

2018 Florida Bar  
Construction Law Institute

# Significant Changes in the New 2017 AIA Contract Documents

Scott P. Pence  
Carlton Fields  
[spence@carltonfields.com](mailto:spence@carltonfields.com)  
(813) 229-4322

Sanjay Kurian  
Becker & Poliakoff  
[skurian@bplegal.com](mailto:skurian@bplegal.com)  
(239) 433-7707

**AIA DOCUMENT A101™-2017**  
**Standard Form of Agreement**  
**Between Owner and Contractor**

§ 3.3.3 If the Contractor fails to achieve Substantial Completion as provided in this Section 3.3, liquidated damages, if any, shall be assessed as set forth in Section 4.5.

4.5 Liquidated damages, if any:

*(Insert terms and conditions for liquidated damages, if any.)*

## 3.3 & 4.5 (Liquidated Damages)

- Provides Optional LD's
- Lacks Certain Typical LD Language
  - Owner's Damages Difficult to Determine
  - Owner's Sole and Exclusive Remedy
  - Not a Penalty
- Contractor May Consider Establishing a Cumulative Cap

## **§ 5.1.7 Retainage**

**§ 5.1.7.1** For each progress payment made prior to Substantial Completion of the Work, the Owner may withhold the following amount, as retainage, from the payment otherwise due:

*(Insert a percentage or amount to be withheld as retainage from each Application for Payment. The amount of retainage may be limited by governing law.)*

**§ 5.1.7.1.1** The following items are not subject to retainage:

*(Insert any items not subject to the withholding of retainage, such as general conditions, insurance, etc.)*

**§ 5.1.7.2** Reduction or limitation of retainage, if any, shall be as follows:

*(If ~~it is intended~~, the retainage established in Section 5.1.7.1 is to be modified prior to Substantial Completion of the entire Work, ~~to reduce or limit the retainage resulting from the percentages inserted in Sections 5.1.6.1 and 5.1.6.2 above, and this is not explained elsewhere in the Contract Documents, insert here~~ including modifications for Substantial Completion of portions of the Work as provided in Section 3.3.2, insert provisions for such ~~reduction or limitation~~ modifications.)*

**§ 5.1.7.3** Except as set forth in this Section 5.1.7.3, upon Substantial Completion of the Work, the Contractor may submit an Application for Payment that includes the retainage withheld from prior Applications for Payment pursuant to this Section 5.1.7. The Application for Payment submitted at Substantial Completion shall not include retainage as follows:

## 5.1.6 (Payments)/5.1.7 (Retainage)

- Option to Identify Specific Exceptions to Retainage
- Option to Reduce or Limit Retainage
- Entire Amount of Retainage Released Unless Other Conditions Identified
  - Typically Owner Retains a Percentage of the Punchlist Work Remaining to be Performed

§ 7.1.1 If the Contract is terminated for the Owner's convenience in accordance with Article 14 of AIA Document A201–2017, then the Owner shall pay the Contractor a termination fee as follows:

*(Insert the amount of, or method for determining, the fee, if any, payable to the Contractor following a termination for the Owner's convenience.)*

## 7.1.1 (Termination Fee)

- **New Concept** – Parties Now Can Identify a Termination Fee if Owner Terminates for Convenience



## ARTICLE 9 ENUMERATION OF CONTRACT DOCUMENTS

~~§ 9.1 The Contract Documents, except for Modifications issued after execution of this Agreement, are enumerated in the sections below.~~ This Agreement is comprised of the following documents:

~~§ 9.1.1 The Agreement is this executed.~~ .1 AIA Document A101-~~2007,~~<sup>TM</sup>-2017, Standard Form of Agreement Between Owner and Contractor

.2 AIA Document A101<sup>TM</sup>-2017, Exhibit A, Insurance and Bonds

~~§ 9.1.2 The General Conditions are.~~ .3 AIA Document A201-~~2007,~~<sup>TM</sup>-2017, General Conditions of the Contract for Construction

.4 AIA Document E203<sup>TM</sup>-2013, Building Information Modeling and Digital Data Exhibit, dated as indicated below: (Insert the date of the E203-2013 incorporated into this Agreement.)

# Article 9 (Contract Documents)

- AIA Document E203™-2013, Building Information Modeling and Digital Data Exhibit Now Automatically Incorporated

**BE CAREFUL!**

## § 8.5 Insurance and Bonds

§ 8.5.1 The Owner and the Contractor shall purchase and maintain insurance as set forth in AIA Document A101™–2017, Standard Form of Agreement Between Owner and Contractor where the basis of payment is a Stipulated Sum, Exhibit A, Insurance and Bonds, and elsewhere in the Contract Documents.

§ 8.5.2 The Contractor shall provide bonds as set forth in AIA Document A101™–2017 Exhibit A, and elsewhere in the Contract Documents.

## 8.5. (Insurance)

- Insurance Requirements for Both the Owner and Contractor Now Identified in a Separate Exhibit (See Discussion Below)
- Bonding Requirements Identified in Separate Exhibit

# Insurance Requirements

- Insurance Requirements for Both Owner and Contractor Now Covered in More Detail in an Insurance Exhibit
- Some Builder's Risk / Property Insurance Provisions Still Contained in A201

# Contractor's Insurance Requirements

- Must Provide Certificates of Insurance
- Must Disclose Deductibles or SIRs
- Must Name Owner, Architect and Architect's Consultants as Additional Insureds on the CGL
  - If Available – Must Use ISO CG “07 04” Versions
- CGL Must be Primary and Non-Contributory to Owner's General Liability Insurance
- Must Maintain Until Expiration of Correction Period Unless Different Duration Stated

# Coverage Types

- Commercial General Liability
  - Must Cover Indemnification Obligations – **BE CAREFUL!**
  - Limitation on Exclusions and Restrictions – **BE CAREFUL!**
- Automobile Liability
- Workers' Compensation / Employer's Liability
- Jones Act and Longshore & Harbor Workers' Compensation (if applicable)
- Professional Liability (if Contractor to Provide Professional Services) – **BE CAREFUL!**
- Pollution Liability (if applicable)
- Maritime Risk (if applicable)
- Aircraft – Manned or Unmanned (if applicable)
- “Other” Insurance Coverage (check the box)
  - Builder's Risk / Property Insurance (in Lieu of Owner Providing)
  - Railroad Protective Liability
  - Asbestos Abatement Liability

# Owner's Insurance Requirements

- Must Provide Evidence Prior to Commencement of the Work
- May Provide Liability Insurance
- Optional Additional Coverage
  - Cyber Security Insurance
  - “Other” Insurance



# Owner's Property Insurance

- Substantially Similar Requirements as 2007 Edition
- Owner (as Opposed to Insurer) Must Provide Notice of Cancellation or Expiration (A201–11.2.3) **BE CAREFUL!**
- Maintained Through the Contractor's Correction Period
- Optional Coverage
  - Loss of Use, Business Interruption and Delay in Completion Insurance
  - Ordinance or Law Insurance
  - Expediting Cost Insurance
  - Extra Expense Insurance
  - Civil Authority Insurance
  - Ingress/Egress Insurance
  - Soft Costs Insurance

**AIA DOCUMENT A201™-2017**  
**General Conditions of the**  
**Contract for Construction**

### § 1.1.8 ~~INITIAL DECISION MAKER~~ Initial Decision Maker

The Initial Decision Maker is 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.~~ 15.2. The Initial Decision Maker shall not show partiality to the Owner or Contractor and shall not be liable for results of interpretations or decisions rendered in good faith.

## 1.1.8 (Initial Decision Maker)

- Not Liable for Results of Interpretations or Decisions Made in Good Faith
  - What if Architect is IDM?

§ 1.2.1.1 The invalidity of any provision of the Contract Documents shall not invalidate the Contract or its remaining provisions. If it is determined that any provision of the Contract Documents violates any law, or is otherwise invalid or unenforceable, then that provision shall be revised to the extent necessary to make that provision legal and enforceable. In such case the Contract Documents shall be construed, to the fullest extent permitted by law, to give effect to the parties' intentions and purposes in executing the Contract.

## 1.2.1.1 (Savings Clause)

- **New Boilerplate** – Standard Savings Provision

§ 1.6.1 Except as otherwise provided in Section 1.6.2, where the Contract Documents require one party to notify or give notice to the other party, such notice shall be provided in writing to the designated representative of the party to whom the notice is addressed and shall be deemed to have been duly served if delivered in person, by mail, by courier, or by electronic transmission if a method for electronic transmission is set forth in the Agreement.

## 1.6.1 (Written Notice)

- **New Concept** - Proper Notice Now Requires it to be Provided “In Writing”
- Many Deletions in Document of “Written” or “In Writing” as a Result



## § 1.7 Digital Data Use and Transmission

~~If~~ The parties ~~intend to transmit~~ shall agree upon  
protocols governing the transmission and use of  
Instruments of Service or any other information  
or documentation in digital form, ~~they shall~~  
~~endeavor~~. The parties will use AIA Document  
E203™–2013, Building Information Modeling  
and Digital Data Exhibit, to establish ~~necessary~~  
~~protocols governing such transmissions, unless~~  
~~otherwise already provided in the Agreement or~~  
~~the Contract Documents~~ the protocols for the  
development, use, transmission, and exchange  
of digital data.

# 1.7 (Digital Data Use and Transmission)

- No Longer Optional (“Shall Agree”)
- E203<sup>TM</sup>-2013 Building information Modeling and Digital Data Exhibit to be Utilized

## § 1.8 Building Information Models Use and Reliance

Any use of, or reliance on, all or a portion of a building information model without agreement to protocols governing the use of, and reliance on, the information contained in the model and without having those protocols set forth in AIA Document E203™–2013, Building Information Modeling and Digital Data Exhibit, and the requisite AIA Document G202™–2013, Project Building Information Modeling Protocol Form, shall be at the using or relying party's sole risk and without liability to the other party and its contractors or consultants, the authors of, or contributors to, the building information model, and each of their agents and employees.

## 1.8 (BIM Use and Reliance)

- Must Agree on Protocols in E203<sup>TM</sup>-2013

OR

- Use of or Reliance on Building Information Model at Using Party's Sole Risk Without Liability to the Other Party

## **§ 2.2 ~~INFORMATION AND SERVICES REQUIRED OF THE OWNER~~** Evidence of the Owner's Financial Arrangements

**§ 2.2.1** Prior to commencement of the Work, ~~the Contractor may request in writing that the Owner provide~~ 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. ~~Thereafter, the Contractor may only request such evidence only~~ if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) ~~a change in the Work materially changes the Contract Sum; or (3)~~ the Contractor identifies in writing a reasonable concern regarding the Owner's ability to make payment when due. ~~The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the~~; 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 ~~a material change~~. 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 ~~the~~ 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 (Owner's Financial Arrangements)

- Extension of Contract Time if Owner Fails to Provide Prior to Commencement
  - What About Additional Costs?
- Must Be Provided Within 14 Days or Contractor Can Stop Performance
  - Adjustment to Contract Time and Contract Sum

### **§ 3.3 ~~SUPERVISION AND CONSTRUCTION PROCEDURES~~ Supervision and Construction Procedures**

**§ 3.3.1** The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences, and procedures, and for coordinating all portions of the Work under the Contract, ~~unless the Contract Documents give other specific instructions concerning these matters.~~ If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences, or procedures, the Contractor shall evaluate the jobsite safety thereof and, ~~except as stated below,~~ shall be ~~fully and~~ solely responsible for the jobsite safety of such means, methods, techniques, sequences, or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely ~~written~~ notice to the Owner and Architect ~~and shall not proceed with that portion of the Work without further written instructions from the Architect. If the Contractor is then instructed to proceed with the required,~~ and shall propose alternative means, methods, techniques, sequences, or procedures ~~without acceptance of changes proposed by.~~ The Architect shall evaluate the proposed alternative solely for conformance with the design intent for the completed construction. Unless the Architect objects to the Contractor's proposed alternative, the ~~Owner shall be solely responsible for any loss or damage arising solely from those Owner required~~ Contractor shall perform the Work using its alternative means, methods, techniques, sequences, or procedures.



### 3.3 (Supervision and Construction Procedures)

- Removes “Unless the Contract Documents Give Other Specific Instructions”
  - Increases Contractor’s Risk
  - Contractor Must Propose Alternatives
  - If Architect Agrees, Contractor Must Comply With Alternative
    - No Language for Additional Costs or Time

§ 3.5.2 All material, equipment, or other special warranties required by the Contract Documents shall be issued in the name of the Owner, or shall be transferable to the Owner, and shall commence in accordance with Section 9.8.4.

## 3.5.2 (Special Warranties)

- **New Concept** – Requires Special and Manufacturer Warranties to be Issued or Transferred to Owner
- Previously Required by Division 1 Documents?

**§ 3.12.10.1** If professional design services or certifications by a design professional related to systems, materials, or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall be entitled to rely upon the adequacy and accuracy of the performance and design criteria provided in the Contract Documents. The Contractor shall cause such services or certifications to be provided by ~~a properly~~an appropriately licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings, and other submittals prepared by such professional. Shop Drawings, and other submittals related to the Work, designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Architect. The Owner and the Architect shall be entitled to rely upon the adequacy, and accuracy ~~and completeness~~ of the services, certifications, and approvals performed or provided by such design professionals, provided the Owner and Architect have specified to the Contractor ~~all~~the performance and design criteria that such services must satisfy. Pursuant to this Section 3.12.10, the Architect will review, and approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. ~~The Contractor shall not be responsible for the adequacy of the performance and design criteria specified in the Contract Documents.~~

**§ 3.12.10.2** If the Contract Documents require the Contractor's design professional to certify that the Work has been performed in accordance with the design criteria, the Contractor shall furnish such certifications to the Architect at the time and in the form specified by the Architect.

## 3.12.10 (Professional Services)

- Contractor Entitled to Rely Upon Performance and Design Criteria Provided by Owner and Architect
- Contractor's Design Professional Must Certify Work Performed in Accordance With Owner's or Architect's Design Criteria

#### § 4.2.4 ~~COMMUNICATIONS FACILITATING CONTRACT~~ ~~ADMINISTRATION~~Communications

~~Except as otherwise provided in the Contract Documents or when~~ The Owner and Contractor shall include the Architect in all communications that relate to or affect the Architect's services or professional responsibilities. The Owner shall promptly notify the Architect of the substance of any direct communications ~~have been specially authorized, the Owner and Contractor shall endeavor to communicate with each other through the Architect about matters arising out of or~~ between the Owner and the Contractor otherwise relating to the ~~Contract~~ Project. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and ~~material~~ suppliers shall be through the Contractor. Communications by and with ~~separate contractors~~ Separate Contractors shall be through the Owner. The Contract Documents may specify other communication protocols.

## 4.2.4 (Communications)

- Communications Now Directly Between Owner and Contractor
  - No Longer Need to “Go Through” Architect
  - Owner Must Notify Architect of the Substance of any Direct Communications

## § 7.4 ~~MINOR CHANGES IN THE WORK~~ Minor Changes in the Work

The Architect ~~has authority to~~ may order minor changes in the Work ~~not involving~~ that are consistent with the intent of the Contract Documents and do not involve an adjustment in the Contract Sum or an extension of the Contract Time ~~and not inconsistent with the intent of the Contract Documents. Such changes will be effected by written order signed by the Architect and shall be binding on the Owner and Contractor.~~ The Architect's order for minor changes shall be in writing. If the Contractor believes that the proposed minor change in the Work will affect the Contract Sum or Contract Time, the Contractor shall notify the Architect and shall not proceed to implement the change in the Work. If the Contractor performs the Work set forth in the Architect's order for a minor change without prior notice to the Architect that such change will affect the Contract Sum or Contract Time, the Contractor waives any adjustment to the Contract Sum or extension of the Contract Time.



## 7.4 (Minor Changes)

- Architect Can Still Order Minor Changes That Do Not Affect Contract Sum or Contract Time
- If Contractor Believes Cost or Time Affected By a Minor Change, Contractor Must Notify Architect and Not Proceed With the Work
  - This is Risky if Contractor is Wrong Because Contractor Will Be Responsible for the Delay
- **BUT** – If Contractor Proceeds With the Work Without Prior Notice, then Contractor Waives its Right to Claim any Cost or Time Adjustment

## § 9.2 Schedule of Values

Where the Contract is based on a stipulated sum or Guaranteed Maximum Price, the Contractor shall submit a schedule of values to the Architect, before the first Application for Payment, ~~a schedule of values~~ allocating the entire Contract Sum to the various portions of the Work ~~and~~. The schedule of values shall be prepared in ~~such~~the form, and supported by ~~such~~the data to substantiate its accuracy ~~as~~, required by the Architect ~~may require~~. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment. Any changes to the schedule of values shall be submitted to the Architect and supported by such data to substantiate its accuracy as the Architect may require, and unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's subsequent Applications for Payment.

## 9.2 (Schedule of Values)

- Changes to Schedule of Values Must Be Submitted to Architect for Review and Approval
- **Watch Out** – Does This Mean Architect Can Reject Transfer from One Line Item to Another to Cover Cost Overruns?
  - Contractor Typically Does Not Separately Guarantee Individual Line Items

§ 9.6.8 Provided the Owner has fulfilled its payment obligations under the Contract Documents, the Contractor shall defend and indemnify the Owner from all loss, liability, damage or expense, including reasonable attorney's fees and litigation expenses, arising out of any lien claim or other claim for payment by any Subcontractor or supplier of any tier. Upon receipt of notice of a lien claim or other claim for payment, the Owner shall notify the Contractor. If approved by the applicable court, when required, the Contractor may substitute a surety bond for the property against which the lien or other claim for payment has been asserted.

## 9.6.8 (Lien Claims)

- **New Concept** – Contractor Now Must Indemnify and Defend Owner Against Lien Claims “Provided Owner Has Fulfilled its Payment Obligations Under the Contract”
- **BE CAREFUL** – Owner May Have Fulfilled its Payment Obligations but Still Not Have Paid Contractor Which Means Contractor Will Have to Remove the Claim of Lien Prior to Actually Receiving Payment
  - Consider Modifying to Condition this Obligation Instead “to the Extent of Payments Received by Contractor”

**§ 14.1.3** If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' ~~written~~ notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed, ~~including~~ as well as reasonable overhead and profit, on Work not executed, and costs incurred by reason of such termination, ~~and damages.~~

**§ 14.4.3** In case of such termination for the Owner's convenience, the Owner shall pay the Contractor ~~shall be entitled to receive payment~~ for Work properly executed, ~~and;~~ costs incurred by reason of ~~such termination, along with reasonable overhead and profit on the Work not executed~~ the termination, including costs attributable to termination of Subcontracts; and the termination fee, if any, set forth in the Agreement.

## 14.1.3 & 14.4.3 (Remedies)

- **New Concept** – Remedies for Owner Default Now Include Overhead & Profit on Work NOT executed (i.e., Anticipated Profits).
  - Previous Version Only Allowed this Remedy if Contract Was Terminated for Owner's Convenience
- **New Concept** – Remedies for Termination for Owner's Convenience Now Include a "Termination Fee" if Identified in the Agreement



## § 15.1.3 Notice of Claims

§ 15.1.3.1 Claims by either the Owner or Contractor ~~must be initiated by written~~, where the condition giving rise to the Claim is first discovered prior to expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party ~~must~~ under this Section 15.1.3.1 shall be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

~~§ 15.1.3 CONTINUING CONTRACT PERFORMANCE~~ 15.1.3.2 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered after expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party. In such event, no decision by the Initial Decision Maker is required.

**§ 15.2.6.1** Either party may, within 30 days from the date of receipt of an initial decision, demand in writing that the other party file for mediation ~~within 60 days of the initial decision~~. If such a demand is made and the party receiving the demand fails to file for mediation within ~~the time required~~ 30 days after receipt thereof, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision.

**§ 15.3.3** Either party may, within 30 days from the date that mediation has been concluded without resolution of the dispute or 60 days after mediation has been demanded without resolution of the dispute, demand in writing that the other party file for binding dispute resolution. If such a demand is made and the party receiving the demand fails to file for binding dispute resolution within 60 days after receipt thereof, then both parties waive their rights to binding dispute resolution proceedings with respect to the initial decision.

# Article 15 (Claims and Dispute Resolution)

- IDM Now Required Only For Claims Arising Prior to Expiration of Correction Obligation
- If No Decision By IDM Within 30 Days, Party Asserting the Claim Can Demand Mediation
  - Can Other Party Also Demand Mediation?
  - **Practice Point:** If Both Parties Have Claims Against the Other, Each Party May Now Need to Demand Decision by IDM in Order to Preserve its Right to Demand Mediation.
- **“Quicker Gotcha”** – If Party Agrees With Initial Decision, it Can Demand the Other Party File for Mediation and if That Party Fails to Do So Within 30 Days, Initial Decision Becomes Binding
- **“New Gotcha”** – If Parties Cannot Resolve Dispute in Mediation, Either Party (Likely the Party Who Is Not Making a Claim) Can Demand the Other Party File for Binding Dispute Resolution and if That Party Fails to Do So Within 60 Days, Both Parties Waive Their Rights to Binding Dispute Resolution of That Issue

**AIA DOCUMENT B101<sup>TM</sup>-2017**  
**Standard Form of Agreement**  
**Between Owner and Architect**

**§ 1.1.6 The Owner's anticipated Sustainable Objective for the Project:**

*(Identify and describe the Owner's Sustainable Objective for the Project, if any.)*

**§ 1.1.6.1** If the Owner identifies a Sustainable Objective, the Owner and Architect shall complete and incorporate AIA Document E204™–2017, Sustainable Projects Exhibit, into this Agreement to define the terms, conditions and services related to the Owner's Sustainable Objective. If E204–2017 is incorporated into this agreement, the Owner and Architect shall incorporate the completed E204–2017 into the agreements with the consultants and contractors performing services or Work in any way associated with the Sustainable Objective.

## 1.1.6 (Sustainable Objective)

- Owner May Now Identify any Sustainable Objectives
- If Owner identifies a Sustainable Objective, “E204™–2017, Sustainable Projects Exhibit” is used and Incorporated into the Agreement

§ 1.2 The Owner and Architect may rely on the Initial Information. Both parties, however, recognize that ~~such information~~ the Initial Information may materially change and, in that event, the Owner and the Architect shall appropriately adjust the Architect's services, schedule, for the Architect's services, and the Architect's compensation. The Owner shall adjust the Owner's budget for the Cost of the Work and the Owner's anticipated design and construction milestones, as necessary, to accommodate material changes in the Initial Information.



## 1.2 (Initial Information)

- New Language “Requires” an Adjustment to Owner Budget, Design and Construction Milestones and Architect’s Compensation if the Initial Information Materially Changes

**§ 1.3** The parties shall agree upon protocols governing the transmission and use of Instruments of Service or any other information or documentation in digital form. The parties will use AIA Document E203™–2013, Building Information Modeling and Digital Data Exhibit, to establish the protocols for the development, use, transmission, and exchange of digital data.

**§ 1.3.1** Any use of, or reliance on, all or a portion of a building information model without agreement to protocols governing the use of, and reliance on, the information contained in the model and without having those protocols set forth in AIA Document E203™–2013, Building Information Modeling and Digital Data Exhibit, and the requisite AIA Document G202™–2013, Project Building Information Modeling Protocol Form, shall be at the using or relying party's sole risk and without liability to the other party and its contractors or consultants, the authors of, or contributors to, the building information model, and each of their agents and employees.

## 1.3 (BIM & Digital Data)

- Just as in A201, Must Agree on Protocols in E203<sup>TM</sup>-2013, Building Information Modeling and Digital Data Exhibit

OR

- Use of or Reliance on Building Information Model is at Using Party's Sole Risk Without Liability to the Other Party

§ 2.5 The Architect shall maintain the following insurance ~~for the duration~~until termination of this Agreement. If any of the requirements set forth below ~~exceed~~are in addition to the types and limits the Architect normally maintains, the Owner shall ~~reimburse~~pay the Architect ~~for any additional cost~~as set forth in Section 11.9.

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

~~.1~~ General Liability

§ 2.5.1 Commercial General Liability with policy limits of not less than « » (\$ « » ) for each occurrence and « » (\$ « » ) in the aggregate for bodily injury and property damage.

~~.2~~ Automobile Liability

§ 2.5.2 Automobile Liability covering vehicles owned, and non-owned vehicles used, by the Architect with policy limits of not less than « » (\$ « » ) per accident for bodily injury, death of any person, and property damage arising out of the ownership, maintenance and use of those motor vehicles, along with any other statutorily required automobile coverage.

§ 2.5.3 The Architect may achieve the required limits and coverage for Commercial General Liability and Automobile Liability through a combination of primary and excess or umbrella liability insurance, provided such primary and excess or umbrella liability insurance policies result in the same or greater coverage as the coverages required under Sections 2.5.1 and 2.5.2, and in no event shall any excess or umbrella liability insurance provide narrower coverage than the primary policy. The excess policy shall not require the exhaustion of the underlying limits only through the actual payment by the underlying insurers.

~~.3~~ § 2.5.4 Workers' Compensation

at statutory limits. ~~.4~~ Professional Liability

§ 2.5.5 Employers' Liability with policy limits not less than « » (\$ « » ) each accident, « » (\$ « » ) each employee, and « » (\$ « » ) policy limit.

§ 2.5.6 Professional Liability covering negligent acts, errors and omissions in the performance of professional services with policy limits of not less than « » (\$ « » ) per claim and « » (\$ « » ) in the aggregate.

**§ 2.5.7 Additional Insured Obligations.** To the fullest extent permitted by law, the Architect shall cause the primary and excess or umbrella policies for Commercial General Liability and Automobile Liability to include the Owner as an additional insured for claims caused in whole or in part by the Architect's negligent acts or omissions. The additional insured coverage shall be primary and non-contributory to any of the Owner's insurance policies and shall apply to both ongoing and completed operations.

**§ 2.5.8** The Architect shall provide certificates of insurance to the Owner that evidence compliance with the requirements in this Section 2.5.

## 2.5 (Insurance)

- Insurance Provisions Expanded
- Still Lacking
  - Additional Insured Endorsement Form Not Specified
  - No “Notice Of Cancellation” Requirement
    - Whether From insurer or Architect
  - Retroactive Date for Professional Liability Insurance
  - No Waiver of Claims / Waiver of Subrogation
  - Only Certificates of Insurance Required
    - No Endorsements
    - No Right to Demand Copies of Policies

§ 3.5.2.2 The Architect shall assist the Owner in bidding the Project by:

- ~~.1~~ ~~procuring~~facilitating the ~~reproduction~~distribution of Bidding Documents ~~for distribution~~ to prospective bidders;
- ~~.2~~ ~~distributing the Bidding Documents to prospective bidders, requesting their return upon completion of the bidding process, and maintaining a log of distribution and retrieval and of the amounts of deposits, if any, received from and returned to prospective bidders;~~
- ~~.3~~.2 organizing and conducting a pre-bid conference for prospective bidders;
- ~~.4~~.3 preparing responses to questions from prospective bidders and providing clarifications and interpretations of the Bidding Documents to ~~all~~the prospective bidders in the form of addenda; and,
- ~~.5~~.4 organizing and conducting the opening of the bids, and subsequently documenting and distributing the bidding results, as directed by the Owner.

§ 3.5.2.3 ~~The~~If the Bidding Documents permit substitutions, upon the Owner's written authorization, the Architect shall, as an Additional Service, consider requests for substitutions, ~~if the Bidding Documents permit substitutions, and shall~~ and prepare and distribute addenda identifying approved substitutions to all prospective bidders.

### § 3.5.3 Negotiated Proposals

§ 3.5.3.1 Proposal Documents shall consist of proposal requirements and proposed Contract Documents.

§ 3.5.3.2 The Architect shall assist the Owner in obtaining proposals by:

- .1 ~~procuring~~facilitating the ~~reproduction~~distribution of Proposal Documents for distribution to prospective contractors, and requesting their return upon completion of the negotiation process;
- .2 organizing and participating in selection interviews with prospective contractors;~~and~~
- .3 preparing responses to questions from prospective contractors and providing clarifications and interpretations of the Proposal Documents to the prospective contractors in the form of addenda; and,
- ~~.3.4~~ participating in negotiations with prospective contractors, and subsequently preparing a summary report of the negotiation results, as directed by the Owner.

§ 3.5.3.3 ~~The~~If the Proposal Documents permit substitutions, upon the Owner's written authorization, the Architect shall, as an Additional Service, consider requests for substitutions,~~if the Proposal Documents permit substitutions, and shall~~ and prepare and distribute addenda identifying approved substitutions to all prospective contractors.



## 3.5.2.2/3.5.3 (Bidding Assistance)

- Architect's Responsibilities Diminished
  - Facilitates the Distribution (as Opposed to Procuring the Reproduction) of Bidding/Proposal Documents
- Preparing Addenda to Bidding/Proposal Documents to Incorporate Substitutions Now Performed as an "Additional Service"

### § 3.6.3 Certificates for Payment to Contractor

§ 3.6.3.1 The Architect shall review and certify the amounts due the Contractor and shall issue certificates in such amounts. 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 3.6.2 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, and that the Contractor is entitled to payment in the amount certified. The foregoing representations are subject to (1) ~~to~~ an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, (2) ~~to~~ results of subsequent tests and inspections, (3) ~~to~~ correction of minor deviations from the Contract Documents prior to completion, and (4) ~~to~~ specific qualifications expressed by the Architect.

### 3.6.3 (Certificates for Payment)

- Architect's Certification for Payment Now Includes Representation That "Contractor is Entitled to Payment in the Amount Certified"

**§ 3.6.4.3** If the Contract Documents specifically require the Contractor to provide professional design services or certifications by a design professional related to systems, materials, or equipment, the Architect shall specify the appropriate performance and design criteria that such services must satisfy. The Architect shall review ~~shop drawings~~ and take appropriate action on Shop Drawings and other submittals related to the Work designed or certified by the Contractor's design professional ~~retained by,~~ provided the ~~Contractor that~~ submittals bear such professional's seal and signature when submitted to the Architect. The Architect's review shall be for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect shall be entitled to rely upon, and shall not be responsible for, the adequacy, and accuracy ~~and completeness~~ of the services, certifications, and approvals performed or provided by such design professionals.

### 3.6.4.3 (Submittals and Shop Drawings)

- Architect Required to Review and Take Appropriate Actions on Submittals and Shop Drawings
  - But Only For the Limited Purpose of Checking For Conformance With Information Given and the Design Concept Expressed in the Contract Documents

## § 4.1 ~~Additional~~Supplemental Services

§ 4.1.1 The services listed below are not included in Basic Services but may be required for the Project. The Architect shall provide the listed ~~Additional~~Supplemental Services only if specifically designated in the table below as the Architect's responsibility, and the Owner shall compensate the Architect as provided in Section 11.2. Unless otherwise specifically addressed in this Agreement, if neither the Owner nor the Architect is designated, the parties agree that the listed Supplemental Service is not being provided for the Project.

## 4.1 (Supplemental Services)

- **New Concept** – “Supplemental Services” introduced
- Matrix Must Identify Whether Owner or Architect is Required to Provide
  - If Neither Owner Nor Architect Identified, Presumption is That the Supplemental Service is Not Being Provided (**BE CAREFUL!**)

§ 4.32.1 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~~Additional Services until the Architect receives the Owner's written authorization:

.1 Services necessitated by a change in the Initial Information, previous instructions or approvals given by the Owner, or a material change in the Project including, ~~but not limited to,~~ size, quality, complexity, the Owner's schedule or budget for Cost of the Work, or procurement or delivery method;

.2 Services necessitated by the ~~Owner's request for extensive environmentally responsible design alternatives, such as unique system designs, in-depth material research, energy modeling, or LEED® certification;~~enactment or revision of codes, laws, or regulations, including changing or editing previously prepared Instruments of Service;

.3 Changing or editing previously prepared Instruments of Service necessitated by ~~the enactment or revision of codes, laws or regulations or~~ official interpretations of applicable codes, laws or regulations that are either (a) contrary to specific interpretations by the applicable authorities having jurisdiction made prior to the issuance of the building permit, or (b) contrary to requirements of the Instruments of Service when those Instruments of Service were prepared in accordance with the applicable standard of care; ...



§ ~~4.3.24.2.2~~ To avoid delay in the Construction Phase, the Architect shall provide the following Additional Services, notify the Owner with reasonable promptness, and explain the facts and circumstances giving rise to the need. If, upon receipt of the Architect's notice, the Owner ~~subsequently~~ determines that all or parts of ~~those~~the services are not required, the Owner shall give prompt written notice to the Architect; ~~and of the Owner's determination. The Owner~~ shall ~~have no further obligation to~~ compensate the Architect for ~~those~~the services; provided prior to the Architect's receipt of the Owner's notice.

- .1 Reviewing a Contractor's submittal out of sequence from the submittal schedule ~~agreed to~~approved by the Architect;
- .2 Responding to the Contractor's requests for information that are not prepared in accordance with the Contract Documents or where such information is available to the Contractor from a careful study and comparison of the Contract Documents, field conditions, other Owner-provided information, Contractor-prepared coordination drawings, or prior Project correspondence or documentation;
- .3 Preparing Change Orders and Construction Change Directives that require evaluation of Contractor's proposals and supporting data, or the preparation or revision of Instruments of Service;
- .4 Evaluating an extensive number of Claims as the Initial Decision Maker; or,
- .5 Evaluating substitutions proposed by the Owner or Contractor and making subsequent revisions to Instruments of Service resulting therefrom; ~~or~~
- ~~.6 To the extent the Architect's Basic Services are affected, providing Construction Phase Services 60 days after (1) the date of Substantial Completion of the Work or (2) the anticipated date of Substantial Completion identified in Initial Information, whichever is earlier.~~

4.2.4 Except for services required under Section 3.6.6.5 and those services that do not exceed the limits set forth in Section 4.2.3, Construction Phase Services provided more than 60 days after (1) the date of Substantial Completion of the Work or (2) the initial date of Substantial Completion identified in the agreement between the Owner and Contractor, whichever is earlier, shall be compensated as Additional Services to the extent the Architect incurs additional cost in providing those Construction Phase Services.

## 4.2 (Additional Services)

- New Circumstances Entitling Architect to Additional Compensation
  - Modifications Due to the Enactment or Revision of Codes, Laws or Regulations
  - Modifications Due to Official Interpretations of Laws that are (a) Contrary to Specific Interpretations by AHJs Made Prior to Issuance of Building Permit or (b) Contrary to Requirements of Drawings When Drawings Prepared in Accordance With Applicable Standard of Care
  - **NOTE** – This Shifts Some of the Risk of the Drawings Complying With Codes and Laws to the Owner
- **BE CAREFUL!** – As Drafted, the Architect May Commence Performance of Some Additional Services Prior to Providing Notice to and Obtaining Approval From Owner

~~§ 5.10~~5.12 ~~Except as otherwise provided in this Agreement, or when direct communications have been specially authorized, the Owner shall endeavor to communicate~~The Owner shall include the Architect in all communications with the Contractor ~~and~~that relate to or affect the Architect's ~~consultants through the Architect about matters arising out of or relating to the Contract Documents~~services or professional responsibilities. The Owner shall promptly notify the Architect of the substance of any direct communications ~~that may affect the Architect's services~~between the Owner and the Contractor otherwise relating to the Project. Communications by and with the Architect's consultants shall be through the Architect.

## 5.12 (Communications)

- Owner is Now Only Required to Either (1) Include Architect in Communications With Contractor That Relate to Architect's Services, or (2) Notify Architect of the Substance of any Direct Communications Between Owner and Contractor

**§ 6.7** If the Owner chooses to proceed under Section 6.6.4, the Architect, ~~without additional compensation,~~ shall modify the Construction Documents as necessary to comply with the Owner's budget for the Cost of the Work at the conclusion of the Construction Documents Phase Services, or the budget as adjusted under Section 6.6.1.

~~The~~ If the Owner requires the Architect to modify the Construction Documents because the lowest bona fide bid or negotiated proposal exceeds the Owner's budget for the Cost of the Work due to market conditions the Architect could not reasonably anticipate, the Owner shall compensate the Architect for the modifications as an Additional Service pursuant to Section 11.3; otherwise the Architect's services for modifying the Construction Documents shall be without additional compensation. In any event, the Architect's modification of the Construction Documents shall be the limit of the Architect's responsibility under this Article 6.

## 6.7 (Modifications)

- Now if the Architect is Required to Modify the Drawings Because Proposals Exceed the Owner's Budget "Due to Market Conditions the Architect Could Not Reasonably Anticipate," the Architect Will Be Entitled to Additional Compensation
  - **BE CAREFUL!** – This seems Like an Issue Ripe for an Argument

**§ 9.6** ~~In the event of termination not the fault of the Architect, the Architect shall be compensated~~If the Owner terminates this Agreement for its convenience pursuant to Section 9.5, or the Architect terminates this Agreement pursuant to Section 9.3, the Owner shall compensate the Architect for services performed prior to termination, together with Reimbursable Expenses then due and all Termination Expenses as defined in Section 9.7. incurred, and costs attributable to termination, including the costs attributable to the Architect's termination of consultant agreements.



~~§ 9.7 Termination Expenses are in addition to compensation for the Architect's services and include expenses directly attributable to termination for which the Architect is not otherwise compensated, plus an amount for the Architect's anticipated profit on the value of the services not performed by the Architect.~~ In addition to any amounts paid under Section 9.6, if the Owner terminates this Agreement for its convenience pursuant to Section 9.5, or the Architect terminates this Agreement pursuant to Section 9.3, the Owner shall pay to the Architect the following fees:

(Set forth below the amount of any termination or licensing fee, or the method for determining any termination or licensing fee.)

.1 Termination Fee:

.2 Licensing Fee if the Owner intends to continue using the Architect's Instruments of Service:

§ 9.8 Except as otherwise expressly provided herein, this Agreement shall terminate one year from the date of Substantial Completion.

## 9.6 & 9.7

### (Termination for Convenience Remedies)

- If Owner Terminates Agreement for its Convenience, the Agreement Now Allows the Parties to Agree Upon and Insert (1) a Termination Fee and/or (2) a Licensing Fee if the Owner Intends to Continue to Use the Instruments of Service

§ 10.9 The invalidity of any provision of the Agreement shall not invalidate the Agreement or its remaining provisions. If it is determined that any provision of the Agreement violates any law, or is otherwise invalid or unenforceable, then that provision shall be revised to the extent necessary to make that provision legal and enforceable. In such case the Agreement shall be construed, to the fullest extent permitted by law, to give effect to the parties' intentions and purposes in executing the Agreement.

## 10.9 (Savings Clause)

- **New Boilerplate** – Standard Savings Provision

**§ 11.9 Architect's Insurance.** If the types and limits of coverage required in Section 2.5 are in addition to the types and limits the Architect normally maintains, the Owner shall pay the Architect for the additional costs incurred by the Architect for the additional coverages as set forth below:

*(Insert the additional coverages the Architect is required to obtain in order to satisfy the requirements set forth in Section 2.5, and for which the Owner shall reimburse the Architect.)*

## 11.9 (Insurance Costs)

- **New Concept** – New Provision Requires Owner to Pay the Architect for Additional Costs Incurred if the Insurance Identified in Section 2.5 is broader than the Insurance Architect Typically Maintains

§ 13.2 This Agreement is comprised of the following documents ~~listed~~identified below:

.1 AIA Document B101<sup>TM</sup>—~~2007~~,2017,  
Standard Form Agreement Between Owner and Architect

.2 AIA Document ~~E201<sup>TM</sup>—2007, Digital Data Protocol Exhibit, if completed, or the following:~~E203<sup>TM</sup>—2013, Building Information Modeling and Digital Data Exhibit, dated as indicated below:

## 13.2 (Contract Documents)

- AIA Document E203<sup>TM</sup>-2013, Building Information Modeling and Digital Data Exhibit Now Automatically Incorporated

**BE CAREFUL!**



# Thank You!

# Questions?

Scott P. Pence  
Carlton Fields  
[spence@carltonfields.com](mailto:spence@carltonfields.com)  
(813) 229-4322

Sanjay Kurian  
Becker & Poliakoff  
[skurian@bplegal.com](mailto:skurian@bplegal.com)  
(239) 433-7707