ARTICLE 1 GENERAL PROVISIONS

Article 1 contains general provisions of the Contract that define basic terms and identify the Contract Documents. Article 1 also contains a severability provision that ensures the validity of the agreement in the event a court finds a particular provision or section void and unenforceable. The Article then addresses the ownership, transfer, and use of the Instruments of Service and building information models. Finally, it describes the acceptable means of transmitting notices required by the Contract.

The primary modifications to Article 1 are small additions addressing notice and the use of the Instruments of Service and building information models. Otherwise, the changes to this Article are merely grammatical corrections, such as the addition of serial commas. This chapter will explain all changes to the text of Article 1 and analyze the case law pertaining to these provisions.1

§ 1.1 BASIC DEFINITIONS

§ 1.1.1 THE CONTRACT DOCUMENTS

The Contract Documents are enumerated in the Agreement between the Owner and Contractor (hereinafter the Agreement) and consist of the Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of the Contract, other documents listed in the Agreement, and Modifications issued after execution of the Contract. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive, or (4) a written order for a minor change in the Work issued by the Architect. Unless specifically enumerated in the Agreement, the Contract Documents do not include the advertisement or invitation to bid, Instructions to Bidders, sample forms, other information furnished by the Owner in anticipation of receiving bids or proposals, the Contractor’s bid or proposal, or portions of Addenda relating to bidding or proposal requirements.

The AIA made minor changes to this section from the AIA® Document A201™–2007, including punctuation changes and a clarification of those documents that are not part of the Contract Documents.

Section 1.1.1, and similar provisions in other current or past AIA® documents, defines the scope of the agreement between the parties by listing all of the documents that are included in the definition of the term “Contract Documents.” These may include the contract, drawings, specifications, addenda, modifications issued after execution, as well as other documents identified in the agreement. If using the AIA suite, the parties should identify the specific version of the general conditions (for example, state that the General Conditions are the AIA® Document A201™–2017). In practice, it is imperative to specify because some courts previously found the provision ambiguous.2 The general conditions may be amended by the supplementary conditions. The phrase “other Conditions” generally refers to federal, state, or local laws or private conditions that are usually specified by the owner.

1. The majority of the sections in Article 1 contain basic definitions and general provisions that have not been the subject of much litigation.
Absent extraordinary conditions, courts uniformly uphold these provisions to allow for enforcement of extra-contractual terms contained within the incorporated documents. For instance, in discussing the AIA® Document A105™–1993’s incorporation of the AIA® Document A205™–1993, General Conditions of the Contract for Construction of a Small Project, the Appellate Court of Connecticut stated “[i]n the present case, the language of the contract clearly and unambiguously refers to A205 as part of the contract. . . . We cannot strain ourselves to import ambiguity into the words of this contract.”

However, courts have found the failure to specifically identify documents prevents those documents from becoming a part of the agreement. Accordingly, if any documents included in the definition of Contract Documents are not physically attached or separately signed by the parties, practitioners should consider modifying this section to explicitly state the particular document (or version) that the parties intend to be included in the Contract Documents.

This section also lists information and documents that are explicitly excluded from the Contract Documents. The purpose of excluding these documents is to eliminate a “battle of the forms” and prevent a contractor from attempting to enforce terms or conditions contained in its proposal that materially differ from the Contract Documents. In practice, some public owners require the bidding documents to be included within the Contract Documents. To avoid the ambiguities and conflicts referenced above, modifications to this section are suggested to provide that any bid documents are superseded when the public entity awards the contract for construction. In the event the bid documents contain statutorily required language, that language may be included in the supplementary conditions.

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\textbf{§ 1.1.2 THE CONTRACT}$

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations, or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Contractor and the Architect or the Architect’s consultants, (2) between the Owner and a Subcontractor or a Sub-subcontractor, (3) between the Owner and the Architect or the Architect’s consultants, or (4) between any persons or entities other than the Owner and the Contractor. The Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Architect’s duties.

Section 1.1.2 contains an integration clause, restricts modifications of the contract, and clarifies the contractual relationships between the parties on the construction project. An integration clause serves to eliminate claims that terms in prior negotiations or agreements are incorporated into the final agreement. This section

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4. 566 New Park Assocs. v. Blando, 906 A.2d 720 (Conn. App. Ct. 2006) (reversing trial court’s finding that general conditions were not incorporated into contract, but finding plaintiff-owner failed to engage in consultation with architect and did not give defendant-contractor requisite notice prior to termination which were contained in general conditions, preventing recovery).
5. See, e.g., Axthelm & Swett Constr., 1997 Wash. App. LEXIS 735, at *9–10 (“The AIA® materials, which were part of the bid information, suggest that the AIA has more than one general conditions form. Thus, even if it was clear that the general conditions document referred to an AIA® form, further specification would be necessary to determine which AIA® form was a part of this particular contract.”).
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supplements the listing of information and documents in Section 1.1.1 that form the Contract Documents by clarifying the contract supersedes all other negotiations, representations, or agreements.

Once the Contract Documents are established, they may only be altered by a modification. The definition of a modification is clearly intended to encourage the parties to memorialize all changes to the Contract Documents in writing. On most projects, changes are routinely made in the field by project superintendents, architects, and other project representatives. Due to the number of typical changes and the time constraints under which most projects are constructed, it is common for the parties to orally agree to changes without any further documentation. These changes are frequently the subject of litigation. Whether a particular court will enforce an oral modification depends entirely on the facts of each case. Parties are, therefore, encouraged to reduce all changes, however small, to writing.

Section 1.1.2 clarifies that the Contract Documents do not create any third-party beneficiaries or create any contractual relationship between parties that are not signatory to the agreement. The AIA A201® document family is based on the idea that construction contractual relationships should be two-party based. Accordingly, the AIA maintains owner/architect, owner/contractor, contractor/subcontractor, and architect/consultant agreements. Each of the parties to these agreements is deemed to be in privity of contract only with the other party to the agreement. Most jurisdictions find provisions such as Section 1.1.2 prevent an owner from maintaining an action against a subcontractor on a third-party beneficiary theory as well as preventing a subcontractor from maintaining a breach of contract action against an owner on such a theory. For example, under a similar non-AIA® provision, the Michigan Court of Appeals found where an owner contracted separately with a construction manager and a general contractor, despite the fact the construction manager's duties to supervise and manage the project would affect and possibly benefit the general contractor, these effects were incidental only and would not overcome the contractual limitation on third-party beneficiary status. The California Court of Appeals came to the same conclusion under a similar scenario and found an architect could not rely on an indemnification provision contained in a construction management contract where that agreement provided no rights or benefits would be conferred on parties that were not part of the agreement.

The only exception to the exclusion of third-party beneficiaries is contained in the final sentence of this section, which notes the architect is entitled to the performance and enforcement of the contractor's obligations. The architect may, therefore, seek enforcement of the contractor's obligations, independent of the owner. These obligations include the contractor's duty to provide access to the work as well as the contractor's obligations to purchase insurance, waive subrogation rights, and indemnify the architect against certain claims. Additionally, courts uphold the documents' incorporation despite the fact they are not separately signed. For instance, in reviewing a provision similar to Section 1.1.2, a Pennsylvania court found a contract that referenced and incorporated prior agreements subjected

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claims arising out of those prior agreements to an arbitration provision contained only in the referencing Agreement.10

§ 1.1.3 THE WORK

The term “Work” means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment, and services provided or to be provided by the Contractor to fulfill the Contractor’s obligations. The Work may constitute the whole or a part of the Project.

The term “Work” is used throughout the AIA Documents and describes the contractor’s duty to provide all necessary labor, materials, equipment, and services necessary to fulfill its obligations under the Contract.11 The work of subcontractors is included within the definition of the contractor’s work. It is important to recognize the term “Work” is not coextensive with the definition of “Project” in Section 1.1.4. Because the owner may utilize multiple contractors or self-perform other work that is part of the project, the work of the contractor may be, and frequently is, less than the work required to construct the project.

Aside from distinguishing between the work required to complete the project and the contractor’s work, a detailed scope of work is necessary to determine what property is covered by insurance required under the contract or whether damages to property are covered by the standard subrogation waiver contained in the AIA Documents. For example, the Missouri Court of Appeals looked to the definition of work in finding that a waiver of claims set forth in Section 11.4 did not bar claims to existing structures that were clearly outside the scope of the contractor’s work.12 In practice, clearly defining the scope of the contractor’s work provides clear expectations of what work the contract requires of the contractor.

§ 1.1.4 THE PROJECT

The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner and by separate contractors—Separate Contractors.

The AIA did not make any substantive changes to this section from the AIA® Document A201™–2007, except to make the term “Separate Contractors” a defined term. Section 6.1.1 states “the term ‘Separate Contractor(s)’ shall mean other contractors retained by the Owner under separate agreements.” The addition clarifies the project may include not only the work performed by the contractor, but also the work of separate contractors on the site, further distinguishing the work from the project.