an Additional Service under Article 4."

The other change permits the Architect to modify the Owner's program for the Project if necessary to maintain budget. There is no requirement that the Owner approve the Architect's modification to the program or scope, although Section 6.6.4 requires the Owner to consult with the Architect regarding such modifications. This is somewhat surprising because the Owner's program reflects the Owner's personal preferences and one would expect that the Architect would need the Owner's permission to modify it.

§7.1 *Copyright and Electronic Documents.* This is a new provision without a predecessor in earlier versions of the AIA Owner-Architect Agreement. It consists of two separate topics and states:

"The Architect and the Owner warrant that in transmitting Instruments of Service, or any other information, the transmitting party is the copyright owner of such information or has permission from the copyright owner to transmit such information for its use on the Project. If the Owner and Architect intend to transmit Instruments of Service or any other information or documentation in digital form, they shall endeavor to establish necessary protocols governing such transmissions."

The first sentence is a warranty of the right to use any drawings or other documentation that one party transmits to the other. This applies not only to design and construction documents prepared by the design team, but also to drawings, such as "as-builts" or preliminary sketches, or

other information provided to the design team by the Owner. The second sentence requires the parties to agree on terms and conditions under which the Architect would provide its drawings or other documents in digital format. This is an important issue because of the likelihood that errors or other glitches may appear due to the electronic nature of the medium that do not appear in the hard copy of the drawings.

§7.3 License to Use the Plans. This provision makes several changes to the predecessor paragraph found at Sections 1.3.2.2 and 1.3.2.3 of the 1997 edition of B141 and Section 1.6.2 of the 1997 edition of B151. The last sentence states: “If the Architect rightfully terminates this Agreement for cause as provided in Sections 9.3 and 9.4, the license granted in this Section 7.3 shall terminate.” The usual reason that an Architect would terminate the contract is for non-payment, and this sentence revokes the Owner’s license to use the Drawings and Specifications in that case. This paragraph also makes the following minor changes and clarifications:

- The license granted to the Owner is for the “use” of the Drawings and Specifications, not merely their reproduction as in prior versions of this provision.
- Although the previous language stated that the license was “solely” for the purposes set forth in the paragraph, the meaning has been clarified by changing the limitation to the phrase, “solely and exclusively.”
- For the first time, the Owner’s permissible uses for the Drawings and Specifications include “altering and adding” to the Project.
- The breadth of the license is clarified to allow not only the Owner but also its “consultants and separate contractors” to reproduce the licensed documents, but only “for use in performing services or construction for the Project.”

§7.3.1 Owner’s Use of Plans Without Architect. This paragraph has been almost completely rewritten from its predecessor provisions, Section 1.3.2.2 of the 1997 edition of B141 and Section 6.2 of the 1997 edition of B151. The new paragraph reads as follows:

"In the event the Owner uses the Instruments of Service without retaining the Architect or the Architect's consultant(s) that authored the Instruments of Service, the Owner releases the Architect and the Architect's consultant(s) from all claims and causes of action arising from such uses. The Owner, to the extent permitted by law, further agrees to indemnify and hold harmless the Architect and its consultant(s) from all costs and expenses, including the cost of defense, related to claims and causes of action asserted by any third person or entity to the extent such cost and expenses arise from the Owner's use of the Instruments of Service under this Section 7.3.1. The terms of this Section 7.3.1 shall not apply if the Owner rightfully terminates this Agreement for cause under Section 9.4 for the Architect's substantial failure to perform its services in accordance with this Agreement."

Note that this provision does not address the consequences of terminating the Architect in the middle of the Project or of hiring the Architect only for very limited services.

This provision provides both for a release and for indemnification. The indemnity is limited to claims by third parties against the Owner. One of the reasons for a release in addition to an indemnification is that some jurisdictions have anti-indemnity laws that would limit or forbid a contractual obligation of indemnity in some circumstances.⁶

§8.1.1 Statute of Repose. The B101 Agreement adopts a new approach to establishing a contractual statute of repose on claims arising out of the Owner-Architect Agreement. Its predecessor provisions, Section 1.3.7.3 of the 1997 edition of B141 and Section 9.3 of the 1997 edition of B151, merely established that the applicable statute of limitations would begin to run no later than Substantial Completion for claims arising before then, and no later than Final Completion for claims arising between Substantial Completion and Final Completion. The local state statute would then determine the length of time after Substantial Completion or Final Completion for filing the claim. The new B101 provision contractually establishes a 10-year statute of repose commencing at Substantial Completion, stating:

"The Owner and Architect shall commence all claims and causes of action, whether in contract, tort or otherwise, against the other arising out of or relating to this Agreement in accordance with the requirements of the

method of binding dispute resolution selected in this Agreement within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Architect waive all claims and causes of action not commenced in accordance with this Section 8.1.1.”

The effect of this language is to establish contractually a 10-year period of repose beginning with Substantial Completion but without superseding any applicable state or other law that may set forth other restrictions, including a shorter repose period. Thus, claims between the Owner and Architect under B101 must both be timely as defined by the applicable jurisdiction’s law and be filed within ten years of the date of Substantial Completion.

§8.2.2 Mediation. This paragraph provides clarification and some minor modifications to its predecessor provision, Section 1.3.4.2 of the 1997 edition of B141 and Section 7.1.2 of the 1997 edition of B151. The modified language makes the following changes and/or clarifications:

- Instead of merely specifying that the American Arbitration Association Mediation Rules will apply, the provision now explicitly states that the American Arbitration Association will administer the mediation unless the parties agree otherwise.
- The version of the American Arbitration Association’s Construction Industry Mediation Procedures that will apply to and govern the mediation will be the version in effect on the date that the B101 Owner-Architect Agreement is signed, not the version in effect when the demand for mediation is filed. This may require the mediation to be administered by what is then an obsolete set of rules, but it gives the parties certainty at the time of contracting as to which set of rules will apply.
- To allow for the possibility that someone other than the American Arbitration Association may administer the mediation, the provision now calls for the request for mediation to be filed with “the person or entity administering the mediation,” rather than specifying the American Arbitration Association, as in the older version.
- The new language allows for the possibility that the parties may have elected litigation, rather than arbitration, as the binding dispute resolution procedure and provides for the request for mediation to be filed simultaneously with a lawsuit as well as with an arbitration demand.

- A new last sentence, which applies in the event that the binding dispute resolution selected is arbitration, permits the parties to “proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings” while the mediation is pending.

§8.2.4 Choice of Binding Dispute Resolution. This paragraph contains the most highly publicized change in the B101 document from the prior versions of the Owner-Architect Agreement. The 1997 (and earlier) versions of B141 and B151, as well as every applicable AIA Document of the last several editions (except for the 2004 Design-Build Documents, which adopted the same approach as the new B101), specified arbitration as the binding dispute resolution method agreed to by the parties. In negotiating the contract, it was not uncommon for one party or the other to delete the arbitration clauses and all references to arbitration because the default binding dispute resolution forum was arbitration.

The new B101 employs a check-box approach to selecting a binding dispute resolution forum. There are three boxes available to check. The first provides for “Arbitration pursuant to Section 8.3 of this Agreement”. The second check-box is for “Litigation in a court of competent jurisdiction”. The third check-box is labeled “Other,” and requires the parties to spell out the type of binding dispute resolution that they have agreed to employ.

The AIA appears to have structured this provision to establish litigation in court as the default binding dispute resolution method if no boxes are checked. The introductory language to the check-box states: “If the Owner and Architect do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, the dispute will be resolved in a court of competent jurisdiction.”

However, this default may be undercut somewhat through the operation of the AIA software which accompanies the license for the documents. I am not a computer or software expert, and I do not know whether the version of the software that I have used for the 2007

edition of B101 is aberrant or unusual, but it automatically places a checkmark in the arbitration box if not modified, although the box can be un-checked manually. If this is a universal or common feature in the software, then the introductory default language quoted above is rarely likely to come into play because either one of the boxes will be checked or else there will have been a conscious decision to remove the checkmark from the arbitration box.

§8.3.1 Arbitration. This paragraph has been modified similarly to the mediation paragraph in 8.2.2 of B101 (see above) in order to clarify and make some minor modifications to the predecessor arbitration provisions, Sections 1.3.5.1 and 1.3.5.2 of the 1997 edition of B141 and Section 7.2.1 of the 1997 edition of B151. The new paragraph makes the following substantive changes and/or clarifications:

- To acknowledge the checkbox options described above, the introductory language to this paragraph states that it applies only if “the parties have selected arbitration as the method for binding dispute resolution in this Agreement”.
- Instead of the prior edition’s approach of containing a broad categorization of all claims subject to arbitration, the claims subject to arbitration in B101 are described as those that are “subject to, but not resolved by mediation”. Substantively, this is as broad a categorization as in previous editions of the AIA Owner-Architect Agreements because the description of claims subject to mediation in Section 8.2 is as broad and inclusive as the prior edition’s arbitration clause.
- The new language clarifies that the arbitration “shall be administered by the American Arbitration Association” unless the parties mutually agree otherwise.
- Similar to the identification of mediation rules in Section 8.2.2, the new B101 language specifies that the applicable Construction Industry Arbitration Rules shall be those “in effect on the date of the Agreement.” Although this may mean that the arbitration is administered under an obsolete set of rules, the new language at least gives the contracting parties certainty as to which rules will apply to the proceeding.
- Acknowledging that someone other than the American Arbitration Association may be administering the arbitration, the new language calls for the demand for arbitration to be filed with “the person or entity

administering the arbitration” rather than with the American Arbitration Association.

§8.3.2 *Timing of Arbitration.* There is new language added to the B101 paragraph for the purpose of resolving issues that had arisen under the predecessor versions of this provision, Section 1.3.5.3 of the 1997 edition of B141 and Section 7.2.2 of the 1997 edition of B151. In order to emphasize that mediation is a binding condition precedent to proceeding with an arbitration, the new provision now provides that a “demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation”.

Another question that has been raised regarding arbitration commenced under AIA Documents was whether the filing of an arbitration demand tolled the statute of limitations. Although the filing of an arbitration demand logically should constitute the prosecution of a claim for statute of limitations purposes, the fact remained that arbitration is a private process and that many statutes of limitations contain language requiring a court filing to toll the limitations period.⁷ A new sentence has been added to the end of paragraph 8.3.2 to clarify this issue:

"For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the claim, dispute or other matter in question."

The intent of the new sentence is to create a binding agreement between the parties establishing that the claim shall be deemed timely if the arbitration demand is filed timely. This follows the well-known principles that parties can agree in their contract to limit or otherwise modify an applicable statute of limitations.⁸

§8.3.3.1 and 8.3.3.2 *Consolidation of Arbitrations.* These paragraphs represent a significant conceptual change from prior editions of the AIA Owner-Architect Agreement. It had previously been the philosophy of the AIA that arbitrations between the Owner and the

Architect should not be consolidated with any other arbitrations involving different parties. The theory was that architects are judged by a different standard than contractors, since architects adhere only to a standard of care and do not give implied warranties, whereas contractors make both explicit and implied warranties as to the outcome of their services. The AIA has always been concerned that in an arbitration involving an Owner, Architect and Contractor, the arbitrator may overlook these distinctions and not require the degree of proof of professional negligence that the Owner would have to establish against the Architect in a two-party arbitration.

Paragraph 8.3.3.1 allows either the Owner or the Architect, without needing the consent of the other, to consolidate any arbitration between them with any other arbitration to which the consolidator is a party if three conditions are met:

"(1) the arbitration agreement governing the other arbitration permits consolidation; (2) the arbitrations to be consolidated substantially involve common issues of law or fact; and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s)."

The provision does not offer any guidance as to what would constitute "common issues of law or fact," but there is a large body of caselaw involving consolidation of claims to serve as precedent.⁹ Nor does paragraph 8.3.3.1 provide any guidance regarding how similar the arbitrator selection procedures must be, and due to the absence of comparable litigation issues, little or no precedent is available.

Paragraph 8.3.3.2 is virtually identical to paragraph 8.3.3.1, but at one further remove. Rather than applying to the Owner and Architect, it applies to non-parties to the Owner-Architect Agreement who are participating in an arbitration that gets consolidated pursuant to paragraph 8.3.3.1 with the arbitration between the Owner and Architect under the B101. Just as paragraph 8.3.3.1 allows the Owner or Architect to assume the role of Third-Party Plaintiff by

consolidating their arbitration against a downstream party, paragraph 8.3.3.2 allows the downstream party to assume the role of Fourth-Party Plaintiff by consolidating its arbitration against an even further downstream party. Thus, if the Owner is arbitrating against the Architect a claim alleging a design error, paragraph 8.3.3.1 allows the Architect to bring third-party in its consulting engineer pursuant to an arbitration clause in the contract between them. And paragraph 8.3.3.2 would permit the consulting engineer to fourth-party in a subconsulting engineer pursuant to an arbitration clause in the contract between them.

Initially, it seems curious that paragraph 8.3.3.2 applies only to parties or entities who are not signatories to the B101 Owner-Architect Agreement. It seems misguided to attempt to bind them to a provision in a contract in which they are not a party. However, it is common for subcontracts, subconsulting agreements and other downstream contracts to incorporate by reference the terms and conditions of the upstream contract, so this language may be incorporated by reference into a downstream contract. Furthermore, it operates to prevent the Owner or Architect from objecting to the efforts of the consulting engineer or other downstream party to consolidate a further downstream arbitration.

§8.3.3.3 Joinder of Parties to Arbitration. This paragraph is intended to complement paragraphs 8.3.3.1 and 8.3.3.2, applying in situations where the downstream party had not previously entered into an arbitration agreement with the upstream party attempting to consolidate the arbitrations. The new language of paragraph 8.3.3.3 states:

"Any party to an arbitration may include by joinder persons or entities substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration, provided that the parties sought to be joined consents in writing to such joinder."

For consolidation to occur under this paragraph, the person or entity sought to be joined to the arbitration must essentially sign an arbitration agreement after the dispute has already arisen.

Note that there is a subtle difference in the language governing requirements for joinder compared to paragraphs 8.3.3.1 and 8.3.3.2. The earlier paragraphs require that the arbitration to be consolidated “substantially involve common issues of law or fact.” Paragraph 8.3.3.3 merely requires that there be “a common question of fact or law.” Thus, under this paragraph, a single common question is sufficient to justify joinder, whereas substantial commonality is necessary to join two arbitrations. This is probably due to the fact that the downstream party to be joined in paragraph 8.3.3.3 is explicitly consenting to the joinder.

§9.2 Compensation Upon Project Suspension. This paragraph is substantially similar to its predecessor provisions, Section 1.3.8.2 of the 1997 edition of B141 and Section 8.2 of the 1997 edition of B151. The only change is deletion of the requirement that the duration of the suspension be “for more than 30 consecutive days” before the compensation provisions of the paragraph are triggered. This change is likely to reflect the realities of managing an architectural office. When an Architect receives notification that a project is suspended, it must promptly reassign the personnel working on that project to other tasks or else suffer significant inefficiencies. This reassignment would normally occur in the manner of a day or a few days – a far shorter time than the previous thirty day minimum duration for the suspension to trigger compensation provisions. The compensation requirements of immediate payment, reimbursement for inefficiencies and equitable adjustment of fees and time schedules have not been changed from the prior version of this provision.

§9.3 Limits of Suspension. This paragraph contains two substantive changes from the prior versions of this provision, Section 1.3.8.3 of the 1997 edition of B141 and Section 8.3 of the 1997 edition of B151. The first change is to allow the Architect to terminate the Agreement if the Project or the Architect’s services are suspended for more than 90 “cumulative” days. The

prior version required the suspension to be for 90 “consecutive” days to trigger the Architect’s right to terminate the Agreement. This change is logical because otherwise the Owner could restart the “suspension clock” by resuming the Project for one day after 89 days of suspension. The other change to this paragraph is the addition of the phrase, “for reasons other than the fault of the Architect,” which is intended to except from the provisions of this paragraph any suspension caused by the Architect’s negligence or other malfeasance.

§9.8 Owner’s License Upon Termination. This is a new provision with no substantive content of its own, which is merely intended to clarify the Owner’s rights and obligations with regard to the use of the Drawings and Specifications in the event that the Agreement is terminated. The entire provision states: “The Owner’s rights to use of the Architect’s Instruments of Service in the event of a termination of this Agreement are set forth in Article 7 and Section 11.9.” For a substantive analysis, see the discussion of the new provisions under Article 7 above and the discussion of paragraph 11.9.1 below.

§10.1 Choice of Law. This paragraph represents a conceptual change from the approach of the predecessor provision, Section 1.3.7.1 of the 1997 edition of B141 and Section 9.1 of the 1997 edition of B151, which stated that the “principal place of business of the Architect” would provide the applicable law. The new approach in this paragraph is more realistic and also designed to be in compliance with laws and court provisions that would void the previous incarnation of this provision.¹⁰ The new provision defines the applicable law as that of the “place where the Project is located.” However, to avoid running afoul of court decisions holding that the Federal Arbitration Act preempts any contrary state law,¹¹ the paragraph further provides “that if the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern Section 8.3.”

This raises an interesting question for projects where all parties and services are located in a single state, not involving interstate commerce: can the parties by their agreement in this paragraph stipulate that the Federal Arbitration Act has jurisdiction in lieu of the applicable state arbitration law? However, this is unlikely to make much substantive difference since most states' arbitration statutes are based on the uniform law, which are similar in most regards to the Federal Arbitration Act.¹²

§10.4 Certificates and Consents. This paragraph adds a new sentence to extend the principle in the prior version of this provision, Section 1.3.7.8 in the 1997 edition of B141, to consents as well as certificates. The prior edition allowed the Architect fourteen days of advance review of any certificate before having to sign it. The new paragraph extends the same principle to consents:

"If the Owner requests the Architect to execute consents reasonably required to facilitate assignment to a lender, the Architect shall execute all such consents that are consistent with its Agreement, provided the proposed consent is submitted to the Architect for review at least 14 days prior to execution."

This reflects the concern that the language of lender's consent is often imprecise or overbroad, requiring negotiation and modification. However, to be consistent with the language in the prior sentence applicable to certificates, the final words of the new sentence should probably read: "at least 14 days prior to the requested dates of execution."

§10.8 Confidential Information. This paragraph has been completely rewritten from its predecessor provision, Section 1.2.3.4 of the 1997 edition of B141. It now reads:

"If the Architect or Owner receives information specifically designated by the other party as "confidential" or "business proprietary", the receiving party shall keep such information strictly confidential and shall not disclose it to any other person except (1) its employees, (2) those who need to know the content of such information in order to perform services or construction solely and exclusively for the Project, or (3) to its consultants and

contractors whose contracts include similar restrictions on the use of Confidential Information.”

For the first time, this provision has been made mutual, rather than applying only to the Architect. It also now applies to “business proprietary” information, which is only confidential for commercial purposes. And the three numbered exceptions now allow the party maintaining confidentiality to disclose it as necessary to perform its services or other obligations for the Project.

The new paragraph also involves significant deletions from the prior version which established exceptions to confidentiality: “unless withholding such information would violate the law, create the risk of significant harm to the public or prevent the Architect from establishing a claim or defense in an adjudicatory proceeding.” B141-1997, §1.2.3.4. The quoted circumstances are arguably legitimate and proper exceptions to confidentiality. It is unclear why they have been deleted.

§11.6 Compensation for Cancelled Projects. This paragraph describes the procedure for calculating payments to an Architect who has been paid as a percentage of the Cost of the Work. It adds a sentence of clarification to its predecessor provision, Section 10.3.4 of the 1997 edition of B151. The new sentence reads: “The Architect shall be entitled to compensation in accordance with this Agreement for all services performed whether or not the Construction Phase is commenced.” This is merely a clarification, rather than a new concept, because the predecessor provision had always provided that the percentage fee would be calculated on the most recent construction cost estimate if no bid or negotiated proposal is received – which would be the case if the Construction Phase never commences.

§11.8.1 Reimbursable Expenses. This paragraph modernizes the list of reimbursable expenses found in its predecessor provision, Section 1.3.9.2 of 1997 edition of B141 and Section

10.2.1 of 1997 edition of B151. Newly added to the list of reimbursable expense are long-distance services, dedicated data and communications services, teleconferences, project websites and extranets, printing, professional photography and presentation material, professional services taxes and site office expenses. Deleted from the list are “electronic communications,” although most typical examples of such communications are identified more specifically in the reimbursable list. And “postage, handling and delivery” are now reimbursable regardless of whether they are for transmittal for the Instruments of Service or any other documents.

§11.9.1 License Fee Upon Termination for Convenience. This is a new concept in the AIA Owner-Architect Agreement. It provides for a fee to be paid by the Owner to the Architect to retain a license to use the Drawings and Specifications after terminating the Owner-Architect Agreement for convenience. This paragraph states:

"If the Owner terminates the Architect for its convenience and without cause under Section 9.5, the Owner shall pay a licensing fee in the amount of _____ Dollars (\$_____) as compensation for the Owner's use of the Architect's Instruments of Service solely for the purposes of completing, using and maintaining the Project."

No predecessor provision exists in the 1997 editions of B141 or B151.

This paragraph responds to the concern of architects who are known for their design skills. Often their fee structure is higher than that of other architectural firms less known for design. The high design architects are concerned that the Owner will obtain the benefits of their design and then terminate them for convenience, hiring a less expensive architecture firm to complete the Project.

§11.10.3 Withholding Architect's Fee. This paragraph prohibits the Owner from withholding a portion the Architect's fee to offset other losses or damages unless the Architect agrees or has been found to be liable for the sum withheld. It is a clarification of its predecessor provision, Section 1.3.9.1 of the 1997 edition of B141. The new paragraph states:

"The Owner shall not withhold amounts from the Architect's compensation to impose a penalty or liquidated damages on the Architect, or to off set sums requested by or paid to contractors for the cost of changes in the Work unless the Architect agrees or has been found liable for the amounts in a binding dispute resolution proceeding."

This concept has always been unpopular and arguably unfair. As a practical matter, it usually is not possible to go through a binding dispute resolution process prior to completion of the Project after a dispute has arisen. This provision is often stricken or negotiated. One possible compromise is to require the Architect to offer adequate security in exchange for the Owner making payment despite the claim of a set off. Such security may be an insurance policy or an irrevocable letter of credit. Another compromise may be to require the Owner to make the withheld payment into an escrow account which would ultimately be distributed in accordance with a settlement agreement or the decision of the binding dispute resolver.

§13.2.2 Digital Data Protocol Exhibit. This paragraph refers to an Exhibit which is new with the 2007 Owner-Architect Agreement. The paragraph states that the new Exhibit, denominated AIA Document E201-2007, entitled "Digital Data Protocol Exhibit," is incorporated by reference if filled out. Presumably, if left blank, it is not part of the parties' agreement. The details of the exhibit itself are beyond the scope of this paper.

¹ See e.g., Am. Jur. 2d Architects § 22; *Overland Constructors, Inc. v. Millard School Dist., School Dist. No. 17, Douglas County*, 220 Neb. 220, 369 N.W.2d 69 (1985); *A. E. Inv. Corp. v. Link Builders, Inc.*, 62 Wis.2d 479, 214 N.W.2d 764 (1974); *Mississippi Meadows, Inc. v. Hodson*, 13 Ill.App.3d 24, 299 N.E.2d 359, 361 (3d Dist. 1973); *Miller v. DeWitt*, 59 Ill.App.2d 38, 208 N.E.2d 249 (4th Dist. 1965).

² See, e.g., *Miller*.

³ *Id.*

⁴ See e.g., *Hulse v. Midwest Emery Freight System, Inc.*, 12 Ill.App.3d 316, 299 N.E.2d 24 (1973); *Middleton v. Lomaskin*, 266 So.2d 678 (Fla.App. 1972); *Basin Oil Co. of Cal. v. Baash-Ross Tool Co.*, 125 Cal.App.2d 578, 271 P.2d 122 (1954).

⁵ See *Block v. Lohan Associates, Inc.*, 269 Ill.App.3d 745, 645 N.E.2d 207, 206 Ill.Dec. 202 (1993). That case arose under different but similar circumstances in which a construction worker claimed that the architect and structural engineer, in their review of the relevant shop drawings, failed to enforce necessary safety procedures. It was clear in oral argument that the court was not impressed by the exculpatory language in the shop drawings provisions of the design professional's contracts. However, when the judge's attention was drawn to the way that the shop drawing provisions divided the review responsibilities between the design and construction teams – with

responsibility for their compliance with design intent and the information in the contract documents belonging to the design team, and responsibility for safety, constructability, etc. belonging to the construction team – the court affirmed summary judgment in favor of the design professionals and placed full responsibility for the construction accident on the construction team.

⁶ See e.g., Illinois: 740 ILCS 35/1 *et seq.*; New York: General Obligations Law §5-322.1; California: Civil Code §2782.

⁷ See *Murphy v. United States Fidelity & Guaranty Co.*, 120 Ill.App.3d 282, 458 N.E.2d 54, 58, 75 Ill.Dec. 886 (5th Dist. 1983) (holding that statute of limitations may be tolled as long as arbitration is demanded by one of the parties to the contract within the applicable statute of limitations time period); *Booth v. Fireman's Fund Insurance Co.*, 253 La. 521, 218 S.2d 580 (1968); *Schleif v. Hardware Dealer's Mutual Fire Insurance Co.*, 218 Tenn. 489, 404 S.W.2d 490 (1966); *DeLuca v. Motor Vehicle Accident Indemnification Corp.*, 17 N.Y.2d 76, 215 N.E.2d 482, 268 N.Y.S.2d 289 (1966); *Lemrick v. Grinnell Mutual Reinsurance Co.*, 263 N.W.2d 714 (Iowa 1978); *Pickering v. American Employers Insurance Co.*, 109 R.I. 143, 282 A.2d 584 (1971); *Franco v. Allstate Insurance Co.*, 505 S.W.2d 789 (Tex.1974); *North River Insurance Co. v. Kowaleski*, 275 Or. 531, 551 P.2d 1286 (1976); *Sahloff v. Western Casualty and Surety Co.*, 45 Wis.2d 60, 171 N.W.2d 914 (1969).

⁸ See e.g., *International Business Lists, Ltd. v. American Tel. & Tel. Co.*, 878 F.Supp. 102 (N.D.Ill.,1994); *John J. Kassner & Co., Inc. v. City of New York*, 389 N.E.2d 99 (N.Y. 1979); *Yakima Asphalt Paving Co. v. Washington State Dept. of Transp.*, 726 P.2d 1021 (Wash. App. 1986); *Burroughs Corp. v. Suntogs of Miami, Inc.*, 472 So.2d 1166 (Fla. 1985).

⁹ See e.g., *In re Repetitive Stress Injury Litigation*, 11 F.3d 368 (C.A.2.N.Y., 1993); *Johnson v. Celotex Corp.*, 899 F.2d 1281 (C.A.2.N.Y., 1990); *Henderson v. National R.R. Passenger Corp.*, 118 F.R.D. 440 (N.D.Ill., 1987); *Bottazzi v. Petroleum Helicopters, Inc.*, 664 F.2d 49 (C.A.5.La., 1981); *Dupont v. Southern Pac. Co.*, 366 F.2d 193 (C.A.5.La., 1966);

¹⁰ See *Labor Ready, Inc. v. Williams Staffing, LLC*, 149 F.Supp.2d 398, 405 (N.D.Ill. 2001); *Manion v. Roadway Package System, Inc.*, 938 F.Supp. 512, 515 (N.D.Ill. 1996). *International Surplus Lines Insurance Co. v. Pioneer Life Insurance Company of Illinois*, 209 Ill.App.3d 144, 568 N.E.2d 9, 154 Ill.Dec. 9 (1st Dist. 1990); *Walter E. Heller & Co. v. Video Innovations, Inc.*, 730 F.2d 50 (C.A.2.N.Y. 1984); *Allen v. Lloyd's of London*, 94 F.3d 923 (C.A.4.Va. 1996); *Kevlin Services, Inc. v. Lexington State Bank*, 46 F.3d 13 (C.A.5.Tex. 1995)

¹¹ See *Aste v. Metropolitan Life Ins. Co.*, 728 N.E.2d 629 (Ill.App. 2000); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266 (Tex. 1992); *Webb v. R. Rowland & Co., Inc.*, 800 F.2d 803 (C.A.8.Mo 1986); *Wolff Motor Co. v. White*, 869 So.2d 1129 (Ala. 2003)

¹² 9 U.S.C. §1, *et seq.*

TABLE AND EXPLANATION OF APPENDICES

Appendix 1 – Analysis of the Issues Raised by B101-2007 p. 44

This is a chart identifying the new issues raised by the B101-2007 Owner-Architect Agreement, as well as a few troublesome issues carried over from the 1997 editions of B141 and B151. It is a quick and simple way to identify what substantive changes have been made from the 1997 to the 2007 editions.

Appendix 2 – Architect’s Rider to the B101-2007 Owner-Architect Agreement..... p. 54

This is a model Rider favorable for architects that includes provisions that clarify or plug gaps in the standard AIA language as well as some additional provisions covering issues not addressed in the B101 contract form.

Appendix 3 - Owner’s Rider to Owner-Architect Agreement..... p. 63

This is a generic Rider favorable to the Owner which addresses issues not covered in the B101 or other typical Owner-Architect Agreements or supersedes and modifies less favorable provisions in the typical Owner-Architect form agreements.

Appendix 1

Analysis of the Issues Raised by B101-2007

ANALYSIS OF THE NEW OR CONTROVERSIAL ISSUES RAISED BY B101 - 2007

Paragraph Number in B101	Prior Paragraph Number in B141 or B151	Subject Matter of Provision	Analysis of the Issues or Changes
2.2	New	Standard of Care	The usual formulation: levels of skill and care ordinarily provided by similarly situated architects.
2.4*	B141 1.2.3.5	Conflicts of Interest	This is a vague promise not to develop a conflict of interest that could be read overly expansively to prohibit the Architect from accepting a commission from its client's competitor or from accepting minor gifts or library contributions from material suppliers.
2.5	New	Insurance	For the first time, the AIA documents list the categories of insurance that the Architect will maintain, but there are no specific terms governing coverage limits, duration or other issues (most of which logically would be project-specific).
3.1.4	B141 2.1.4 & 2.1.5	Owner substitutions/directives	The Architect is not responsible for directives or substitutions made by the Owners without the Architect's knowledge/evaluation or over its written objection. If the Owner makes a change and notifies the Architect, who does not evaluate it or respond, the Architect appears to have no liability.
3.1.5	New	Construction Documents Complying with Requirements	Includes utility companies as well as governmental authorities but merely requires the Architect to "respond to applicable requirements". However, see Section 3.4.2 for the obligation to design in accordance with the requirements.
3.2.3	B151 2.2.3	Preliminary evaluation	Feasibility of environmentally responsible design approaches is part of the Architect's preliminary discussions with the Owner, with the parties required to "reach an understanding" regarding the requirements of the project.

Paragraph Number in B101	Prior Paragraph Number in B141 or B151	Subject Matter of Provision	Analysis of the Issues or Changes
3.2.5.1	New	Environmentally responsible design	Environmental issues are a basic service for ordinary issues, such as material choices and building orientation, although more detailed environmentally responsible design services are Additional Services. The environmental issues shall be integrated with a design which is consistent with the Owner's program, schedule and budget.
3.4.1	B141 2.4.4.1; B151 2.4.1	Construction Documents	Acknowledgement that the Contractor will be providing shop drawings and other submittals, developing a level of detail beyond the Construction Documents.
3.4.2	B141 1.2.3.6	Construction documents compliant with law	Clarifying the loose language of the 1997 documents, the Architect is required to design in accordance with all government requirements. The provision does not clarify whether the Architect's initial submittal to the Building Department is expected to fully comply with its requirements, or the more realistic situation that comments would be received and changes made on the drawings to conform to the comments.
3.6.1.1	B141 2.6.1.1, 2.6.1.3; B151 2.6.2, 2.6.4	Construction phase services	The Architect's construction phase services shall comply with B101 and A201-207, but modifications to A201 made by the Owner and Contractor do not bind the Architect unless the B101 is amended.
3.6.1.2	B141 2.6.1.1, 2.6.1.3, B151 2.6.2, 2.6.4	Architect's on-site responsibilities	Deletion of language stating that construction means, methods, techniques, sequences or procedures and safety precautions and programs are solely the Contractor's rights and responsibilities. The reason for the deletion is unclear: who else has these responsibilities?

Paragraph Number in B101	Prior Paragraph Number in B141 or B151	Subject Matter of Provision	Analysis of the Issues or Changes
3.6.1.3*	B141 2.6.1.2; B151 2.6.1	Duration of construction phase services	Construction phase services terminate on the date of the Final Certificate for Payment. What if the Certificate is never issued? This provision is superseded by sections 4.2.4 and 4.2.2.6, which place an end date of Basic Services.
3.6.2.1	B141 2.6.2.1, 2.6.2.2	Evaluations of the work	The promise to endeavor to guard the Owner against construction defects is changed to promising to report observed construction defects.
3.6.2.2*	B141 2.6.2.5; B151 2.6.10	Rejection of work	The Architect is given the authority to reject Work, rather than merely advising the Owner to reject the Work, which is inconsistent with the Owner's right to accept the defective work and take a credit as provided in section 12.3.1 of A201.
3.6.2.4*	B141 2.6.1.8; B151 2.6.16	Architect's interpretations and decisions	The Architect still has final decision-making power with regard to aesthetic issues despite the Owner supposedly having control of the property.
3.6.2.5	B141 2.6.1.9; B151 2.6.17	Architect as judge	The Owner and Contractor are allowed to designate a third party, rather than the Architect, to serve as the initial decision maker.
3.6.3.1	B141 2.6.3.1; B151 2.6.9.1	Certificates for payment	Unlike previous editions, the caveat that the certification is made "to the best of the Architect's knowledge, information and belief" now also applies to the Work having progressed to the point indicated.
3.6.4.1 & 3.6.4.2	B141 2.6.4.1; B151 2.6.11	Review of submittals	The Architect reviews and approves the Contractor's schedule of submittals. The Architect's reviews of submittals will be in accordance with the schedule, or if there is no schedule, "with reasonable promptness." The requirement that the review "cause no delay in the Work" has been deleted.

Paragraph Number in B101	Prior Paragraph Number in B141 or B151	Subject Matter of Provision	Analysis of the Issues or Changes
3.6.4.4	B141 2.6.1.5, 2.6.1.6	Requests for Information	The requirement that RFI's be properly prepared, timely and seeking only additional information has been deleted, although responding to improper RFI's remains an Additional Service (See 4.2.2.2). The timing of the response shall be as agreed or else with reasonable promptness.
4.1	B141 2.8.3	Optional Additional Services	New Additional Services include: measured drawings, building information modeling, conformed construction documents, as-designed record drawings, as-constructed record drawings, coordination of Owner's consultants, telecommunications/data design, security design, extensive environmentally responsible design, LEED certification, and fast-track design services. Optional Additional Services no longer offered or listed: land survey services, geotechnical services, space schematic/flow diagrams, economic feasibility studies, environmental studies and reports, Owner-supplied data coordination, schedule development and monitoring, special bidding or negotiation, and construction management.
4.2.1	B141 1.3.3.2, 2.8.2; B151 3.4	Contingent Additional Services	The Owner must give written authorization for Services, not just fail to respond (for this section only). New services include: extensive environmental design alternatives/ LEED Certification, preparing digital data for transmission, evaluating bidders' qualifications, assisting a third-party initial Decision Maker. None of these services are considered additional if the need for them is the Architect's fault.

Paragraph Number in B101	Prior Paragraph Number in B141 or B151	Subject Matter of Provision	Analysis of the Issues or Changes
4.2.2	B141 2.8.1	Additional construction administration services	The Architect promptly notifies the Owner if he begins to provide these services, and the Owner can stop the Architect, who may then cease providing the services. Clarifications from earlier additions include responding to improperly prepared RFI's and providing services more than sixty days after the identified expected date of Substantial Completion. Preparation of alternate bid or proposal requests for the Owner has been deleted.
4.2.3*	B141 2.8.2; B151 3.4	Limitations on construction phase services	The Architect must notify the Owner if the Contractor is requiring him to perform more than the specified limits of the listed services, but there is no requirement for Owner approval.
5.2	B141 1.2.2.2; B151 4.2	Revising budget and costs	The Owner is permitted to change its budget for the project without the Architect's approval, although it must so notify the Architect.
5.4	B141 2.2.1.2; B151 4.4	Surveys	Surveys now to include designated wetlands
5.5	B141 2.2.1.3; B151 4.5	Geotechnical Services	Geotechnical Services may now include seismic evaluation.
5.6	B141 1.2.2.4; B151 4.6	Owner's Consultants	The Owner must coordinate the services of its consultants with the services of the Architect and provide the Architect a copy of its consultants' scope of services. The Architect must "demonstrate" that other consultants' services are needed. The Owner's consultants must maintain professional liability insurance like the Architect.
5.10	B141 2.6.2.4; B151 2.6.8	Communications	The Owner agrees to notify the Architect of any direct communications affecting the Architect and may, if necessary, communicate directly with subconsultants.

Paragraph Number in B101	Prior Paragraph Number in B141 or B151	Subject Matter of Provision	Analysis of the Issues or Changes
5.11	New	Coordination of duties	Before signing the construction contract, the Owner must coordinate its terms with those of the Architect's contract and provide the Architect a copy of the executed construction contract.
6.1	B141 1.3.1.1, 1.3.1.2, 1.3.1.3; B151 5.1.1, 5.1.2, 5.1.3	Cost of the Work	"Cost of the Work" clarified to include all construction costs within the Architect's design scope, but not Owner contingencies.
6.3	B141 2.1.7.3; B151 5.2.2	Architect's cost estimate	The Architect is allowed to adjust the Owner's program to meet the budget, but there is no provision for Owner agreement. The Architect's cost estimating techniques are defined as merely conceptual.
6.6	B141 2.1.7.5; B151 5.2.4	Bids exceeding budget	If the lowest bid or proposal exceeds the budget, value engineering is a joint responsibility of the Architect and Owner. The program may be revised, and ultimate responsibility for its revision is the Owner's. Any other mutually acceptable alternative is also permitted.
7.1	New	Copyright of plans and information	The party providing drawings or other information to the other warrants that it either owns the copyright or has permission to transmit the information. The parties agree to establish protocols for transmitting digital information.
7.3	B141 1.3.2.2, 1.3.2.3; B151 6.2	License to use plans	The scope of the license has been expanded to allow the documents to be used to alter or add to the project. Proper termination for cause by the Architect terminates the license.

Paragraph Number in B101	Prior Paragraph Number in B141 or B151	Subject Matter of Provision	Analysis of the Issues or Changes
7.3.1	B141 1.3.2.2; B151 6.2	Owner's use of the plans without Architect	The Owner releases and indemnifies the Architect and its consultants if it uses the plans without retaining the design team, unless they were terminated for a cause. There is no discussion of the consequences of terminating the Architect mid-project or hiring the Architect for only very limited services.
8.1.1	B141 1.3.7.3; B151 9.3	Statute of repose	Establishes a contractual statute of repose lasting 10 years from the date of substantial completion, unless the local statute is shorter, in which case it controls. Late claims are waived.
8.2.2	B141 1.3.4.2; B151 7.1.2	Mediation	Non-binding mediation under American Arbitration Association rules in effect on the date of the Agreement. Preliminary arbitrator selection and scheduling can proceed during mediation.
8.2.4	New	Arbitrations/binding dispute resolution	Instead of a mandatory arbitration clause, there is now a check-box procedure to elect arbitration or litigation (or an unspecified "other."). If no box is checked, disputes are resolved in litigation.
8.3.1	B141 1.3.5.1, 1.3.5.2; B151 7.2.1	Arbitration	If the parties elect to arbitrate, the applicable arbitration rules are those in effect on the date of the Agreement.
8.3.2	B141 1.3.5.3; B151 7.2.2	Timing of Arbitration	An arbitration demand may not be filed prior to a demand for mediation, and receipt of the demand for arbitration tolls any statute of limitations.
8.3.3.1 & 8.3.3.2	New	Consolidation of Arbitrations	Arbitrations may be consolidated with other arbitrations involving one or more of the same parties if the other arbitration agreement permits and the arbitrations involve common issues of law, fact and procedure. The language appears to allow only the party participating in more than one arbitration to consolidate them.

Paragraph Number in B101	Prior Paragraph Number in B141 or B151	Subject Matter of Provision	Analysis of the Issues or Changes
8.3.3.3	B141 1.3.5.4; B151 7.2.4	Addition of third parties to an arbitration	A third party may be joined to an arbitration if substantial common questions of law and fact exist and equity requires a third party's presence, but only if the third party consents to consolidation and is bound or agrees to arbitrate.
9.2	B141 1.3.8.2; B151 8.2	Compensation for suspended project	The requirement that a Project be suspended for more than 30 consecutive days before the Architect's compensation may be adjusted has been deleted.
9.3	B141 1.3.8.3; B151 8.3	Suspension resulting in termination	The Architect may terminate the contract if suspended for more than ninety cumulative (rather than consecutive) days for reasons other than the Architect's fault.
9.8	New	License to use plans upon termination	By referring to other provisions, this section clarifies that the license may terminate or the Owner may need to pay a fee to remain able to use the plans after termination for convenience.
10.1	B141 1.3.7.1; B151 9.1	Choice of law	The applicable law is that of the place where the project is located, except the Federal Arbitration Act governs arbitration.
10.4	B141 1.3.7.8	Certificates and Consents	The Architect gets 14 days advance prior notice of any consent forms for lenders and need not sign those which expand liability beyond the scope of the Agreement (treating consents like certificates.)
10.8	B141 1.2.3.4	Confidential information	Confidential information includes "business proprietary" information, and the prohibition against disclosure is made mutual. The exceptions to non-disclosure for compulsion by legal process or risk of harm to the public have been deleted.

Paragraph Number in B101	Prior Paragraph Number in B141 or B151	Subject Matter of Provision	Analysis of the Issues or Changes
11.6	B151 10.3.4	Compensation when construction does not proceed	An Architect being paid as a percentage of the Cost of the Work is entitled to payment based on the lowest bid or most recent estimate, even if construction never commences.
11.8.1	B141 1.3.9.2; B151 10.2.1	Reimbursable Expenses	Reimbursable expenses now include long distance services, dedicated data and communications services, teleconferences, project websites and extranets (rather than electronic communications); printing; professional photography and presentation material; professional services taxes; and site office expenses.
11.9.1	New	License fee upon termination for convenience	The Owner must pay a fee (amount to be filled in) for maintaining its license to use the plans if it terminates the Architect for convenience.
11.10.3	B141 1.3.9.1	Withholding Architect's fee	Clarification of similar provisions in the earlier edition that the Owner may not withhold or claim an offset against the Architect's fee unless the Architect agrees or binding dispute resolution has been completed and the Architect has been found liable.
13.2.2	B141 1.4.1.1, .2, .3	Documents incorporated by reference into the agreement	A Digital Data Protocol Exhibit (AIA document E201-2007) is available to be incorporated by reference into the Agreement.

* Not a new provision or concept

Appendix 2

Architect's Rider to the B101-2007 Owner-Architect Agreement

ARCHITECT'S RIDER TO THE B101-2007 OWNER-ARCHITECT AGREEMENT

The provisions of this Rider take precedence over any provision of contract between the Owner and Architect which are in conflict with this Rider.

1. Limited Liability Entity.

The Owner acknowledges that the Architect and its consultants are limited liability entities and agrees that any claim made by it arising out of any act or omission of any director, officer or employee of the Architect, or its consultants, in the execution or performance of this Agreement, shall be made against the entity and not against any of their individual directors, officers or employees.

2. Limitation of Liability to Amount of Insurance.

Owner and persons claiming through Owner agree to limit the liability of the Architect, its agents, consultants and employees for all claims arising out of, in connection with or resulting from the performance of services under this Agreement to an amount equal to the proceeds available under the Architect's applicable insurance policy.

3. Contractor's Obligation to Insure for Bodily Injury Claims.

Owner will require the Contractor and its Subcontractors to purchase insurance to cover claims and other expenses, including costs of defense, asserted against Architect, its agents, employees and consultants for bodily injury, sickness, disease or death caused by any negligent act or omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts any of them may be liable. Such insurance shall state: "The coverage afforded the additional insureds shall be primary insurance for the insured or additional insured with respect to claims arising out of operations performed by or on behalf of the named insured. If the additional insureds have other insurance which is applicable to the loss, such other insurance shall be treated as excess or contingent coverage. The extent of the insurer's liability under this insurance policy shall not be reduced by the existence of such other insurance."

4. Standard of Care/Disclaimer of Warranties.

Nothing contained in this Agreement shall require the Architect to exercise professional skill and judgment greater than that set forth in Section 2.2 hereof (the "Standard of Care"). Architect makes no warranties, express or implied regarding the adequacy of the Instruments of Service or the outcome of the Project. This limitation shall not be modified by any certification or representation made by Architect as an accommodation upon request of Owner. Architect shall not be responsible for any failure to follow or apply any knowledge or techniques which were not generally known, acknowledged or accepted as of the time during which Architect is performing his services under this Agreement. The parties acknowledge that no set of plans and specifications is entirely free of errors and omissions and that the existence of an error or omission does not automatically constitute a breach of the Standard of Care. The parties agree that the amount of 3% of the construction cost of the Project represents the minimum threshold amount below which the impact of designer-responsible changes on overall Project cost would

be considered within the range expected from competent professionals and therefore in accordance with the Standard of Care. In any event, all costs of architectural errors, omissions or other changes which result in “betterment” or “value added” to the Owner shall be born by the Owner, not the Architect, (to the extent of the betterment or value added) and shall not be the basis of a claim. The Owner shall establish a reasonable contingency line item in the construction budget to cover additional costs resulting from errors and omissions, and the Architect shall not be liable therefor unless the errors and omissions both exceed a reasonable contingency amount and constitute a breach of the Standard of Care.

5. Fast-Track.

In order to minimize construction problems and change orders, Architect’s standard practice requires the completion of detailed working drawings prior to bidding and entering into firm construction contracts. However, Owner may choose to accelerate the completion of the Work on a fast-track basis pursuant to Section 4.1.25 hereof so that it is completed in a shorter time period than would normally be required. Owner understands that if construction or furnishings contracts are let prior to the completion of final Construction Documents, there may be increases in costs and change orders caused by the difficulty of coordinating Construction Documents and the inability to make various decisions until after early bids are received and some construction undertaken.

6. Invoicing and Payment.

Within the time for payment to become due, Owner shall examine the invoice in detail to determine its accuracy and completeness. Owner shall raise any questions or objections which it may have regarding the format of or information on the invoice within this period. After such period, Owner waives any question or objection to the format of or information on the invoice not previously raised. The Architect shall be entitled to recover all costs, including attorneys’ fees, incurred in enforcing any provisions of this Agreement. In the event that the Owner fails to make payment when due, or if the Owner and Architect disagree as to whether the Owner has improperly failed to make a payment, the Architect shall be entitled to suspend performing services under the contract until either the dispute has been resolved or else the Owner places a sum equal to the amount in dispute in an escrow account, reasonably satisfactory to both parties, which specifies that the escrow agent shall distribute the escrow sum between the parties in accordance with any agreement, arbitration award or court judgment entered resolving the dispute.

7. Force Majeure.

In the event Architect is hindered, delayed or prevented from performing its obligations under this Agreement as a result of any fire, flood, landslide, tornado or other act of God, malicious mischief, theft, strike, lockout, other labor problems, shortages of material or labor, failure of any governmental agency or Owner to furnish information or to approve or to disapprove Architect’s work or any other cause beyond the reasonable control of Architect, the time for completion of Architect’s work shall be extended by the period of resulting delay.

8. Responsibility for Code Compliance.

The Architect shall conform the Drawings and Specifications to all applicable federal, state and local laws, statutes, ordinances, rules, regulations, orders or other legal requirements applicable to the Project (collectively “Governmental Requirements”) existing on the date of this Agreement. However, Owner recognizes that interpretations by governmental officials (“Code Authority”) are often subject to change even after issuance of a building permit. If after award of the building permit, modifications to the Drawings or Specifications are required because of an interpretation by the Code Authority which had not been previously given, or which if given, was different than a prior interpretation of the Code Authority, Architect shall make the required modifications, but the cost of such modifications shall be compensated as a Contingent Additional Service. The parties acknowledge that submittal of Drawings and Specifications for permit routinely results in comments, questions and change requests by the Code Authority, and the Architect shall make such changes and/or provide the requested information as a Basic Service. Nothing contained herein shall relieve the Architect of its obligation to modify at its own expense Plans and Specifications where the Architect has negligently failed to prepare them in compliance with the applicable Government Requirements.

9. Indemnity From Contractor Required in Construction Contract.

Architect will cause the following clause to be inserted in the construction contract(s) and Owner shall not permit it to be modified or deleted without Architect’s consent:

“To the fullest extent permitted by law, the Contractor shall waive any right of contribution and, with respect to the Indemnified Parties, any limitation of liability under Worker Compensation laws, and shall indemnify and hold harmless the Owner, the Architect and their agents and employees and consultants (the Indemnified Parties”) from and against all claims, damages, losses and expenses (“Claims”), including but not limited to attorneys’ fees and economic or consequential damages, arising out of, resulting from or in connection with the performance of the Work, provided that any such Claim, is caused in whole or in part by any negligent act or omission of any Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by an Indemnified Party. Such obligation shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Agreement.

“In any and all Claims against any Indemnified Party by any employee of the Contractor or any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation under this Paragraph shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Contractor or any

Subcontractor under worker compensation acts, disability benefit acts or other employee benefits acts.

“The term ‘Claim’ as used in this Paragraph shall be construed to include, but not be limited to (1) injury or damage consequent upon the failure of or use or misuse by Contractor, its Subcontractors, agents, servants or employees, of any kind of items of equipment, whether or not the same be owned, furnished or loaned by Owner or Contractor; (2) all attorneys’ fees and costs incurred in bringing an action to enforce the provisions of this indemnity or any other indemnity contained in the Contract Documents; and (3) time expended by the Indemnified Party and its employees, at their usual rates plus costs of travel, long distance telephone and reproduction of documents.

NOTE: In states with anti-indemnity laws, such as Illinois, include:

“Only to the extent necessary to prevent this provision from being void under 740 ILCS 35/1, *et seq.*, entitled “Indemnification of person from person’s own negligence, this indemnity agreement shall not require the Contractor to indemnify any Indemnified Party against that party’s own negligence.”

10. Third Party Beneficiary.

No person or entity other than Owner is intended to be a beneficiary of Architect’s services under this Agreement and contractor shall have no right to maintain any action in contract, tort or otherwise directly against the Architect. However, notwithstanding Section 10.5 hereof, Architect will cause the following clause to be inserted in the construction contract(s), and Owner shall not modify or delete it: “Architect is intended to be a third party beneficiary of this contract.”

11. Indemnity for Deviations.

The Owner may choose to disregard the advice of the Architect or may otherwise choose to deviate during construction from the printed documents prepared by the Architect. Accordingly, Owner hereby agrees to indemnify and hold harmless the Architect, its agents, employees and consultants from and against all claims, damages, losses and expenses, including but not limited to attorneys’ fees and economic damages, arising out of, in connection with, or resulting from the performance of (or failure to perform) any aspect of construction of the Project, where the Owner has knowingly authorized or permitted a deviation from any document prepared by Architect which, over Architect’s objection, has not been corrected or where the Owner has elected not to follow any written recommendation of the Architect. In the event that Architect or any other party indemnified hereunder is required to bring an action to enforce the provisions of this indemnity, the indemnifying party shall pay the attorneys’ fees and costs incurred by the indemnified party in bringing this action.

12. Credit and Publicity.

The Owner agrees, and will obtain a similar agreement from the Contractor, to the effect that the Architect will be properly identified and will be given appropriate credit on all construction signs, building signage showing credits, press releases and other forms of publicity for the Project.

13. Hazardous Materials.

Unless otherwise disclosed and arranged for disposal, Owner represents to Architect that no hazardous or toxic substances within the meaning of any applicable statute or regulation are presently stored, or otherwise located on the Project site or adjacent thereto. Further, within the definition of such statutes or regulations, no part of the Project site or adjacent real estate, including the ground water located thereon, is presently contaminated with such substances.

14. Service Tax.

If any governmental authority imposes a tax on the professional services set forth in this Agreement and obligates the Architect to play a role in its collection, the Architect may include the amount of the tax in its periodic invoices, and Owner agrees to pay it.

15. Americans With Disabilities Act.

Architect shall conform the Construction Documents to the requirements known to similarly situated architects of the Americans With Disabilities Act Accessibility Guidelines (“ADAAG”). Owner shall be solely responsible for compliance with the remaining provisions of the Americans With Disabilities Act. Owner and Architect further recognize that interpretations of the ADAAG by governmental officials and/or courts of law may evolve, vary or change. Should such evolution, variance or change require Architect to make modifications to the Drawings or Specifications, such modifications shall be considered an Additional Service.

16. Electronic Media.

The license under this Agreement for Instruments of Service is only for information contained on printed documents. However, for the Owner’s convenience, Architect may also furnish such information in electronic media. The parties acknowledge that untraceable changes from causes not the fault of Architect may sometimes occur in the information on electronic media, caused by the media conversion and changes in software. In such event, Owner agrees to release, and for third party claims, to indemnify Architect, its employees and consultants from and against all claims, losses and expenses (including reasonable attorneys defense fees and those incurred to enforce this obligation) arising out of, resulting from or in connection with any deviations of the information in electronic media from that in the printed documents. This release and indemnity shall survive the termination of this Agreement. The Owner shall have the right to request the Architect to furnish to Contractor, Subcontractors, Sub-subcontractors and material or equipment suppliers to utilize portions of the Instruments of Service for use in the execution of their portion of the Work. Such permission shall be granted pursuant to Exhibit A.

17. Job Site Safety.

Notwithstanding any contrary or potentially ambiguous description of Architect services, it is intended that the Architect shall have no responsibility for job site safety on the Project. The Contractor and Subcontractors shall have full and sole authority for all safety programs and precautions and the means, methods, techniques, sequences and procedures in connection with the Work. When Architect is present at the site, such presence shall be only for the purpose of endeavoring to protect the Owner against any deviations or defects in the completed construction Work, and Architect shall have no authority to take any action whatsoever on the site regarding safety precautions or procedures. No provision of this Agreement shall be interpreted to confer upon the Architect any duty owed under the common law, under OSHA, or any other statute or regulation to construction workers or any other party regarding safety or the prevention of accidents at the jobsite.

18. Waiver of Subrogation.

The Owner agrees to include in all agreements and documentation connected with this project, including but not limited to design and construction contracts and agreements binding on any purchasers of the property or Project, waivers of subrogation against all of the other parties to the Project.

19. Rehab Projects – Hidden Conditions.

Owner acknowledges that there may be hidden conditions that are concealed by existing finishes or not susceptible to reasonable visual observation. If such a hidden condition requires a change in the design or construction work, the costs of such a change are solely Owner's, and Architect shall have no responsibility for any resulting costs or damages. If Architect's services include the design of repairs based on a review of existing conditions of the building, Owner acknowledges that Architect is working from imperfect information, and Architect does not warrant that he will have seen and designed repairs for every defective condition.

20. Design Coordination.

If the mechanical, electrical, plumbing and fire protection ("MEP/FP") systems are being procured through Design-Build subcontractors, the Architect shall coordinate the architectural documents with the documents provided by the MEP/FP Design-Build subcontractors. Under Basic Services, such coordination shall consist of providing architectural backgrounds to the MEP/FP engineer for his use, reviewing the drawings provided by the MEP/FP Design-Build subcontractors for potential conflicts with base building architectural and/or structural elements, modifying base building architectural and structural elements as required to accommodate MEP/FP elements, where appropriate, and/or alerting the MEP/FP engineers or subcontractors to conflicts to be coordinated through modification of the MEP/FP design. Such coordination shall not include directing the MEP/FP Design-Build subcontractors, peer-reviewing their work, nor any responsibility for their performance of their services.

If the building involves construction being performed by tenants, Architect shall coordinate the core and shell architectural components of their documents with the tenants' construction documents to the extent that the tenants' documents interface with the core and shell

architectural components or impact the structure. Under Basic Services, such coordination shall consist of providing architectural backgrounds to the tenants' architect/engineer for his use, reviewing the drawings provided by the tenants' architect/engineer for potential conflicts with base building architectural and/or structural elements, modifying base building architectural and structural elements as required to accommodate tenant improvement elements, where appropriate, and/or alerting the tenants' architect/engineer to conflicts to be coordinated through the modification of the tenant improvement design. Such coordination shall not include directing the tenants' architect/engineer(s), peer-reviewing their work, nor any responsibility for their performance of their services.

21. Shop Drawing and Submittal Review.

The parties acknowledge that Architect's internal costs and efficiencies during the construction phase are dependent on the Contractor's submittals and inquiries conforming to pre-approved schedules and deadlines. Any time limits for Architect's review of shop drawings or other submittals are conditioned upon Contractor's preparing and obtaining Architect's approval of a master schedule of submittals per Section 3.6.4.1 hereof and subsequently transmitting the submittals to Architect in accordance with this schedule. Additionally, if after commencement of construction, Contractor requests Architect to review and analyze a requested product or material substitution, Architect shall undertake such review only as an Additional Service and after obtaining Owner's approval to do so.

22. Responsibility for Product Suitability.

With regard to new equipment, materials, and products (collectively "Products") required by the Architect's construction documents, it is understood the Architect is relying on stated and implied representations made by manufacturers, suppliers and installers of such Products as being suitably fit for their intended purposes. The Architect is not responsible for the Product's failure to perform consistently with those representations.

23. Construction Warranty.

The Owner shall ensure that the construction is performed by a general contractor or construction manager who shall have overall responsibility for the construction of the entire Project and who shall warrant the quality of the construction to the Owner and Architect under terms no less stringent nor of shorter duration than those of section 3.5.1 of American Institute of Architects Document A201, "General Conditions of the Contract for Construction" (2007 edition).

24. Acceptance.

Owner may accept this Agreement either by signature, oral assent, authorizing Architect to commence providing services or making any payments to Architect in consideration of its services, and any of the above modes of acceptance shall be deemed to incorporate all of the terms and conditions of this Agreement, including this Rider, into the contract between the parties thereby formed.

Appendix 3

**Owner's Rider to
Owner-Architect Agreement**

OWNER'S RIDER TO OWNER-ARCHITECT AGREEMENT

1. Conflicting Terms.

Should any conflict exist between the terms of the standard AIA B-101 agreement and this Rider, the terms of this Rider shall prevail. The Agreement between the parties consists of the standard form agreement including any modification thereto and this Rider.

2. Standard of Care and Quality.

Architect's services under this Agreement shall be performed in conformance with the standards of care and quality practiced by design professionals experienced with projects similar to the Project. Any designs, drawings or specifications prepared or furnished by Architect that contain errors, conflicts or omissions will be promptly corrected by Architect at no additional cost to Owner. Owner's approval, acceptance, use of or payment for all or any part of Architect's services shall in no way alter Architect's obligations or Owner's rights hereunder.

3. Quality of Documents.

Architect agrees that all Drawings and Specifications and other documents prepared by Architect for the Project which are utilized by Owner and/or Owner's contractor or contractors, shall be reasonably accurate and complete as is customary for typical construction documents. Architect shall notify Owner in a prompt and timely manner of any discovered discrepancies, inconsistencies or missing information necessary to provide reasonably accurate and complete documents. Failure to so notify Owner will be considered a breach of the standard of professional practice set forth in Section 2 of this Rider.

4. Coordination of Services.

Architect shall be fully responsible for coordinating all Architect's Basic and Additional Services required under this Agreement regardless of whether performed by its own employees or by consultants hired by Architect to perform a portion of its services ("Subconsultants"). The purpose of such coordination is to ensure that the services required are performed in a reasonably efficient, timely and economical manner. Architect shall be responsible to Owner for the services furnished to Architect by any Subconsultant to the same extent as if Architect had furnished the service itself. Architect also agrees to coordinate, and resolve any inconsistencies its work and the work of its consultants. All of Architect's contracts with his Subconsultants shall be in writing, signed by both parties, and shall include the following provision: "The Owner is intended to be a third party beneficiary of this agreement."

5. Compliance With Laws.

Architect shall provide a design which when constructed in accordance with the Contract Documents will comply with all applicable federal, state and local laws, statutes, ordinances, rules, regulations, orders or other legal requirements, including but not limited to all zoning, restrictions or requirements of record, building, occupancy, environmental, disabled persons accessibility and land use laws, requirements, regulations and ordinances relating to the

construction, use and occupancy of the Project (collectively “Governmental Requirements”) existing on the date of this Agreement and which may be enacted prior to Owner’s approval of completed Construction Documents. Architect shall use its best efforts to avoid incorporating into the Project design, elements that would give rise to code interpretation questions and to discuss in advance all such situations with Owner.

6. **Compliance With Owner/Lender Requests.**

To The extent applicable, Owner may have to comply with Lender requirements, and the parties acknowledge that Owner’s approvals and other actions regarding Architect’s services may be affected by Lender requirements. Architect shall comply with all reasonable requests by Owner or the Lender for reports, certificates, statements and further services which are not inconsistent with the terms and conditions of this Agreement. However, in the event any such request requires Architect to provide services not already part of the scope of services hereunder, Architect shall be entitled to compensation as an Additional Service.

7. **Exclusion of Hazardous Materials.**

Architect shall not design, specify or incorporate in the Drawings or Specifications for the Project, and shall not approve any shop drawings specifying any Hazardous Materials, in such manner as would violate the requirements of all existing laws, ordinances, codes, rules and regulations, orders and decisions of all government authorities having jurisdiction over the Site, the Work or any part of either, or would cause substantial damage or a risk of substantial damage to the environment, or in such a manner as to leave any residue which could be hazardous to persons or property or cause liability to Owner. For purposes of this Agreement the term “Hazardous Materials” shall include, but shall not be limited to, substances currently defined as “hazardous substances” or “toxic substances” in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended 42 U.S.C. Sec. 9061 et seq, Hazardous Materials Transportation Act, 49 U.S.C. Sec. 1802, the Resource Conservation Act and Recovery Act, 42 U.S.C. Sec. 6910 et seq., and all other environmental laws, rules and regulations as all of the above may be amended from time to time.

8. **Notification of Material Problems.**

Architect shall promptly advise Owner of any problems which come to his attention that may cause a delay in the completion of the Project, or any portion thereof, or in the performance of Architect’s services. Architect acknowledges that time is of the essence in this Agreement.

9. **Owner’s Review of Application for Payment.**

Promptly upon receipt, Owner shall review Architect’s Application for Payment. If Owner disputes in good faith all or any portion of any statement, Owner shall notify Architect within fifteen (15) days of receipt of the disputed statement. Such notification shall clearly indicate that portion of the statement which Owner disputes or for which Owner claims a setoff and shall include a reasonably detailed explanation of the reasons for disputing such portion or for the setoff respectively. Any statement or portion of a statement not disputed by Owner in the manner and within the time period set forth above shall be paid by Owner within thirty (30) days of receipt; provided, that such payment shall not act as Owner’s waiver of any claims that may

be asserted against Architect for the performance of defective or deficient services. Owner shall not be required to make payment to Architect on account of any amount disputed in good faith by Owner in the manner and within the time period set forth above until the matter in dispute has been resolved by the parties. Any amount so disputed shall not be deemed to be an amount due Architect under this Agreement until the matter is so resolved by the parties. If the resolution of the matter indicates that Architect is entitled to be paid all or any portion of such disputed amount, then such amount to be paid to Architect shall be due and payable within ten (10) days after resolution of the matter.

10. **No Charge for Travel Time.**

Unless otherwise agreed to in writing by Owner, there shall be no charge for time spent in travel.

11. **Written Consent for Additional Services.**

Architect shall not perform or be reimbursed for any Additional Service unless Owner expressly authorizes same in writing prior to Architect commencing such Additional Service. Owner agrees to put any such authorization in writing in a timely manner.

12. **Indemnity From Architect's Subconsultants.**

Architect shall protect, defend, indemnify, and hold harmless Owner from and against any claims, actions, liabilities, losses, damages, costs and expenses (including attorneys' fees) in the event that a claim or mechanic's lien is asserted by one of Architect's Subconsultants for non-payment by Architect to that Subconsultant after Owner has made payment to Architect on account of that Subconsultant's work.

13. **Owner's Reviews and Approvals.**

Notwithstanding anything to the contrary contained in this Agreement, Owner's review and approval of any and all documents or other matters required herein shall be for the purpose of providing Architect with information as to Owner's objectives and goals with respect to the Project and not for the purpose of determining the accuracy and completeness of such documents, and in no way should any such review and approval alter Architect's responsibilities hereunder and with respect to such documents.

14. **Records Maintained on Generally Recognized Accounting Basis.**

Records which provide the basis for Architect's compensation and Reimbursable Expenses relating to the Project and records of accounts between Owner and Architect shall be kept on a generally recognized accounting basis. Such records shall be available for audit by Owner or his authorized representative during normal business hours at Architect's principal place of business for a period of one year following completion of the Project, upon request of Owner.

15. **Use of Drawings.**

Owner is granted an irrevocable license to use the Drawings, Specifications and other documents prepared by Architect for this Project and for future work at the property which is the site of the Project, but not at any other location. Architect shall not use or allow to be used the Drawings, Specifications and reports or the unique design aspects of this Project for any other project, without the prior written approval of Owner. Architect may re-use standard specification texts and details.

16. **Insurance Coverages.**

Architect shall procure and maintain in effect during the term of this Agreement the insurance coverages described below, which insurance shall be placed with insurance companies authorized to do business in the State of Illinois and rated A minus VII or better by the current edition of Best's Key Rating Guide or otherwise approved by Owner.

- a. Professional Liability Errors and Omissions Insurance including contractual liability coverage with limits of not less than \$1,000,000 aggregate. Architect shall maintain this coverage in effect during the term of this Agreement and for two (2) years after the Date of Substantial Completion. Upon Owner's request, Architect shall give prompt written notice to Owner of any and all claims made against this policy during the period in which this policy is required to be maintained pursuant to this Agreement;
- b. Worker's Compensation Insurance with statutory benefits and limits which shall fully comply with all State and Federal requirements and contain Broad Form All States and Voluntary Compensation Endorsements and have limits not less than \$500,000 per accident, \$500,000 per disease and \$500,000 policy limit on disease; and
- c. Comprehensive Automobile Liability Insurance with limits not less than \$1,000,000 combined single limit per occurrence for bodily injury and property damage.
- d. Commercial General Liability Insurance. A broad form Commercial General Liability Insurance Policy including, without limitation, a waiver of subrogation endorsement in favor of the additional insureds, and appropriate endorsements adding the following coverages: Premises and Operations Liability; Explosion, Collapse and Underground Damage Liability; Personal Injury Liability (with employee and contractual exclusions deleted); Broad Form Property Damage Liability; Broad Form Contractual Liability supporting Architect's indemnification agreements in favor of the additional insureds; Independent Contractor's Protective Liability; Completed Operations and Products Liability for a period of not less than two (2) years following the date of final payment for all services provided under this Agreement, if insurance is available and affordable. The Commercial General Liability Insurance Policy must be written with a combined single limit of liability of not less than \$1,000,000 for each

occurrence of bodily injury and/or property damage and an annual aggregate of liability of not less than \$1,000,000 for bodily injury and/or property damage, and an annual aggregate of liability of not less than \$1,000,000 for Completed Operations and Products Liability.

17. **Insurance Requirements of Subconsultants.**

Architect agrees to require Subconsultants to comply with the insurance provisions required of Architect pursuant to this Agreement unless Architect and Owner mutually agree to modify these requirements for Subconsultants whose work is of relatively small scope. Architect agrees that it will contractually obligate its Subconsultants to advise Architect promptly of any changes or lapses of the requisite insurance coverages and Architect agrees to promptly advise Owner of any such notices Architect receives from its Subconsultants. Architect agrees that it will contractually obligate its Subconsultants to indemnify and hold harmless Owner to the same extent that Architect is required to do so as provided in this Agreement. Architect assumes all responsibility for monitoring Subconsultant contracts and insurance certificates for compliance with the insurance and other provisions of this Agreement until final completion of the Project.

18. **Additional Insurance Requirements.**

Architect shall not make changes in or allow the required insurance coverages to lapse without Owner's prior written approval thereto. All policies for insurance must be endorsed to contain a provision giving Owner a thirty (30) day prior written notice by certified mail of any cancellation of that policy or material change in coverage. Should a notice of cancellation be issued for non-payment of premiums or any part thereof, or should Architect fail to provide and maintain certificates as set forth herein, Owner shall have the right, but shall not the obligation, to pay such premium to the insurance company or to obtain such coverage and to deduct such payment from any sums that may be due or become due to Architect, or to seek reimbursement for said payments from Architect. Any sums paid by Owner shall be due and payable immediately by Architect upon notice from Owner. Receipt and review by Owner of any copies of insurance policies or insurance certificates shall not relieve Architect of his obligation to comply with the insurance provisions of this Agreement. The insurance provisions of this Agreement shall not be construed as a limitation on Architect's responsibilities and liabilities pursuant to the terms and conditions of this Agreement.

19. **Owner's Suspension of Architect's Services.**

Upon written notice to Architect, Owner may order that Architect suspend all or any part of the services provided under this Agreement. Owner shall pay Architect all monies otherwise due hereunder to the date of the suspension plus all out-of-pocket expenses directly related to such suspension. Owner shall not have any obligation to pay or reimburse Architect for lost profits and/or unabsorbed overhead or any other consequential or incidental damages. If the Project is suspended in whole or in part for more than three (3) months, and then resumed, Architect shall be compensated for reasonable costs of re-familiarizing itself with the Project.

20. **Owner's Termination of Agreement for Convenience.**

Owner may terminate this Agreement for the convenience of Owner, upon seven (7) days advance written notice to Architect, in which case Owner shall pay Architect for all monies otherwise due hereunder to the date of termination plus all out-of-pocket expenses directly related to the termination, but Owner shall have no obligation to pay or reimburse Architect for lost profits and/or unabsorbed overhead, or any other consequential or incidental damages.

21. **Delivery by Architect of Completed and In-Progress Documents.**

In the event of suspension or termination for convenience, upon request of Owner and payment of all fees pursuant to the prior two paragraphs, Architect shall promptly provide Owner with reproducible drawings and computer tapes or disks of all documents completed or in progress on the date of termination. Architect shall not be reimbursed for reproduction costs associated with maintaining or storing Drawings, Specifications, or computer tapes or disks for his own use.

22. **Termination for Cause.**

In the event that Architect fails to perform in accordance with the terms and conditions of this Agreement, Owner may terminate this Agreement by sending a Notice of Termination which shall be effective seven (7) days after its date of transmittal if Architect does not cure such default within the seven days. In the event of termination for cause by Owner, Architect shall be entitled to be compensated for all services performed prior to receipt of written notice from Owner of such termination, together with Reimbursable Expenses incurred, up to the effective date of the termination. However, Owner shall be entitled to offset any amounts due and owing Architect pursuant to this provision by the amounts of any damages incurred by Owner as a result of Architect's breach, which offset shall not prejudice the right of Owner to recover additional damages or to exercise any other remedy at law or in equity. In no event shall Architect be entitled to receive termination expenses, unabsorbed overhead or lost profit or any other incidental or consequential damages if terminated for cause. If Owner terminated this Agreement for cause, and the termination is later found or agreed to have been improper then the termination will be construed as a termination for convenience pursuant to paragraph 20 hereof.

23. **Indemnification by Architect.**

To the fullest extent permitted by law, Architect shall hold harmless and indemnify Owner from and against all claims, actions, liabilities, damages, losses, costs and expenses (including, without limitation, injury to or death of any persons and damage to property, economic and consequential damages and attorneys' fees) asserted by third parties against Owner arising out of negligent acts, errors or omissions or breach of the obligations set forth in this Agreement by Architect, any Subconsultant, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable. However, Architect shall not be required to indemnify Owner from the consequences of Owner's own negligence. Paragraph 8.1.3 of B101 is hereby deleted.

24. **Dispute Resolution.**

All claims, disputes and other matters in question (hereinafter referred to as a "Controversy") between the parties to this Agreement arising out of or relating to this Agreement or the breach thereof shall be initially submitted to mediation in accordance with the Construction Mediation Rules of JAMS/Endispute or any other mutually agreeable mediation firm. If the mediation process has not resolved the Controversy within sixty (60) days of the submission of the matter to mediation, the Controversy may be submitted to arbitration; provided, however, that no such claim shall be barred by the applicable statutes of limitation and repose if it was timely at the date of its submission to mediation.

Claims, disputes and other matters in question between the parties that are not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. Demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. A demand for arbitration shall be made within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. Any arbitration between or among the Owner and Architect or any of its Subconsultants shall be consolidated with any arbitration between the Owner and Contractor involving overlapping issues of fact or law.

25. **Continuing Obligations During Disputes.**

In the event of any Controversy between Owner and Architect under this Agreement, including but not limited to, whether or not any services Owner expects Architect to perform are within the scope of Basic Services or any dispute as to whether or not Architect is entitled to additional compensation for any Work requested, Architect shall continue to proceed diligently with the performance of its services under this Agreement pending resolution of the dispute, and Owner agrees to pay Architect in accordance with this Agreement for all services rendered by Architect which are not the subject of the Controversy.

26. **Waiver.**

No consent or waiver by Owner or Architect shall be effective unless it is in writing and then only to the extent specifically stated. Failure on the part of any party to this Agreement to enforce any act or failure to act of the other party or to declare the other party in default hereunder, irrespective of how long such failure continues, shall not constitute a waiver of the rights of such party hereunder.

27. **Choice of Law.**

The laws of the State of _____ shall govern this Agreement and all Controversies arising hereunder.

28. **Choice of Forum.**

All mediation or arbitration regarding this Agreement and any proceedings over Controversies arising hereunder shall take place in _____.

Architect: _____

Owner: _____

By: _____

By: _____

Its: _____

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