

# AIA B101™ - 2017 Owner-Architect Agreement

## Understanding Some Key Issues Addressed

*Presented by:*

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# Learning objectives

- Learn about the AIA B101™ 2017 Agreement between Owner and Architect;
- Learn important risk management concepts included in the B101;
- Obtain ideas for editing contract language to reduce or mitigate risk.
- Learn negotiation tips for reaching agreement on use of contract language.

## Reliance on Information

- “§ 1.1 “This Agreement is based on the Initial Information set forth in this Section 1.1.”
- “§ 1.2 “The Owner and Architect **may rely** on the Initial Information. Both parties, however, recognize that 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.”
  - **Comment:** Beware of contracts denying DP right to rely on information and documents provided by Owner.

# Transferring Digital Data

- “§ 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 a 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 relying party’s sole risk** and without liability to the other party and its contractors or consultants....”
  - **Comment:** Important to limit reliance as shown here.

# Architect's License

- “§ 2.1 The Architect shall provide professional services as set forth in this Agreement. The Architect represents that if is properly licensed in the jurisdiction where the Project is located to provide the services required by this Agreement....”
  - **Comment:** Beware of Owner drafted clauses requiring Architect to obtain all permits and governmental approvals needed for the project.

# 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 profession skill and care and the orderly progress of the Project.”
  - **Comment 1:** This is the same standard courts would impose in the absence of any written agreement. It is insurable because it mean the DP will be responsible for damages from negligence.
  - **Comment 2:** Timeliness. Don’t agree to “time is of the essence” clauses. Try to include this language in your contract.

# Insurance

- “**§2.5.3** -- The Architect may achieve the required limits of 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 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....”
  - **Comment:** Note how the umbrella policy is used to meet the minimum insurance requirements.

## Additional Insureds

- “§ 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.”
  - **Comment:** Note that the Owner is not an additional insured under the professional liability policy. That cannot be done by the carriers, so don't agree to do so by contract.

## Coordination of Services

- “§ 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....”
  - **Comment:** Beware of Owner contract wording requiring the DP to take responsibility for coordinating the services of other consultants. The B101 appropriately limits the DP responsibility.

# Owner Acceptance of Substitutions and Non-Conforming Construction Work

- “**3.1.4** The Architect shall not be responsible for an Owner’s directive or substitution, or for the Owner’s acceptance of non-conforming Work, made or given without the Architect’s written approval.”
  - **Comment:** See next slide.

## Substitutions (§3.1.4 ) - comment

- **Comment:**
- With the 2007 edition of the B101™, the Architects obtained protection against claims where the Owner made directives or substitutions contrary to the recommendations of the Architect or that were done without the Architect's approval.
  - With this new edition, this protection has been further expanded to include damages arising out of an Owner's acceptance of non-conforming construction work.
  - If the Owner accepts non-conforming work without the Architect's written approval, the Architect has no responsibility for problems resulting from that non-conforming work.

# Sustainable Project Exhibit - (AIA E 204-2017) comments

- New **sustainable project exhibit** (AIA E 204-2017). Sustainable project services can be added as a supplemental service under Section 4.1
  - This exhibit eliminates the need to have a sustainable project version of each contract document.
  - The requirement that the Architect discuss with the Owner the feasibility of incorporating environmental responsible design approaches has been deleted from the basic Agreement form (§3.2.3), but a requirement that the Architect consider sustainable design alternatives is added (§3.2.5.1).

# Schematic Design Phase Services

- “§ 3.2.3 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. The Architect shall reach an understanding with the Owner regarding the requirements of the Project.”
- “§ 3.2.5.1 The Architect shall consider sustainable 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 the Work. The Owner may obtain more advanced sustainable design services as a Supplemental Service under Section 4.1.1”

## § 3.2.3 - Deletion of Environmentally Responsible Design, - comments

- **Comment:** This removes the affirmative obligation the Architect had to raise and discuss environmentally responsible design approaches with the Owner.
  - However, it appears to be more cosmetic than substantive in that §3.2.5.1 remains in the Agreement and it requires the Architect to consider “sustainable design alternatives” in lieu of what used to be the required “environmentally responsible design alternatives.”

# Architect Paid for Reviewing Substitution Requests

- “§3.5.2.3 If the bidding documents permit substitutions, upon the Owner's written authorization, the Architect shall, as an additional service, consider requests for substitutions and prepare and distribute addenda identifying approved substitutions to all prospective bidders.”
  - **Comment:** The Architect will be paid for reviewing Contractor requests for substitutions (See also 3.5.3.3)

# Architect not Responsible for Contractor Acts and Omissions

- “§ 3.6.1.2 ... The Architect shall not have control over, charge of, or responsibility 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. The Architect shall be responsible for the Architect's negligent acts or omissions, but shall not have control over or charge of, and shall not be responsible for, acts or omissions of the Contractor or of any other persons or entities performing portions of the Work.”
  - **Comment:** This is good protection for the DP.

## Site Visits to Evaluate Contractor's Work

- “§ 3.6.2.1 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 promptly report to the Owner (1) **known deviations** from the Contract Documents, (2) **known deviations** from the most recent construction schedule submitted by the Contractor, and (3) **defects and deficiencies observed** in the Work.”

## Authority to Reject Work

- “§ 3.6.2.2 The Architect has the authority to reject Work that does not conform to the Contract documents.... . However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give risk to a duty or responsibility of the Architect to the Contractor....”
  - **Comment:** This clarifies that although the DP has authority to reject the work this does not create any liability for the DP.

## §3.6.4 Submittals

- **§3.6.4.2** -- “... The Architect’s review shall not constitute approval of safety precautions or, ~~unless otherwise specifically stated by the Architect, of any~~ construction means, methods, techniques, sequences or procedures.”
- **Comment:** Note the words that were deleted from the former 2007 version. This clarifies that under *no* circumstances is the Architect taking on responsibility for the Contractor’s means and methods.
  - No option is being provided whereby the Agreement can specify that the Architect will be responsible for the Contractor’s means and methods.

## Reviewing Contractor's Design Services

- § 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 and take appropriate action on Shop Drawings and other submittals related to the Work designed or certified by the Contractor's design professional, provided the 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 of the services, certifications, and approvals performed or provided by such design professionals.”

## § 3.6.4.3 – Contractor’s Design Services - comment

- **Comment:** The sentence added to the end of this section 3.6.4.3 clarifies the intent of this section that the Architect may rely on the certifications and approvals of the Contractor’s design professionals and is in no way itself responsible for the adequacy, accuracy and completeness of the same.

# Certificate for Payment

- **§3.6.6.1** -- The Architect shall:
- **.4** -- issue a final certificate for payment based upon a final inspection indicating that, to the best of the Architect's knowledge, information, and belief, the work complies with the requirements of the contract documents.
  - **Comment:** This new language clarifies that there is no express or implied warranty by the Architect concerning compliance of the Contractor's work with the contract documents.

The words “best of” “knowledge, information, and belief” are often used as a concise way to hedge on what is being certified and thereby avoid the potential for having someone argue that the certification is a warranty.

This same type of language is recommended for other types of certifications by Architects as well.

## Architect's Additional Services (Code Interpretation Changes)

Additional services include:

- **§4.2.1.2** -- Services necessitated by enactment or revision of codes, laws, or regulations, including changing or editing previously prepared Instruments of service.
- **§4.2.1.3** -- Changing or editing previously prepared Instruments of service necessitated 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 services were prepared in accordance with the applicable standard of care.

## § 4.2.1 - Payment for Revisions Due to Code Interpretations - comments

- **Comment:**
- “Additional Services” has been revised to include extra payment for services that are necessitated by code changes or even by official interpretations of codes that are contrary to the requirements existing will be paid for as additional service (§4.2.1).
- For example, a Fire Marshal who interprets the fire code requirements in a manner contrary to the requirements generally understood to apply by a design professional exercising the generally accepted standard of care. It is one thing to have to make changes because codes change after contract award. But it is quite another to have to make changes because a code official interprets the code differently than the design professional who exercised the appropriate standard of care in its own interpretation. This new provision addresses that problem.

# Owner Communications with Contractor Must Include Architect

- “§5.12 The Owner shall include the Architect in all communications with the Contractor 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 between the Owner and the Contractor otherwise relating to the project....”
  - **Comment:.** Note that many project owner’s delete or significantly revise this text in the contract. **See next slide**

# Comments on Owner Communication

- In all communications with the Contractor that relate to or affect the Architect's services or professional responsibilities, the Owner must include the Architect, and the Owner must also notify the Architect of the substance of and communications with the Contractor that "relate to the project."
- Greatly expands Owner's duty to include the Architect in communications with the Contractor where the communication relates to or affects the Architect's services or responsibilities.
- An absolute requirement that the Owner include the Architect in all communications with the Contractor that relate to the Architect's services or responsibilities.
- Owner must notify the Architect of the substance of its communications with the Contractor in any manner "relating to the project." So the Owner can't have a substantive communication with the Contractor concerning the project without advising the Architect.

# Owner's Duty to Coordinate its Other Consultants

- “§5.8 The Owner shall coordinate the services of its own consultants with those services provided by the Architect...’
  - **Comment:** Beware that some owner generated contracts state just the opposite.

## Cost Estimates Exceeded (2 slides)

- “**§6.5.** If at any time the Architect's estimate of the Cost of the Work exceeds the Owner’s budget for the Cost of the Work, the Architect shall make appropriate recommendations to the Owner to adjust the Project’s size, quality, or budget for the Cost of the work, and the Owner shall cooperate with the Architect in making such adjustments.”
- **§6.6** If the Owner’s budget for the Cost of the work at the conclusion of the Construction Documents Phase Services is exceeded by the lowest bona fide bid or negotiated proposal, the Owner shall:
  - **.4** in consultation with the Architect, revise the Project program, scope, or quality as required to reduce the Cost of the Work.

## Cost Estimates Exceeded (part 2)

- “6.7 If the Owner chooses to proceed under Section 6.6.4, the Architect shall modify the Construction Documents as necessary to comply with the Owner’s budget for the Cost of the Work.... If the Owner required the Architect to modify the Construction Documents because the lowest bona fide bid or negotiated proposal exceeds the Owner’s budget ... due to market conditions the Architect could not reasonably anticipate, the Owner shall compensate the Architect for the modifications... as an additional service...; 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.”
  - **Comment:** Discuss this concept. Negligence based. Note the LoL.

# Owner's License to Use Instruments of Service (Upon payment rather than Execution)

- **§ 7.3** ~~Upon execution of this Agreement, the~~ 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.
  - **Comment:** Note the change from 2007 wording. The Owner's license to use the Instruments of Service is no longer created upon execution of the Agreement, but will instead be granted only after the Owner complies with all contract requirements, including payment to the Architect.

# Owner Indemnifies Architect if Damages from Reuse of Documents without Architect Involvement

- § 7.3.1 In the event the Owner uses the Instruments of Service without retaining authors of the Instruments of Service, the Owner releases the Architect and Architect's consultant(s) from all claims and causes of action from such uses....
  - **Comment:** This clause affords appropriate protection.

## Litigation is Preferred Over Arbitration

- “§ 8.2.4 If the parties do not resolve a dispute through mediation pursuant to this Section 8.2, the dispute resolution shall be the following:
- ***(Check the appropriate box.)*** If the Owner and Architect do not select a method of binding dispute resolution, or don not subsequently agree in writing to a binding dispute resolution other than litigation, the dispute will be resolved in a court of competent jurisdiction.”
  - **Comment:** The 2007 version stated arbitration would be used if no other selection was made. Insurance carriers generally like this change to litigation.

## Termination (Changed in 2017)

- ~~§ 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 terminate this Agreement pursuant to Section 9.4, the Owner shall pay to the Architect the following fees:~~
- .1 Termination Fee:

# Comments on Termination Fee

- The defined term, “Termination Expenses” has been eliminated. This is significant because the term “Termination Expenses” included “anticipated profit on the value of the services not performed by the Architect.”
- This means the Architect will no longer receive payment for anticipated profit on the terminated portion of the work since that was one element of what had been defined as “termination expenses” (§9.7).

# What Law Applies and What Courts?

- § 10.1 This Agreement shall be governed by the law of the place where the Project is located, excluding that jurisdiction's choice of law rules...
  - **Comment:** We believe that the dispute clause should state that the parties will first attempt to resolve disputes through mediation, and if that fails, then “Disputes will be resolved through litigation in a court of competent jurisdiction in the State in which the Project is located.

## Owner Assignment of Contract to Lender (§10.3)

- **§10.3** ... 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.
  - **Comment:** Assignment of the Agreement by Owner to a different entity, such as a lender, is made expressly conditional upon payment to the Architect of all amounts due prior to the assignment. Beware of “Consents to Assignment” agreements in which the Lender requests warranties or duties exceeding what was agreed upon in the Owner/Architect agreement.

## No Third Party Beneficiaries

- § 10.5 Nothing contained in this Agreement shall create a contractual relationship with, or a cause of action in favor of, a third party against either the Owner or Architect
  - **Comment:** This clause may be effective in preventing law suits being filed against DP by individuals or entities other than the client.

# Photographing the Project for use in Marketing

- “§ 10.7 The Architect shall have the right to include photographic or artistic presentations of the design of the Project among the Architect's promotional and professional materials....”
  - **Comment:** Some owner generated contracts state that the Architect has no such right. Be careful what the contract states.

# Confidentiality

- **“10.8.1** The receiving party may disclose “confidential” or “business proprietary” information after 7 days' notice to the other party, which required by law, arbitrator’s order, or court order, including a subpoena or other form of compulsory legal process issued by a court or governmental entity, or to the extent such information is reasonably necessary for the receiving party to defend itself in any dispute. The receiving party may also disclose such information to its employees, consultants, or contactors in order to perform services or work solely and exclusively for the Project, provided those employees, consultants and contractors are subject to the restrictions on the she disclosure and use of such information as set forth in this Section 10.8.”
  - **Comment:** Set reasonably time limit on confidentiality. If agree to return or destroy all confidential information, use wording like shown in next slide:

# Dealing with Electronically Maintained Data

- ConstructionRisk, LLC, when redlining design contracts that require the DP to return all confidential information will add a clause like the following:
- “Notwithstanding the obligation to return or destroy the Confidential Information and corresponding copies: (i) there shall be no obligation to return or destroy Confidential Information maintained electronically on networks or email servers provided the electronic data is maintained in confidence and not readily accessible to third parties; and (ii) derivative information, consisting of notes, analyses, compilations, studies or other documents which contain or reference Confidential Information need not be returned or destroyed, provided it is at all times held and kept confidential pursuant to the terms of this Agreement.”

# Article 12 – Special Terms and Conditions

- We believe all design professional contracts should contain a limitation of liability clause. One that we typically insert in contracts provides as follows:
- **“Limitation of Liability.** To the fullest extent permitted by law, the total liability, in the aggregate, of Consultant and its officers, directors, partners, employees, agents, and subconsultants, to Client, and anyone claiming through or under Client, for any claims, losses, costs, or damages whatsoever arising out of, resulting from or in any way relating to this Project or Contract, from any cause or causes, including but not limited to tort (including negligence and professional errors and omissions), strict liability, breach of contract, or breach of warranty shall not exceed the total compensation received by Consultant or \$XXX, whichever is greater.

# DISCLAIMER

**Disclaimer:** This information is not legal advice and cannot be relied upon as such. Any suggested changes in wording of contract clauses, and any other information provided herein is for general educational purposes to assist in identifying potential issues concerning the insurability of certain identified risks that may result from the allocation of risks under the contractual agreement and to identify potential contract language that could minimize overall risk. Advice from legal counsel familiar with the laws of the state applicable to the contract should be sought for crafting final contract language. This is not intended to provide an exhaustive review of risk and insurance issues, and does not in any way affect, change or alter the coverage provided under any insurance policy.

# Questions?

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