

Construction Professional Services Agreements

Key Provisions, Common Areas of Dispute, and Streamlined Contract Negotiations

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Construction Professional Services Agreements

Key Provisions, Common Areas of Dispute, and Streamlined Contract Negotiations

January 18, 2018

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Agenda

1. Overview

- Standard Form Agreements
- International Work
- Common Issues

2. Key Provisions

- Scope of Services
- Limitation of Liability
- Indemnification
- Insurance
- Intellectual Property
- Assignment
- Third-Party Beneficiaries
- Payment
- Termination
- Dispute Resolution

Part 1: Overview

Standard Form Agreements

- American Institute of Architects (AIA):
 - Most popular construction form contracts
 - Revised numerous documents in 2017
 - B101 – SFOA between O/A
 - B102 – SFOA between O/A without predefined scope
 - B103 – SFOA between O/A for a complex project
 - B104 – S Abbreviated FOA between O/A (formerly titled for limited scope)
 - B105 – S Short FOA between O/A (formerly titled for residential or small commercial project)
 - A201 – General Conditions (incorporated by reference)
 - Generally favor design professionals

Standard Form Agreements

- **ConsensusDocs:**



- Consensus Construction Documents
- Fair Project document versus advocate document
 - 240 – Agreement Between Owner and Design Professional
 - 245 – Short Form

Design-Build Institute of America:

Contract forms for Design Build projects



International Work

- Licensing
- Choice of Law
- Dispute Resolution
- FIDIC (International Federal of Consulting Engineers) Form Contracts

Common Issues

- Risk Management
- Who should bear the risk?
- Risk Allocation
 - Contracts
 - Insurance
 - Indemnification
- Contract Formation – Public v. Private

Contracts – Why?

- Central Purposes of a Contract:
 - A record of rights and obligations
 - A vehicle for risk allocation
- Predictability is the first step toward profitability.
- If you fail to plan, you plan to fail.



DRAFT AIA[®] Document B101[™] - 2017

Standard Form of Agreement Between Owner and Architect

AGREEMENT made as of the « » day of « » in the year « »
(In words, indicate day, month and year.)

BETWEEN the Architect's client identified as the Owner:
(Name, legal status, address and other information)

« »
« »
« »
« »

and the Architect:
(Name, legal status, address and other information)

ADDITIONS AND DELETIONS: The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An Additions and Deletions Report that notes added information as well as revisions to the standard form text is available from the author and should be reviewed.

Part 2: Key Provisions

Contract Clauses to Watch Out For

1. Scope of work
2. Limitation of liability
3. Indemnification
4. Insurance
5. Intellectual Property
6. Assignment
7. Third Party Beneficiaries
8. Payment
9. Termination
10. Dispute resolution

Standard of Care

- Common law definition –
the degree of skill and
expertise that a similarly
situated design
professional exercises
under like circumstances
- Below = negligence



Standard of Care

B101-2017

§ 2.2 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.

Heightened Standard of Care

§ 2.2 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. Notwithstanding anything to the contrary contained in this Agreement, Owner and Architect agree and acknowledge that Owner is entering into this Agreement in reliance on Architect's professional abilities with respect to performing the Architect's services, duties, and obligations under this Agreement. The Architect accepts the relationship of trust and confidence established between the Architect and Owner by this Agreement. The Architect covenants with Owner to use the Architect's professional efforts, skill, judgment, and abilities in performing the Architect's services. The Architect covenants to perform the Architect's services (i) in accordance with professional standards consistent with those of architectural firms of skill and knowledge in the United States of a similar size and character which provide design services for the type of project described herein in the Northeast U.S., (ii) in compliance with all applicable federal, state, municipal, and any other laws, regulations, codes, ordinances, orders and with those of any other body having jurisdiction, and (iii) diligently and in the best interests of the Owner. The Architect represents that it knows of no obligations, commitments, or impediments of any kind that will limit or prevent performance of the Architect's services. Should the Architect fail to comply with the standard of care required herein, the Architect's responsibilities under this Agreement, or the applicable laws, regulations, codes, ordinances, and orders, the Architect hereby agrees to bear the full cost of correcting the Architect's services and the services of its consultants, and others who have acted in reliance thereupon to the extent the harm is caused by the negligence of Architect, its employees, agents and consultants.

Scope of Services

- Clear scope of work benefit all parties.
- B101, Article 3 – Five traditional phases of services:
(1) Schematic Design Phase Services; (2) Design Development Phase Services; (3) Construction Document Phase Services; (4) Procurement Phase Services; and (5) Construction Phase Services.



B101-2017 – Article 3

- Basic Services (Sec. 3.1) – all described services and includes “usual and customary” structural, mechanical, and electrical engineering services. All other services are Supplemental or Additional Services.
- Supplemental Services (Sec. 4.1) – NEW – provides a list of specific, foreseeable services that are outside scope of Basic Services Fee. If Architect is listed as responsible, then Architect is to be compensated as set forth in Sec. 11.2 (either amount or basis).
- Additional Services (Sec. 4.2) – general categories of services that may be necessary for unforeseen changes. If Architect provides Additional Services, then Architect is to be compensated as set forth in Sec. 11.3 (either amount or basis).

How Owners Address Scope of Services and Compensation for Services

- Heavily modify and/or flip the structure.
- Owner's define what constitutes additional or supplemental services that may require additional compensation and then provide that all other services are Basis Services included in contract price.



Owner Modifications

§ 4.3.1 In the event the Owner directs the Architect to perform any Additional Services or the Architect notifies the Owner that Additional Services may be necessary, the Architect shall within seven (7) days of such request or notification submit to the Owner in writing a fee proposal to perform the Additional Services. If the Owner accepts the fee proposal, the Owner and Architect shall both sign a modification of services agreement in a form required by Owner, and Architect shall promptly proceed to perform the Additional Services for the agreed upon fee. If the Owner rejects Architect's fee proposal, Architect, only upon express written direction from Owner, shall proceed to perform the Additional Services. If Architect performs services without Owner's express written authorization, Architect acknowledges that it does so as a volunteer and shall not be entitled to payment for such services. The Owner and Architect shall promptly negotiate a fee for the Additional Services acceptable to Owner and Architect which shall be confirmed by both parties signing a modification of services agreement in a form required by Owner. Additional fees shall be paid according to the terms of the modification of services agreement and this Agreement. Owner is under no obligation to pay Architect for such Additional Services until the parties execute a modification of services agreement. If the parties cannot reach agreement on the fee for Additional Services, then the Architect and Owner may proceed in accordance with Article 8 of this Agreement. Upon recognizing the need to perform the following Additional Services, the Architect shall notify the Owner with reasonable promptness and explain the facts and circumstances giving rise to the need. The Architect shall not proceed to provide the following services until the Architect receives the Owner's written authorization:

B101-2017 Revisions

§ 3.1.2 The Architect shall coordinate its services with those services provided by the Owner and the Owner's consultants. The Architect shall be entitled to rely on, and shall not be responsible for, the accuracy, completeness, and timeliness of, services and information furnished by the Owner and the Owner's consultants. The Architect shall provide prompt written notice to the Owner if the Architect becomes aware of any error, omission, or inconsistency in such services or information.

Construction Phase Scope of Services

- Review of Submittals and Responsibility for Accuracy
- Inspections
- Coordination of Design with any delegated design responsibilities
- Approval of Payment Applications
- Issuance of Construction Change Directives and Minor Changes in the Work

Other Scope of Work Issues

- Owner's right to make changes to the design and who pays for it

§ 2.11 The Owner shall have the right to disapprove any portion of the Architect's work on the Project, including, but not limited to, schematic phase, design development phase, construction documents phase, bidding or negotiation phase or construction phase work, and any other design work or documents, on any reasonable basis, including, but not limited to, aesthetics, or because in the Owner's opinion, the construction cost of such design is likely to render such work or the Project infeasible. In the event that any portion of the Architect's work is not approved by the Owner, the Architect shall proceed, when requested by the Owner, with revisions to the design work or documents prepared for that phase to attempt to satisfy Owner's objections. These revisions will be made without adjustment to the Architect's compensation, except to the extent that Architect can demonstrate that the work previously was reviewed and approved by the Owner.

Limitation of Liability

- Clause providing a cap on liability to one or more parties.
- A limitation of liability clause can drastically reduce, or limit, a party's liability.
- Some jurisdictions will not enforce a limitation on liability clause if it is:
 - Ambiguous or unconscionable;
 - Against public policy; or
 - Not freely negotiated.
- Commonly utilized by design professionals (especially geotechnical engineers) to limit liability for design defects, including indemnity claims.

Indemnification

- Another clause by which parties can reduce their overall risk and control potential legal expenses.
- Indemnification clause may include any, or all, of three related obligations/duties:
 1. Duty to indemnify;
 2. Duty to defend; and/or
 3. Duty to hold harmless.
- Properly drafted indemnification clause should include:
 1. Types of losses covered (e.g., bodily injury, disease, death, property damage, etc.).
 2. Scope of indemnification (e.g., negligent acts/omissions, legal fees, etc.)

Indemnification

- **Common types of indemnification clauses include:**
 1. Broad Form Indemnity: Indemnitor bears the risk of its own negligence, as well as the negligence of third parties.
 2. Intermediate Form Indemnity: Indemnitor bears the risk of its own negligence, but not the negligence of the indemnitee.



Indemnification

- **AIA A201 – 2017 - § 3.18 Indemnification**

*§ 3.18.1 To the fullest extent permitted by law, the **Contractor shall indemnify** and hold harmless the Owner, **Architect**, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss, or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other indemnity that would otherwise exist as to a party or person described in this Section 3.18.*

Indemnification

- AIA B101:
 - no provision in Article 8 for Architect to indemnify the Owner against the Architect's professional negligence.
- AIA B103:
 - indemnity is limited to insurance proceeds.

Indemnification

ConsensusDocs Indemnity Provision:

1. To the fullest extent permitted by law, Design Professional shall indemnify and hold harmless Owner, Owner's officers, directors, members, consultants, agents, and employees, Constructor, Subcontractors, and Others (the Indemnitees) from and against all claims, losses, damages, liabilities, including reasonable attorneys' fees, costs, and expenses, for bodily injury, sickness, or death, and property damage, that may arise from the performance of or the failure to perform Services under this Agreement, but only to the extent caused by the negligent acts or omissions of Design Professional, Design Professional's consultants or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable. Design Professional shall be entitled to reimbursement of any defense costs paid above Design Professional's percentage of liability for the underlying claim to the extent provided for under §7.1.2 immediately below.
2. To the fullest extent permitted by law, Owner shall indemnify and hold harmless Design Professional, its officers, directors, members, consultants, agents, and employees, or anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable from all claims for bodily injury and property damage, other than property insured under §7.3.1, including reasonable attorneys' fees, costs, and expenses, that may arise from the performance of work by Owner or Others, but only to the extent caused by the negligent acts or omissions of Owner or Others. Owner shall be entitled to reimbursement of any defense costs paid above Owner's percentage of liability for the underlying claim to the extent provided for under §7.1.1.

Indemnification

- ▶ Owner commonly indemnifies Design Professional for any subsequent use of the design professional's instruments of service



Insurance

- Indemnity provisions and other risk-shifting clauses are only as good as the party's ability to honor it, i.e. pay a claim.
- Whether transferring or assuming a risk, it is best to ensure that the risk is insurable.



Key Aspects of Errors & Omissions / Professional Liability Insurance

- Not all risks are insurable.
- E&O policies are claims made policies.
- E&O policies are cannibalizing policies.
- Self-insured retention
- Aggregate v. Project Specific Policies

Other Insurance Considerations

- Design Professional should also maintain commercial general liability (CGL), automobile, worker's compensation, employer's liability, and other insurances.
- "Additional Insured Obligations" only apply to CGL and automobile liability policies (B101-2017, Sec. 2.5.7)
- Certificates of Insurance
 - B101-2017, Sec. 2.5.8 – Architect shall provide certificates
 - Owner should require Architect to provide a copy of its insurance policies to verify appropriate coverage.
- Subconsultant Insurance Requirements



Intellectual Property

Ownership Under the B101

§ 7.2 The Architect and the Architect's consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and shall retain all common law, statutory and other reserved rights, including copyrights. Submission or distribution of Instruments of Service to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publication in derogation of the reserved rights of the Architect and the Architect's consultants.

§ 7.3 The Architect grants to the Owner a nonexclusive license to use the Architect's Instruments of Service solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that the Owner substantially performs its obligations under this Agreement, including prompt payment of all sums due pursuant to Article 9 and Article 11. The Architect shall obtain similar nonexclusive licenses from the Architect's consultants consistent with this Agreement. The license granted under this section permits the Owner to authorize the Contractor, Subcontractors, Sub-subcontractors, and suppliers, as well as the Owner's consultants and separate contractors, to reproduce applicable portions of the Instruments of Service, subject to any protocols established pursuant to Section 1.3, solely and exclusively for use in performing services or construction for the Project. If the Architect rightfully terminates this Agreement for cause as provided in Section 9.4, the license granted in this Section 7.3 shall terminate.

Other Modifications

ARTICLE 7 COPYRIGHTS AND LICENSES

§ 7.1 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. Drawings, Specifications and other documents, including those in electronic form, prepared by the Architect and the Architect's consultants for this Project are Instruments of Service. The Instruments of Service are the property of the Owner, and Architect may not use them for any purpose not relating to the Project without Owner's consent. The Architect shall obtain in writing all necessary consents from its consultants to make this section fully effective. Owner shall be furnished with such reproductions of drawings and specifications as Owner may reasonably require. Prints shall be furnished, as an additional service, at any other time requested by Owner. All such reproductions shall be the property of Owner who may use them without Architect's permission for any proper purpose, including but not limited to, additions to or completion of the Project.

If the Owner uses the Instruments of Service for a purpose that the Architect is not under a agreement with the Owner to provide architectural services which would be appropriate to that purpose, the Owner hereby agrees to the following: The Owner agrees that it will indemnify, defend and hold the Architect harmless for any claims, suits, or causes of action against the Architect whether for personal injury, property damage or economic loss or any other form of equitable or legal relief, in contract or in tort, or for any other purpose, only to the extent such claims, suits, or causes of action arise from the Owner's uses of the Instruments of Service described in the preceding sentence. The Owner also agrees to obtain similar indemnification provisions from any architect or design professional who utilizes in any way the plans, specifications or other "Instruments of Service" first provided by the Architect for this Project. It is the intent of this section that the Architect's Instruments of Service when used for a project other than this Project, shall be used at the Owner's sole risk and without liability to the Architect or the Architect's consultants.

§ 7.2 The Architect and the Architect's consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and shall retain all common law, statutory and other reserved rights, including copyrights. Submission or distribution of Instruments of Service Submission or distribution of documents to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publication in derogation of the reserved rights of the Architect and the Architect's consultants. Architect's reserved rights.

B101-2017 Revisions

- Sec. 7.5 – provides that the copyright ownership arrangement and license for Owner to use the design survives the termination of the agreement (unless architect terminates due to non-payment)

BIM Implications

- Building Information Modeling (BIM) is become increasingly more popular on large, commercial and industrial project.
- BIM raises a number of intellectual property concerns?
 - Who owns and is responsible for the model?
 - How can parties retain IP for constituent parts of model?
- BIM Protocol
 - Example: AIA G202-2013 Project BIM Protocol

Assignment

- Normally design professional strictly prohibits the assignment of licenses granted to Owner in instruments.
 - **§ 7.4** Except for the licenses granted in this Article 7, no other license or right shall be deemed granted or implied under this Agreement. **The Owner shall not assign**, delegate, sublicense, pledge or otherwise transfer **any license granted herein to another party** without the prior written agreement of the Architect. Any unauthorized use of the Instruments of Service shall be at the Owner's sole risk and without liability to the Architect and the Architect's consultants.

Assignment

- Either party to a construction related contract may seek to assign their interest in the agreement.
- Often requires “written consent” of the other party to the agreement.
- However, project owners may seek to assign the contract (without written consent) to a lender providing financing for the Project.
 - Such assignment requires the lender to assume the owner’s rights and obligations under the contract documents.

AIA B101 - § 10.3 The Owner and Architect, respectively, bind themselves, their agents, successors, assigns, and legal representatives to this Agreement. **Neither the Owner nor the Architect shall assign this Agreement** without the written consent of the other, **except that the Owner may assign this Agreement to a lender** providing financing for the Project if the lender agrees to assume the Owner’s rights and obligations under this Agreement, including any payments due to the Architect by the Owner prior to the assignment.

Third-Party Beneficiaries

- General Rule:
 - A party does not become a third-party beneficiary of a contract absent manifestation of the promisor and promisee’s intent to provide a direct benefit to the third party.
- Majority Rule:
 - Project owners are “incidental” beneficiaries to subcontracts entered between design professionals and their consultants.
- Contract agreements may clarify the issue by including a “non-beneficiary” clause.

Third-Party Beneficiaries

- However, “flow down” clauses may conflict with non-beneficiary clauses used in subcontracts.
- To avoid such conflict, contract (and subcontract) documents should be clearly integrated to establish which of the conflicting terms / documents takes precedence.
 - Flow down clause should specify the provisions to which it applies / does not apply.
 - Carve out non-beneficiary clause from flow down clause.

Payment

- Payment Terms – Stipulated Sum v. Percentage of Budget v. Other (B101-2017, Sec. 11.1)
- Reimbursable Expenses (B101-2017, Sec. 11.8)
- Withholding Payment



Common Payment Terms

- Payment within **60** or more days.
 - **30** days (or less).
- Payment after **approval** of the invoice.
 - Should be upon **receipt** of the invoice.

Withholding Payment

§ 11.10.2.2 The Owner shall not withhold amounts from the Architect's compensation to impose a penalty or liquidated damages on the Architect, or to offset 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.

- Owner Modifications – permit withholding for:
 - Contractor E&O claims
 - Delays
 - Other failure to carry out work in accordance with the contract requirements.
- Non-Waiver / Waiver

B101-2017 – New Provisions

- Sec. 4.2.1.3 – Changes to Codes, Laws, or Regulations
 - Common Issue – disagreement between Design Professional and AHJ regarding code interpretation and approvals.
 - Redesign v. Appeal
 - Who pays for redesign and associated costs?
 - Owner – Design Professional must pay as code compliance is required by
 - Architect – design in accordance with Standard of Care
 - Revisions Break the Tie – Design Professional entitled to be paid as an Additional Service.

B101-2017 – New Provisions

- Sec. 4.2.4 – Additional Services for Delayed Construction Completion
 - New Section – if Architect has to render Construction Phase Services beyond 60 days after the earlier of the Substantial Completion Date or expected Substantial Completion date, the Architect is entitled to compensation for its Additional Services.
- Sec. 6.7 – Modification of Construction Documents to Meet Budget
 - Previously, if contractor’s proposals exceeded the Owner’s budget and Owner requested Architect to modify design, it was to be performed “without additional compensation.”
 - 2017 revisions provide that the Architect is entitled to additional compensation if bids exceeded budget “due to market conditions the Architect could not reasonable anticipate.”

Termination for Cause

- Termination for Cause v. Termination for Convenience
- Design Professional's Right to Termination for Non-Payment (B101-2017, Sec. 9.1)
 - Rights to Withhold Payment
 - Compensation for Suspension of Services / Delays
- Use of Design After Termination
 - Copyright v. License

Design Professional Modifications

- Design Professional must be given notice and opportunity to cure its default.
- Notice must be reasonable time period.
 - Can defaults be cured in 2/5/7/10/14 days?
 - Include language that Design Professional will commence a cure or proceed diligently to cure the default within the cure period.
- Remove any clause that provides that a wrongful termination will be converted to a termination for convenience.

B101-2017 – Termination for Convenience

- **§ 9.6 and § 9.7** – If the Owner terminates the contract for convenience or the Architect terminates because the Project has been suspended for more than 90 cumulative days, the Owner shall pay the Architect for services performed prior to termination, Reimbursable Expenses incurred, costs attributable to termination (including termination of consulting agreements), a Termination Fee, and a Licensing Fee if the Owner intends to continue to use the Instruments of Service.

Owner Modifications: Termination for Convenience

- In the case of a termination for Owner's convenience, the Design Professional shall be entitled to payment for Work **executed**, and costs incurred by reason of such termination.
- Upon termination for convenience, Design Professional shall **assign** all subcontracts to Owner.
 - B101-2017 is silent

Dispute Resolution

- What does the contract say?
 - First step when a dispute arises is to review your contract.
- Claims Provision
 - Contractual Notice Requirements
 - Timing of Notice
 - Form of Notice
- Dispute Resolution Provisions
 - Initial Decision Maker
 - Required Pre-mediation resolution meetings
 - Mediation (condition precedent)
 - Arbitration or Court

Questions?

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Other Issues for Consideration

- Design Professionals should be conservative about construction cost estimates and be clear that any cost estimate provided is only an estimate and not a guarantee of construction cost
- If given a project budget, design to the budget – if there are budget issues with the design requested by the client, bring the issues to the client's attention as early as possible
- Know the funding source – state and federal grants come with a number of strings that may not be identified in the contract

Subconsultant Agreements

- Special Issues in Subconsulting
 - Consequential damages - want to avoid as a subconsultant; want to include as a prime consultant
 - Consequential damages are damages that “flow as a consequence of a contractual breach”
 - Be aware of the role of subconsultant’s services in the overall project – is the risk greater than the reward?
 - As a subconsultant, do not agree to be bound by the terms of the prime contract without reviewing and finding the terms acceptable
 - Pay-if-paid

Green Construction

- LEED certification
- B101-2017 SP (Sustainable Projects)