

B101 Owner/Architect Agreement I 2017 AIA Document Series – Revisions to the Core Contract Documents (Part 5)

Article

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Part 5: Revisions to the B101 Owner/Architect Agreement.

The changes in B101 dovetail with other newly-modified documents, such as the A201 General Conditions, and this article should be read in conjunction with Parts 1-4 of the series.

Architect Compensation. Numerous changes have been made in the various sections of the Agreement dealing with the Architect's compensation. For example, what constitutes Additional Services which warrant compensation over and above that paid for Basic Services has been substantially redefined. What was formerly deemed to be "Additional Services" is now broken into two categories: "Supplemental" and "Additional." Supplemental Services are defined in Section 4.1 to include items not included in Basic Services, but that the parties recognize may be required. The document includes a table of services which, after negotiation, identifies each Supplemental Service and the party (Owner or Architect) deemed responsible. All Supplemental Services are compensated as described in Section 11.2 (hourly rate, fixed price per activity, etc.). Additional Services fall into two categories: 1) services required because of code changes (not new); and 2) services required because the applicable authority interprets the code contrary with previous interpretations or from the design which was prepared in accordance with the standard of care (new). See Sections 4.2.1.2 and 4.2.1.3. These items, too, are compensated under Section 11.2.

Several other items related to compensation are similarly new and important. First, under Section 3.5.3.3, an Architect's review of requests for substitutions are now specifically deemed an Additional Service for which additional compensation is due. Second, under Section 6.3, when an Architect is asked by the Owner to provide a "detailed estimate of the Cost of Work," that, too, is now deemed a Supplemental Service requiring separate compensation. Third, unlike previous editions, Section 6.7 now provides that fees to redesign under circumstances where unanticipated market conditions resulted in a project cost

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too high for the Owner's budget now require additional compensation. Architects will like the new form language; Owners will need to negotiate more favorable language, or risk some potentially-significant added costs for work that had previously been deemed to be Basic Services.

License to the Documents. Section 7.3 contains a subtle, but somewhat powerful change to the timing of the granting of a license to the Owner for Instruments of Service. Formerly, such license was expressly granted "upon execution of this Agreement." The 2017 version deletes that language, stating instead that the license is granted when the Owner "substantially performs its obligations under this Agreement." Among other things, this change protects the Architect in scenarios, for example, where the Owner replaces the Architect with another, after not paying the first. Under the previous version, the successor Architect could purportedly proceed with the first Architect's design because the license was already granted. Now the opposite is true.

Termination Fee. Sections 9.6 and 9.7 make a significant change to how an Architect gets paid when the Owner terminates the Project for convenience. Formerly, the Architect would receive Termination Expenses, defined as the expenses directly attributable to the termination plus the Architect's anticipated profit on the services not performed. The concept of Termination Expenses has been replaced by Termination Fee, which is to be negotiated at the time of entering the contract and inserted therein. This is a new concept and should pose some interesting discussions at the negotiating table. By going this route, the parties avoid a complicated analysis later of what is properly included in Termination Expenses by bringing certainty from the get-go. It also provides more information to the Owner so that, when making a decision to terminate, the Owner knows what its termination costs will be.

Insurance Requirements. The expansive changes to the standard documents relating to insurance (see Part 4 of this series) are carried forth into the B101 document as well. Among the more important revisions are the following: 1) the Architect must maintain its coverage for a minimum of one year after Substantial Completion (Section 2.5); 2) Section 2.5 contains a better and more detailed description of the insurance required; 3) now, required limits for certain insurance may be satisfied through a combination of primary and excess policies (Section 2.5.6) and 4) additional insured coverage shall apply to ongoing and completed operations (Section 2.5.7). As a general observation, the changes in the insurance provisions throughout the core AIA documents has clarified (and to some extent, simplified) what had formerly been user-unfriendly documents (see Part 4 of this series). Yet the changes are significant enough that they could catch parties, who assume that life remains the same, off guard. These changes will require careful consultation with a party's insurance provider and attorney to ensure that all contractual requirements are met.

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Miscellaneous. Three other unrelated changes are worthy of note. First, Section 2.1 has a new sentence by which the Architect represents that it is properly licensed, in the Project's jurisdiction, to provide the contracted services, "or shall cause such services to be performed by appropriately licensed design professionals." Architectural firms need to be cautious about whether they can satisfy their own licensure requirement by simply subcontracting with individuals to perform services for which the firm itself is unlicensed. The answer may be different in different states. Second, Section 5.12 now allows certain communications between Owner and Contractor to occur, as long as: 1) Owner notifies Architect of the substance of the communications; and 2) the communications do not relate to or affect, "the Architect's services or professional responsibilities." While this will likely streamline communications and remove some bureaucracy, the issue of what "relates" or "affects" the Architect's services is hardly unambiguous. Some discussion of the parameters here would be helpful at the negotiation stage. Finally, Section 11.6 now provides that when the Architect is paid on a percentage of completion basis, progress payments are to be calculated based upon the current cost of the work budget, without adjustment to previous amounts paid. This adds clarity to a scenario where the Owner's budget changes in some significant way.

- **Part 1: Dispute Resolution Under the Revised A201 General Conditions Document**
- **Part 2: 2017 AIA Contract Document Series Revisions to the AIA Core Contract Documents: Notice Requirements**
- **Part 3: 2017 AIA Contract Document Series: Revisions to the AIA Core Contract Documents**
- **Part 4: Insurance and Bonding Provisions | 2017 AIA Document Series – Revisions to the Core Contract Documents**
- **Part 6: Additional Changes to A201 | 2017 AIA Document Series – Revisions to the Core Contract Documents**

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