

AIA DOCUMENT G728-2024/G729-2024

July 8, 2024 Construction Transactions Subcommittee

The American Institute of Architects has issued two (2) new documents of significance for Owners and Contractors using any form of agreement with the AIA Document A201-2017. Under the A201 the Project Owner has an obligation to provide “reasonable evidence” of its ability to pay the Contractor for the work under Section 2.2.. The relevant text is set forth below. The Owner must disclose such “reasonable evidence” both before work can commence on the Project and during construction if:

- (1) the Owner fails to make payments to the Contractor as the Contract Documents require;
- (2) the Contractor identifies in writing a reasonable concern regarding the Owner’s ability to make payment when due; or
- (3) a change in the Work materially changes the Contract Sum.

“Reasonable evidence” was not easy to define but the new documents intend to bring formality and objectivity to the process.

Please note that without “reasonable evidence” the Contractor may delay commencement and may have a defense to its obligation to prosecute the work timely and diligently. In addition, the Contractor has a right under Section 14.1.1.4 to terminate the Owner for its failure to provide such “reasonable evidence” unless this right is stricken during negotiations.

REASONABLE EVIDENCE

ARTICLE 2 OWNER

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§ 2.2 Evidence of the Owner’s Financial Arrangements

§ 2.2.1 **Prior to commencement** of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner’s obligations under the Contract. The Contractor shall have no obligation to commence the Work until the Owner provides such evidence. If commencement of the Work is delayed under this Section 2.2.1, the Contract Time shall be extended appropriately.

§ 2.2.2 Following commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner’s obligations under the Contract only if **(1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) the Contractor identifies in writing a reasonable concern regarding the Owner’s ability to make payment when due; or (3) a change in the Work materially changes the Contract Sum.** If the Owner fails to

provide such evidence, as required, within fourteen days of the Contractor's request, the Contractor may immediately stop the Work and, in that event, shall notify the Owner that the Work has stopped. However, if the request is made because a change in the Work materially changes the Contract Sum under (3) above, the Contractor may immediately stop only that portion of the Work affected by the change until reasonable evidence is provided. **If the Work is stopped under this Section 2.2.2,** the Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shutdown, delay and start-up, plus interest as provided in the Contract Documents.

§ 2.2.3 After the Owner furnishes evidence of financial arrangements under this Section 2.2, **the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.**

§ 2.2.4 Where the Owner has designated information furnished under this Section 2.2 as "confidential," the Contractor shall keep the information confidential and shall not disclose it to any other person. However, the Contractor may disclose "confidential" information, after seven (7) days' notice to the Owner, where disclosure is required by law, including a subpoena or other form of compulsory legal process issued by a court or governmental entity, or by court or arbitrator(s) order. The Contractor may also disclose "confidential" information to its employees, consultants, sureties, Subcontractors and their employees, Sub-subcontractors, and others who need to know the content of such information solely and exclusively for the Project and who agree to maintain the confidentiality of such information.

ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

§ 14.1 Termination by the Contractor

§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, their agents or employees, or any other persons or entities performing portions of the Work, for any of the following reasons:

- .1** Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;
- .2** An act of government, such as a declaration of national emergency, that requires all Work to be stopped;
- .3** Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or
- .4** **The Owner has failed to furnish to the Contractor reasonable evidence as required by Section 2.2.**