FINDING WIN-WIN SOLUTIONS:
Successfully Anticipating and Allocating Risks in the Owner Agreements

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Presented as Plenary 2 at the 2018 Fall Program
October 4-5, 2018
Le Centre Sheraton Montreal Hotel

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INTRODUCTION

As with all national industry standard contract forms, the American Institute of Architects’ (“AIA”) forms allocate risks to favor the AIA’s current and prospective constituency (architects) and do not uniformly address every legal challenge in each state. Construction lawyers using the 2017 AIA form design and construction contracts should make state-specific adjustments to the standard form documents to address state requirements and dispute resolution issues. In addition to state-specific adjustments, practitioners may wish to alter the risk allocation in the 2017 AIA form documents.

This paper does not address every state-specific or potential risk allocation issue in all 2017 AIA form documents, but does focus on issues that practitioners often encounter during contract negotiations based on the 2017 editions of the B101 Standard Form of Agreement Between Owner and Architect, A101 Standard Form of Agreement Between Owner and Contractor, and the A201 General Conditions of the Contract for Construction (collectively, the “AIA Forms”). The authors hope that this will assist practitioners in providing their clients with design and construction agreements that reflect an equitable risk allocation tailored for each particular project.

OWNER-DESIGN AGREEMENT (MODELED ON AIA B101-2017)

The AIA B101-2017 Standard Form of Agreement Between Owner and Architect (the “B101”) and its cousins in the AIA Forms are widely used in the construction industry. Most risk allocation issues raised in the B101 group of forms apply with equal force to the other “B” Series Owner/Architect agreements within the family of AIA Forms. As with the other “B” Series standard form agreements, the B101 favors the Architect over all other construction project participants. Not surprisingly, the “B” Series documents are the most unbalanced in the AIA
Forms; to achieve an equitable risk allocation in the design documents, owners’ counsel should consider significant amendments.

The “A” Series Owner/Contractor agreements within the family of AIA Forms, which are also discussed herein, are also widely considered to heavily favor the Architect, inasmuch as the Architect is referenced or discussed in the “A” Series agreements. Aside from positive treatment of the Architect, the “A” Series documents seem to benefit the Contractor over the Owner. Owner’s counsel should try to restore a more balanced risk allocation to the B101 before next considering the uneven risk allocation in the “A” series construction contracts.

When using the B101 as a starting point for contract negotiation, there are many different ways that the Owner and Architect counsel may fairly allocate risk. This paper evaluates the following topics: (1) Scope of Services, including the scope of basic services, review of submittals and “additional” supplemental services; (2) Liability of the Architect, including indemnification, insurability of redefinition of the standard of care, limitation of liability, and waiver of consequential damages; (3) Contract Administration, including site inspection requirements, submittal review, and risk in decision making; (4) Intellectual Property Ownership and Risk, including ownership and use as well as new considerations within the B101-2017; and (5) Dispute Resolution.

I. **SCOPE OF SERVICES**

The Scope of Services in any services agreement is arguably the most important section of the contract as it includes both Parties’ obligations and expectations regarding services of the consultant or contractor as well as responsibilities and payment obligations of the owner. In an Owner-Architect Agreement in particular, the Parties’ must determine the Architect’s scope of services as an independent contractor and as an agent of the Owner. Failure to do so may result in
unnecessary confusion, disruption to the Project, additional payment obligations by the Owner and disputes amongst the parties.

Article 3 of the B101 contains multiple provisions carefully defining and describing the Architect’s Scope of Basic Services. Of particular note is Section 3.1, set forth fully below, which states specifically that services not set forth in Article 3, which regards Basic Services, are considered Supplemental or Additional Services. Given the multiple categories of services in the B101, all of which are generally compensable to the Architect and many of which could affect the Owner’s budget and/or schedule or become the basis of a Dispute amongst the Parties, Owner’s counsel must take particular note of and consider each category of services when negotiating an Owner-Architect agreement.

Supplemental Services are a new category of services in the B101-2017 form agreement. Supplemental Services, however, are not actually “new” to the B101. Instead, Additional Services, as defined in B101-2007 and its predecessors, are now considered one of two distinct and separate categories of services: (1) Additional Services or (2) Supplemental Services. Stated differently, prior iterations of the B101 divided “additional services” into those services listed in Table 4.1 of the B101, which must be determined before contract execution (now considered “supplemental services”) as well as services not included in Table 4.1, which the Architect may provide following contract execution (now considered “additional services”). Given the confusion between two distinct types of services labeled by the same name, the 2017 AIA B101 divided these services into two categories (supplemental and additional services) to reflect their differences. Other than the change in names, there is little meaningful difference between the 2007 and 2017 approach. Both Additional and Supplemental Services will be discussed further in this paper.
Given the number of “services” contemplated within the B101, as well as the unknown aspect of certain tasks and costs, both the Architect and the Owner need to determine and delineate all of the services that the Architect will perform or supervise in Articles 3 and 4 of the B101.

A. **Scope of Basic Services**

Section 3.1 of the B101 defines “Basic Services” as “those described in this Article 3 and include usual and customary structural, mechanical, and electrical engineering services” and then states that “Services not set forth in this Article 3 are Supplemental or Additional Services.” Article 3 then delineates the Architect’s Basic Services during the schematic design phase, design development phase, construction documents phase, procurement phase and construction phase of the Owner’s construction project.

From the Architect’s perspective, Article 3, and arguably the entirety of the B101 form agreement, provides adequate protection from the risks associated with an undefined scope of work. For example, the Architect is entitled to “order” certain minor changes in the Work without consulting the Owner. Additionally, B101 specifically places the burden to the Owner to provide accurate, complete and timely information to the Architect in order for him/her to complete its services.² New language in the B101-2017 form states that the Architect is entitled to rely upon such Owner representations and “**shall not be responsible**” for any errors or omissions in representations by the Owner or its consultants.³ Also, to the extent that the Owner provides a directive or substitution or accepts non-conforming Work, the Architect is not responsible unless it provides **written** approval.⁴

For Owners, Article 3 is deliberately vague and protective of the Architect, both at the Owner’s expense. An Owner would prefer a version of Section 3.1 that provides clearer definition
of the “usual and customary” services required by the Architect. For example, an Owner could propose language to replace Section 3.1 of B101 similar to the following:

The Architect will provide all professional services necessary for the complete design and construction documentation of the Project. The Architect agrees that the Basic Services Fee, as stated in this Agreement, represents adequate and sufficient compensation for its timely provision of all professional Basic Services (including those of its consulting or retained structural, mechanical, electrical, plumbing, and civil, and other consulting engineers) necessary to completely design the Project and prepare Construction Documents that fully indicate the requirements for construction of the Work, whether or not those Services are individually listed or referred to in this Agreement, the only exceptions to this being: (1) the cost of those services that are provided by third parties and that are expressly designated herein as being “the Owner’s responsibility” or “Owner-provided”; and (2) the cost of those engineering or consulting Services that become necessary as a result of an Owner-directed change in Project scope affecting the Architect (and that are the subject of a written agreement for Additional Services between the Owner and Architect).

In the new Section 3.1, as proposed by the Owner, the Architect is fully responsible for any and all services required for a complete design and all of the documentation required by a Contractor, except for the cost of services listed as “the Owner’s responsibility” or those services brought about by a change in the design as requested by the Owner. A substantially similar provision could be crafted by an Architect that limits its services in the opposite manner as the above provision. Additionally, as part of its Schematic Design, Design Development and Construction Documents Phase Services, the Owner should require language providing that, “The Architect will coordinate its work with the Owner’s and the Contractor’s consultants for those portions of the design prepared by others.”

B. Review of Substitutions

Substitutions are requests, generally by the contractor, to replace a specified product or system with another that is arguably equally as suitable. A substitution may be requested for multiple reasons, including convenience, lack of availability or price escalation of the specified
product and for convenience such as saving money or time. Substitutions are also routinely requested when a product is not specifically designated in the construction documents or is designated with the phrase “or equal.”

As contained within the B101, consideration of requests for substitutions are contained within the Architect’s Procurement Phase Services, no longer as a Basic Service but now provided as an Additional Service, as follows:

§ 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.

* * *

§ 3.5.3.3. If the Proposal 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 contractors.

As written, the B101 contemplates that, upon written authorization by the Owner, the Architect will consider substitutions during the procurement process if requests for such are permitted by the bidding documents. These services are now considered Additional Services in the B101-2017 and must be paid accordingly.5 Despite language in the B101 specifically directed to the procurement process only, as stated previously, the B101 states explicitly that “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.”6

During the negotiation phase of the Owner-Architect agreement, the Owner in particular must be prudent when determining how proposed substitutions are reviewed. Without adequate consideration before contract execution, it is easy to comprehend a scenario where a contractor’s Request for Information transforms into a substitution with significant ramifications to the project and results in changes to the design intent, Additional Services and multiple costly change orders.
The Owner should also note the B101’s standard language, which states that the Architect “shall review and approve, or take other appropriate action upon, the Contractor’s submittals…but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents.” Additionally, as discussed further, the Architect’s review of submittals could ultimately be considered an Additional Service, and suddenly become an unexpected cost of the Project attributable to the Owner.

In order to adequately establish expectations, reduce costs and decrease the potential for disputes, the Parties must address, and the Agreement must reflect: (1) who is authorized to request a substitution (e.g. just the Owner or the Contractor and the Owner), (2) whether the Owner wants to have final approval of each and every substitution, (3) whether the Architect’s review and approval of each substitution are considered part of the Basic Services, Supplemental Services or Additional Services; and (4) in what manner the substitution should be formally approved.

C. “Additional” Services

As noted earlier in this paper, B101-2017 creates a new designation for “additional services.” Specifically, the formerly named “Additional” Services are now considered and broken into two types of services: “Additional Services” and “Supplemental Services.” “Supplemental” Services are merely one category of the formerly named Additional Services under the auspices of a new title. Also included within the B101-2017 are the newly minted and rebranded “Additional Services”, which are discussed in detail herein and should also be considered by the Owner prior to contract execution.

As indicated earlier, Section 3.1 of the B101 states that Additional Services include required services that are not considered part of the Basic Services and, likewise, not designated as Supplemental Services. Supplemental Services, which are delineated within Section 4.1.1, must
be specifically designated as the responsibility of the Architect before the agreement is executed. The table of available supplemental services, located within Section 4.1.1 of the B101, references multiple types of service as well as provides space for the Parties to designate the responsible entity: either the Architect, the Owner or not provided.

Additional Services, unlike Basic and Supplemental Services remain largely undefined in scope or cost at the time of contract execution. Specifically, Additional Services may be provided with written Owner authorization (regarding submittals and those items contained within Section 4.2.1) or initially without Owner consent, in an effort to avoid delay in the Construction Phase (as to those items contained within Section 4.2.2) of the Project.

Although B101 contains certain protections to both the Owner and Architect regarding the need for and number of Additional Services required, i.e., requirements of written Owner authorization and/or reasonable compensation to the Architect in the event the Owner determines Additional Services not required, in an effort to reduce and manage costs the Parties must understand, discuss and, finally, quantify the potential Additional Services required during the Project.

The Owner, in particular, must understand the circumstances when Additional Services may be provided and take appropriate care to consider the potential impact of Additional Services to the Project’s cost and schedule. For example, although the Architect must generally obtain the Owner’s written authorization before proceeding with Additional Services, the Architect is entitled to additional time and an “appropriate adjustment” in the Architect’s schedule when providing such services. Additionally, the Architect may be entitled to compensation for Additional Services provided during the Construction Phase regardless of whether the Owner authorizes the services or not.
Both parties must spend adequate time to consider and quantify the number of times the Architect is expected to perform site visits, reviews of Shop Drawings, Product Data items and similar submittals, and inspections of the work to determine substantial or final completion. The B101 provides for “fill in the blanks” for the number of times the Architect must provide these Construction Phase Services and, if and when that number is exceeded, further Construction Phase Services will be considered Additional Services.\textsuperscript{11}

Further, both parties must review the B101 regarding Additional Services already contemplated as well as those which require Owner and Architect input. Regarding the Architect, in particular, Section 4.2 of the B101 is fairly detailed and provides the Architect the ability to set out a reasonable limit on the number of times they will perform specific services. By carefully planning and estimating, the Architect can delineate the extent of the Additional Services upfront, saving potential disputes and claims at a later date. It is also important for the parties to agree on how the Architect is going to be compensated for such Additional Services by filling out Section 11.3 of the B101.

Alternatively, the Owner should negotiate such that the Architect agrees to provide, as part of its Basic Services, some of the services listed as Supplemental and Additional Services. Also, the Owner’s counsel should request change to the B101’s compensation language contained with Article 11, such that Supplemental Services are within the scope of the Basic Services fee, whereas the remainder of the agreement does not change, particularly regarding the language in Section 4.1 that Supplemental Services are outside of the contract.

II. LIABILITY OF ARCHITECT

Risk, and the transfer of it, are at the core of contract negotiation. When reviewing the B101 as well as any construction-related agreement, both the Owner and Architect must consider
the legal and monetary implications of contractual risk transfer and the resultant exposure to liability. The provisions within the B101 that are likely to be altered in regard to liability of the Architect include language regrading indemnification, insurability of any redefinition of the standard of care and limitation of liability provisions.

A. **Indemnification Provisions**

The B101 does not require the Architect to indemnify the Owner for claims brought by third parties related to the design services. As written, in the event of a large scale design failure, indemnification provisions, or the lack thereof, would be especially important to the Owner. As for the Architect the B101 is extremely favorable regarding the Architect’s lack of indemnification of the Owner.

From the Owner’s perspective, without an adequate indemnification provision, it is often the case that available insurance proceeds do not adequately address the Owner’s potential risk and losses in excess of the available proceeds are not collectible. The Architect would prefer that there be no requirement to indemnify the Owner, both from a risk allocation standpoint and because certain risks included in most indemnification clauses are not insurable. By way of compromise, the Parties may wish to have a draft a mutual indemnification provision under which each party is liable to the other only for its own negligence and/or claims, losses, and damages resulting from the other party’s breach of its obligations under the contract.

In the context of this paper, it remains difficult, if not impossible, to broadly state when, or if, an indemnification obligation is enforceable. Each state’s statute, and relevant case law, contains express language whether and to what extent a design professional may indemnify another party. In many states, agreements that contravene the statutory requirements may be void. Both
parties must determine whether one of the many broad anti-indemnification state statutes applies to ensure that the Agreement does not contain an indemnification provision in violation of the law.

In the absence of an indemnification provision, Owners would be advised to pay particular attention to Article 2 of the B101 regarding the Architect’s responsibilities and insurance requirements. In particular, the insurance requirements should remain reasonable, but ensure that the Owner is adequately protected from a risk standpoint. The B101 contains language providing insurance that the Architect must maintain and states that the Architect must list the Owner as an additional insured on its commercial general liability and automobile primary and excess or umbrella policies. Additionally, the B101 states affirmatively that the Architect “shall provide certificates of insurance to the Owner” to evidence compliance with the AIA.\textsuperscript{12}

At the very least, however, the Owner should consider requiring project-specific professional liability insurance and require the Architect to supply an endorsement for each policy, before contract execution, that indicates expressly that the Owner is listed as an additional insured. Additionally, the Owner’s counsel should add language similar to the following, as part of Article 2 – Architect’s Responsibilities:

\textbf{§ 2.5.9} The Architect shall ensure that all of its consultants also carry insurance in the same levels required of the Architect.

Additionally, the Owner’s counsel would do well to include language that allows the Owner to withhold payment from the Architect during a claim. Sample language, which alters Section 11 regarding progress payments, follows:

\textbf{§ 11.10.2.2} The Owner shall may not withhold amounts from the Architect’s compensation as reasonably necessary to protect the Owner from loss resulting from Owner Claims against the Architect to impose a penalty or liquidated damages on the Architect, or to offset sums requested by or paid to contractors for the cost of changes in the Work, unless the Architect agrees or has been found liable for the amounts in a binding dispute resolution proceeding.
B. Insurability of Redefinition of Standard of Care

The Insurability of a particular standard of care imputed to an Architect in an Owner-Architect agreement is an issue rife with potential peril for the Architect. Section 2.1 of the B101 contains language regarding the Architect’s standard of care as follows:

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.13

From the perspective of the Architect’s counsel, the language in B101 regarding the Architect’s standard of care is straight forward and generally insurable. Architects, and their counsel, should carefully scrutinize any attempts by the Owner to expand the standard of care beyond just negligence. These changes usually come in the form of attempts to (1) create a fiduciary relationship between the parties, (2) ensure an error-free design, (3) create warranties and guarantees that are excluded under a CGL policy, (4) require a blanket compliance with all laws and code (not just a reasonable interpretation of the same), and (5) make the Architect responsible for the fault or negligence of a third party (e.g. an Owner’s consultant). A careful review of any attempts at redefining the Architect’s standard of care will ensure that the Architect is only agreeing to perform work at the standard by which they are insured.

Architects cannot insure risks in excess of the Architect’s professional standard of care. The AIA design agreements consistently add the standard of care or vague language to prevent Architects from absorbing uninsured business or contractual risks. From the Owner’s perspective, however, some risks are inherent to business operations and, although uninsurable, are nevertheless risks that the design contract should assign to the Architect. For example, the Owner and the Contractor have uninsurable risks with each construction agreement and project. The Architect should bear the risk of providing the services it was contracted perform, including: (a)
designing the project to comply with codes and regulations, (b) conducting site inspections, reviewing submittals, and responding to RFIs with professional care to check for conformity with the contract documents (rather than the generalized language in the standard B101 and A201), and (c) when time is of the essence, taking on business risk for delaying the Owner’s project.

C. **Limitation of Liability Provisions**

The B101 does not contain an express limitation of liability provision. The Architect, in particular, would likely benefit from the inclusion of such a provision. From the perspective of the Architect, without such a provision and limitation the Architect could be liable to the Owner for damages above and beyond its insurance policy limits or ability to pay.

Often, liability limitations are set at the amount paid for services during the Project or the amount of insurance coverage that the Architect is required to carry under the contract. Although Owners are generally not fond of limiting an Architect’s liability, the Owner could consider offering to pay the architect an additional fee for the architect’s acceptance of such liability, without a limit, or reimbursing the architect for costs related to additional insurance coverage. In both instances, the Owner will be adequately protected in the event that it experiences damages above the Architect’s liability limitation. Thus, it may be prudent for both parties to add a limitation of liability provision to the contract.

As Owner’s counsel, in exchange for its heightened risk allocation in the B101 agreement, the Owner could agree to limit the Architect’s liability using language similar to the following example:

> Notwithstanding any other provision of this Agreement, the aggregate liability of the Architect to the Owner shall not exceed the greater of (1) the amount of insurance coverage available to pay the claim before deducting the cost of defense, and (2) the Architect’s total fee, as adjusted for Additional and Supplemental Services and regardless of whether the Owner actually paid the fee.
Importantly, after including such language within the Agreement, the Owner should require the Architect and its subconsultants to carry insurance adequate to protect the Owner from design errors and omissions on the Project. Likewise, the Owner must be aware that, if the Architect will be required to buy additional insurance to perform the Work associated with the Agreement, the Owner will need to pay for the extra insurance or hire an architect that normally carries enough insurance for the project.

D. **Waiver of Consequential Damages**

Section 8.1.3 of the B101 contains a mutual waiver of consequential damages.

The Architect and Owner waive consequential damages for claims, disputes, or other matters in question, arising out of or relating to this Agreement. This mutual waiver is applicable, without limitation, to all consequential damages due to either party’s termination of this Agreement, except as specifically provided in Section 9.7.

The fees within Section 9.7, which are specifically not contained within the Parties’ mutual waiver of consequential damages, include further compensation available to the Architect in the event that the Owner terminates the Agreement for convenience or the Architect terminates the Agreement due to suspension of the Project, as provided within the B101. The fees, which are to be agreed on by the parties prior to contract execution, relate to termination and licensing fees.

Consequential damages, which are generally provided for by each state’s common law, are those damages, losses or injuries that do not directly relate to the wrongful conduct of a party, but from some of the consequences or results of such conduct. Although both parties may incur consequential damages, or indirect expenses, as a result of claims, disputes or termination of the Agreement, it is widely settled that the Owner is most likely to incur these indirect expenses in the event of a breach.
Consequential damages incurred by the Owner may include (1) loss of use, (2) loss of income, (3) loss of profit, and (4) loss of or a greater expense for financing. Consequential damages incurred by the Architect might include lost profits from work the architect had to turn down to perform under the contract or an increase in principal office expenses. One of the primary difficulties in considering this type of damage is its foreseeability, or lack thereof.

When representing the Owner, counsel should attempt to narrow the definition of consequential damages to thereby establish that certain types of damage (e.g., damages for delay) are both foreseeable and within the contemplation of the Parties at the time of contracting. Even though Architects rarely agree to an Owner’s alteration of the B101’s language regarding consequential damages, consequential damages are important to the Owner in the event it needs to hold the architect accountable—to the extent of the Architect’s insurance—for extended general conditions properly demanded by the Contractor in situations in which the design defect results in an extension of time.

In the event that the parties do not agree to a mutual waiver of consequential damages, the parties may consider drafting a provision, specific to their particular state law and project, that (1) implements specific limits on each party’s liability for each specific type of damages that they may incur, and (2) limits the waiver of consequential damages to specific categories. A draft, modified mutual waiver of consequential damages provision follows:

The Architect and Owner waive consequential damages for claims, disputes, or other matters in question, arising out of or relating to this Agreement, except as follows: as specifically provided in Section 9.7 as well as damages incurred by Owner for (1) loss of use, (2) loss of income and (3) loss of profit and/or damages incurred by Architect for lost profit from the Work and principal office expenses. This mutual waiver is applicable, without limitation, to all consequential damages due to either party’s termination of this Agreement, except as specifically provided in Section 9.7.
III. CONTRACT ADMINISTRATION

In addition to the Basic Services provided by the Architect during the design phase, as an independent contractor of the Owner, the Architect often advises and consults with the Owner during the Procurement and Construction Phases of the Project. It is important that the Owner-Architect Agreement adequately address the Architect’s services in both capacities.

A. Site Inspection Requirements

As part of the Construction Phase Services, the B101 imposes requirements upon the Architect to evaluate the work of the Owner’s Contractor. In particular, the B101 requires that the Architect “visit the site at intervals appropriate to the stage of construction” or as otherwise required as a designated Additional Service. On the basis of these visits, the Architect is required to “keep the Owner reasonably informed about the progress and quality of the portion of the work completed, and promptly notify” the Owner of certain defined deviations, deficiencies and deficiencies in the work. Although the Architect is given the authority to reject work not in conformance with the Contract Documents, any such exercise of this discretion does not create a duty or responsibility of the Architect to the Contractor.

From the Owner’s perspective, it would be advisable to require site-inspections at designated intervals to confirm that the work is progressing. Additionally, if the Owner has expectations that the Architect prepare and provide reports following such inspections, the Agreement should set forth the timing and content of such reports. Ultimately, since site-inspections in excess of the number designated within Section 4.2.3, regarding Additional Services during the Construction Phase Services, will be compensated as Additional Services, both parties will be best served by discussing and designate the number of times and particular time frames or milestones for site-inspections.
Sample language could include the following:

§ 3.6.1.4 The Architect will assist the Contractor and will respond to comments from the Owner during the inspection processes.

§ 3.6.2 Evaluations of the 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 evaluate and become generally familiar with the progress and quality of the portion of the Work completed, and to determine in general, if whether 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, but shall conduct inspections and evaluate the Work using professional care. 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.

§ 3.6.2.2 The Architect shall have the authority to reject Work that does not conform to the Contract Documents unless the Owner gives informed consent to the nonconforming Work after full disclosure from the Architect, waives the requirement in writing, and accepts the nonconforming Work. Whenever the Architect considers it necessary or advisable, the Architect shall have the authority to require inspection or testing of the Work in accordance with the provisions of the Contract Documents, whether or not the Work is fabricated, installed or completed. However, neither the authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, suppliers, their agents or employees, or other persons or entities performing portions of the Work.

§ 3.6.2.3 The Architect shall, using professional care, interpret and decide matters concerning performance under, and requirements of, the Contract Documents on written request of either the Owner or Contractor. The Architect’s response to such requests shall be made in writing within any time limits agreed upon or otherwise with reasonable promptness.

§ 3.6.2.4 Interpretations and decisions of the Architect shall be made consistent with the intent of and reasonably inferable from the Contract Documents and shall be in writing or in the form of drawings. When making such interpretations and decisions, the Architect shall endeavor to secure faithful performance by both Owner and Contractor, shall not show partiality to either, and shall not be liable for results of interpretations or decisions rendered in good faith. The Architect’s
decisions on matters relating to aesthetic effect shall be final if consistent with the intent expressed in the Contract Documents.

B. Submittal Review

As part of the Basic Services stated in Article 3 of the B101 form, the Architect reviews the Contractor’s proposed submittal schedule and submittals. Absent a designated time frame for its review, the Architect will review the submittal schedule and any submittals “with reasonable promptness…to permit adequate review.”  Although the Architect will review and approve submittals such as Product Data Samples and Shop Drawings, its review is only for the “limited purpose of checking for conformance with the information given and the design concept expressed in the Contract Documents.”

The Architect also generally reviews and responds to requests for information about the Contract Documents. Similarly, the Architect will review and respond to requests for information with reasonable promptness, unless otherwise agreed upon. In the event appropriate, the “Architect shall prepare and issue supplemental Drawings and Specifications in response to the requests for information.” The Architect may also order minor changes in the work “that are consistent with the intent of the Contract Document and do not involve an adjustment in the Contract Sum or an extension of the Contract Time.”

The Owner should remain aware that, following the Architect’s review and approval, it may incur costs for Additional Services. From the Owner’s (and Architect’s) perspective, both parties would be well served to designate specific time frames for the Architect’s review of submittals, RFI’s and/or change order requests. By specifying a specific time frame, both parties are aware of the expectations. Additionally, the Owner should provide for a specific number of days that will be tied in and conform with the Contractor’s general conditions within the Owner-Contractor agreement in A201.
When considering the B101 regarding submittals, the Owner’s counsel should consider language providing the Owner with final say on all approvals and responses and, similarly, require that the Architect inform the Owner when such requests are received as well as provide the Owner with the Architect’s final responses. Another suggestion is to require that the Architect provide written approvals and responses, which would prevent the Architect from providing drawings as its sole response. Sample alternative language to the B101 follows:

§ 3.6.4.1 The Architect shall review the Contractor’s submittal schedule and shall not unreasonably delay or withhold approval of the schedule. The Architect’s action in reviewing submittals shall be taken in accordance with the approved submittal schedule or, in the absence of an approved submittal schedule, within seven (7) days after receiving the submittal ready for final approval. The Architect’s action shall be taken with reasonable promptness while allowing sufficient time, in the Architect’s professional judgment, to permit adequate review.

§ 3.6.4.2 Using professional care, the Architect shall review and approve, or take other appropriate action upon, the Contractor’s submittals, including without limitation such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents…

C. Role in Decision Making

As provided in the B101, during the Construction Phase Services and unless otherwise so designated by the Owner and Contractor, the Architect is the Initial Decision Maker on “claims between the Owner and Contractor as provided in the Contract Documents.” Specifically, the Architect is the Initial Decision Maker on matters concerning performance pursuant to the Contract Documents:

The Architect shall interpret and decide matters concerning performance under, and requirements of, the Contract Documents on written request of either the Owner or Contractor. The Architect’s response to such requests shall be made in writing within any time limits agreed upon or otherwise with reasonable promptness.

Necessarily, the Architect must render decisions in accordance with the Contract Documents and remain impartial:
Interpretations and decisions of the Architect shall be consistent with the intent of, and reasonably inferable from, the Contract Documents and shall be in writing or in the form of drawings. When making such interpretations and decisions, the Architect shall endeavor to secure faithful performance by both Owner and Contractor, shall not show partiality to either, and shall not be liable for results of interpretations or decisions rendered in good faith. The Architect’s decisions on matters relating to aesthetic effect shall be final if consistent with the intent expressed in the Contract Documents.25

The Architect should determine initially whether the Architect even wants the responsibility of the Initial Decision Maker. If not, Owner’s counsel should remove the Initial Decision Maker language from the A- and B-Series AIA Forms such that the Owner is required to respond to Claims within a proscribed period of time and the Architect merely serves as an advisor. Therefore, the Architect is not required to decide the claim and the Owner, from a process perspective, will consult with counsel at the first sign of a claim. In this instance, Section 3.6.2.4 of the B101 must be removed or altered and appropriate changes, as will be discussed further, should be made to Article 8, Claims and Disputes. Sample language follows:

§ 3.6.2.3 The Architect shall, using professional care, interpret and decide matters concerning performance under, and requirements of, the Contract Documents on written request of either the Owner or Contractor. The Architect’s response to such requests shall be made in writing within any time limits agreed upon or otherwise with reasonable promptness.

§ 3.6.2.4 Interpretations and decisions of the Architect shall be consistent with the intent of, and reasonably inferable from, the Contract Documents and shall be in writing or in the form of drawings. When making such interpretations and decisions, the Architect shall endeavor to secure faithful performance by both Owner and Contractor, shall not show partiality to either, and shall not be liable for results of interpretations or decisions rendered in good faith. The Architect’s decisions on matters relating to aesthetic effect shall be final if consistent with the intent expressed in the Contract Documents.

§ 3.6.2.5 Unless the Owner and Contractor designate another person to serve as an Initial Decision Maker, as that term is defined in AIA Document A201–2017, the Architect shall render initial decisions on Claims between the Owner and Contractor as provided in the Contract Documents. Not used.
Except for stating that compensation related to assisting the Initial Decision Maker, assuming that another party is selected, is recoverable as Additional Services, the B101 is silent on payment to the Architect. Evaluating a claim could require the Architect to expend substantial time. Given the potential risk that inherently comes from issuing interpretations and decisions as the Initial Decision Maker, the Architect should consider suggesting contract language that requires indemnification from the Owner and Contractor.

Both the Owner and the Contractor have reasons to believe that the Architect may have conflicts of interest as the Initial Decision Maker. These conflict can arise from the Architect interpreting its own design and, based upon the Architect’s findings or decisions, requiring the Owner to incur fees for Additional Services. Similarly, the Contractor rarely considers the Architect as anything more than the “creature” of the Owner. The Initial Decision process, therefore, rarely resolves disputes.

A possible solution to the potential issues by both the Owner and Architect is to treat the Architect’s findings as a non-binding settlement offer between the Owner and Contractor. Additionally, or alternatively, the Parties can require that the Owner and Contractor both compensate the Architect equally for its Initial Decision-Marking services at an agreed rate and/or specifically providing the Architect authority to consult with counsel or a neutral third-party.

IV. INTELLECTUAL PROPERTY OWNERSHIP AND USE

Unless assigned, the Architect retains copyright ownership in its architectural works. 17 U.S.C. § 102. From each parties’ perspective, the Architect would seek to retain full ownership and the Owner would prefer assignment of the copyright ownership in architectural works. With the advent of Building Information Modeling and Digital Data, these protections, and the use of the work model, are an evolving matter.
A. **Ownership and Use**

In the B101, not surprisingly, the Architect retains all property rights, including copyright ownership, of its Instruments of Service such as the Drawings and Specifications. The Owner, however, is granted 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.” The B101-2017 now states that the Owner’s right to use the Instruments of Service only arises “provided that the Owner substantially performs its obligations, under [the] Agreement, including prompt payment of all sums due pursuant to Article 9 [regarding Termination or Suspension] and Article 11 [regarding Compensation].” Previous iterations of the B101 granted the Owner a nonexclusive license upon execution of the Agreement. Further, if the Architect terminates the agreement for cause, the Owner’s license terminates.

The B101 requires that, if the Owner terminates the Agreement for convenience or the Architect terminates the Agreement following an Owner suspension of the Project for more than ninety (90) cumulative days for reasons other than the fault of the Architect, the Owner must pay the Architect a Licensing Fee. The requirement for the Owner to pay the Architect a Licensing Fee is mandated “if the Owner intends to continue using the Architect’s Instruments of Service.” Additionally, unless the Owner terminates the Agreement for cause, the Architect may include photographic or artistic representations of the design on its promotional and professional materials and shall be provided reasonable access to the completed Project. The Architect’s rights to include photographic or artistic representations of its design otherwise survives the termination of the Agreement.

From the Owner’s perspective, the B101 language is too favorable to the Architect. The Owner can pay Architect in full for Basic Services, but be unable to use the Instruments of Service.
For example, if the Owner terminates the Architect for cause, pursuant to Article 9, its license to use the Architect’s Instruments of Service terminates. Arguably, from the standpoint of the Owner, the recent changes to the B101 may not allow the Owner to use the design for which it paid. The Architect, however, would argue that it provides a professional service, not a product, and if the Architect is not paid for its services, then the Owner should not be able to use the Instruments of Service. Regardless of the perspective, both the Owner and the Architect must be aware of the nature of ownership and use of the Architect’s copyright to its architectural works.

Sample B101 contract language, in which the Architect assigns rights in its copyright to the owner upon receipt of payment, while reserving a license to the material follows:

**ARTICLE 7 COPYRIGHTS AND LICENSES**

§ 7.1 The Architect and the Owner warrant that in transmitting Instruments of Service, or any other information, the transmitting party is the copyright owner of such information or has permission from the copyright owner to transmit such information for its use on the Project.

§ 7.2 Except as otherwise provided in this Agreement, the Architect and the Architect’s consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and shall retain all common law, statutory and other reserved rights, including copyrights. Submission or distribution of Instruments of Service to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publication in derogation of the reserved rights of the Architect and the Architect’s consultants.

§ 7.3 The Architect shall, upon the Architect’s receipt of payment from the Owner, assign and convey to the Owner all common law, statutory and other reserved rights, including copyrights, in Instruments of Service for which the Owner has made progress payments; save and except, that the Architect shall not assign and convey to the Owner any rights in standard details or specifications that the Architect reuses from Project to Project. The Architect grants to the Owner a perpetual, irrevocable, nonexclusive license to use the Architect’s standard details and specifications contained in the 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. The Architect shall obtain similar assignments of rights and perpetual,
irrevocable, nonexclusive licenses from the Architect’s consultants in favor of the Owner consistent with this Agreement. The license granted under this section permits the Owner to authorize the Contractor, Subcontractors, Sub-subcontractors, and suppliers, as well as the Owner’s consultants and separate contractors, to reproduce applicable portions of the Instruments of Service, subject to any protocols established pursuant to Section 1.3, solely and exclusively for use in performing services or construction for the Project. 

If the Architect rightfully terminates this Agreement for cause as provided in Section 9.4, the license granted in this Section 7.3 shall terminate.

§ 7.3.1 In the event the Owner uses the Instruments of Service without retaining the authors of the Instruments of Service, the Owner releases the Architect and Architect’s consultant(s) from all claims and causes of action arising from such uses. Before using any Instrument of Service for a purpose not related to this Project, the Owner shall redact the professional seals of the Architect and any engineers involved in the Project. The Owner, to the extent permitted by law, further agrees to indemnify and hold harmless the Architect and its consultants from all costs and expenses, including the cost of defense, related to claims and causes of action asserted by any third person or entity to the extent such costs and expenses arise from the Owner’s use of the Instruments of Service under this Section 7.3.1.

The terms of this Section 7.3.1 shall not apply if the Owner rightfully terminates this Agreement for cause under Section 9.4.

7.4 Except for the licenses and assignments granted in this Article 7, no other license or right shall be deemed granted or implied under this Agreement. The Owner shall not assign, delegate, sublicense, pledge or otherwise transfer any license granted herein to another party without the prior written agreement of the Architect—author of the Instrument of Service. Any unauthorized use of the Instruments of Service shall be at the Owner’s sole risk and without liability to the Architect and the Architect’s consultants.

§ 7.5 Except as otherwise stated in Section 7.3, the provisions of this Article 7 shall survive the termination of this Agreement.

One difficulty with assigning ownership of the drawings to the Owner is whether the Architect retains ownership of the copyrights to its own standard details (that the Architect reuses on multiple projects). The above language deals with this problem, but one obvious issue is that the term “standard detail” is undefined and defies definition. Other options for handling copyrights in the Instruments of Service that are fair to the Owner include allowing the Architect to retain ownership
of its copyright, but grant the Owner an irrevocable license to use the Instruments of Service after payment for purposes related to the construction, maintenance and use or operation of the project.

B. New Considerations

In addition to the changes to the B101 discussed in the previous subsection of this paper, the B101 – 2017 now includes specific reference to Building Information Modeling. The B101 now states explicitly that

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.\(^{32}\)

In addition, the B101 provides expressly when the parties may, and may not, rely upon the information contained in such a model:

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.\(^{33}\)

Ideally prior to execution of the Agreement, but at the latest early in the contract term, both parties must discuss and ultimately agree upon protocols regarding use of Instruments of Service in the digital form. Such protocols should include development, transmission, use and exchange of digital data during the term of the Project. As expressly stated in the B101, reliance upon all or a portion of a building information model without a protocol in place is entirely at the risk of the relying party. Ultimately, the Parties should address a simple e-mail communication protocol for written notice (not including claims) that may be used as an alternative to the BIM/Digital Data
Protocol document published by the AIA, which arguably is too complicated for most construction projects.

V. DISPUTE RESOLUTION

Although there are few changes to Article 8, Claims and Disputes, in the B101 – 2017 document, one notable alteration regards clarification regarding methods of dispute resolution. Specifically, if the Owner and the Architect “do not select a method of binding dispute resolution, or do not independently agree in writing to a binding dispute resolution method other than litigation, the dispute will be resolved in a court of competent jurisdiction.”

The provisions that remain absent within Article 8, however, may be of interest to both the Owner and Architect, including (1) no requirement for continued performance during resolution of the claim or dispute; and (2) no provision for payment of attorney’s fees by the prevailing party. The language below should be added to the B101 regarding Claims and Dispute to address the gap and to make mediation concurrent with binding dispute resolution, rather than a condition precedent to it:

§ 8.5 To the fullest extent permitted by law, the prevailing party in any litigation or arbitration shall recover its reasonable attorneys’ fees and litigation or arbitration expenses from the losing party. For purposes of this provision, the “prevailing party” is a claimant that obtained a judgment or arbitration award of at least fifty percent (50%) of the monetary amount sought in a claim or is a respondent against which a claim is asserted which results in a judgment or award of less than fifty percent (50%) of the amount sought in the claim defended. When a respondent agrees in writing that some amount is owed, but not the entire amount demanded by the claimant, the claim amount for purposes of determining the prevailing party shall be determined based on the difference between the total amount claimed by a claimant and the amount conceded by the respondent party with respect to such claim.

§ 8.6 The Architect shall ensure that all of its contracts with its consultants, if any, shall bind the consultants to the Architect to the same extent that the Architect is bound to the Owner, including without limitation all termination and dispute resolution procedures.
OWNER-CONTRACTOR AGREEMENT

(MODELED ON A101-2017/A201-2017)

Just as the design agreement requires changes to reallocate risk between the Architect and the Owner, the contract for construction also needs adjustments to the risk allocation to make it fair to the parties and to tailor it to the particular project and jurisdiction. A contracting party’s pain threshold for risk necessarily varies from project to project, depending on the size and location of Project, length of the Project, trade contractor availability and built-in profit margin. A generic industry form, therefore, is a good starting point, but seldom a good end point, for all commercial projects in all states. The following section address specific risk allocation issues important to Owners and Contractors.

I. OWNER FINANCIAL ABILITY

The quality and sufficiency of the Owner’s ability to pay the Contractor for the work is a significant concern to both parties in a construction contract. While contractors have significant interests in avoiding Owner payment defaults as a result insufficient funds, the AIA forms do not fully address or implement common lender requirements that have a significant effect on the project. The Owner’s counsel, therefore, should review owner/lender loan documents to ensure that the contract for construction mirrors provisions in the loan documents that may affect the Owner’s ability to perform.

The A201 references the Owner’s construction lender only twice, both times in Section 13.2.2 dealing with collateral assignment of the contract for construction to the lender:

The Owner may, without consent of the Contractor, assign the Contract to a lender providing construction financing for the Project, if the lender assumes the Owner’s rights and obligations under the Contract Documents. The Contractor shall execute all consents reasonably required to facilitate the assignment.
In addition, Section 2.2 regards the Owner’s “financial arrangements,” a collective, nonspecific reference to the Owner’s own resources and the additional funding that the Owner may have obtained from a construction lender or other third party.

Examples of areas for further consideration, which are not addressed in the standard AIA construction document, include mismatches between the method and timing of payments to the Contractor in relation to payments made to the Owner under the loan agreement, retainage, submission requirements (e.g. if the loan agreement requires that a certain form be submitted by the contractor with each draw request, but the construction contract does not), lender approval of change orders and the method and time frame for the same, subordination of mechanics’ lien rights to the construction loan security documents, and conditions for final payment to the Contractor.

A. Collateral Assignment

Section 13.2.2 of A201 permits the Owner to collaterally assign the Owner’s rights and obligations to its construction lender. The Owner’s loan documents generally contain collateral assignment provisions that require the Owner to assign the contract for construction before the project starts. The lender may or may not exercise such assignment if the Owner defaults on the loan.

Frequently, lenders seek concession from contractors, including an agreement to allow the lender to exercise the collateral assignment without assuming pre-exercise (payment) obligations to the Contractor. In short, lenders seek to give itself the ability to direct the Contractor to complete the work specified in the contract without necessarily curing the defaults of the Owner vis-à-vis the Contractor. The AIA language protects the Owner, but not the Contractor, when it requires the Contractor to sign “reasonable” consents. As such, Contractors should require amendments to this provision, such as the following:
The Owner may, without consent of the Contractor, collaterally assign the Contract to a lender providing construction financing for the Project, if the lender assumes the Owner’s rights and obligations under the Contract Documents. The Contractor shall execute all those consents reasonably required to facilitate the assignment; provided, however, that such consents shall not require the Contractor to continue to perform the Work unless the assignee lender assumes all obligations of the Owner to the Contractor and cures all defaults of the Owner.

B. Payment Provisions

Similarly, the Owner’s loan covenants may also impact progress payment requirements in a manner that require the Owner to modify A101 Section 5.1 and A201 Section 9.3 to conform to those covenants. For example, the Owner’s loan covenants could require that the Contractor submit additional substantiating documents along with an application for payment or could include a lengthier time frame, not specifically taken into account in the Owner- Contractor Agreement, for the lender’s review of a Certificate of Payment. Thus, Section 9.3.1 of the A201 should be amended as follows:

The Contractor shall submit to the Architect and the Owner itemized Applications for Payment prepared in accordance with the schedule of values for completed portions of the Work and using a form reasonably acceptable to the Owner, and Architect, and Owner’s lender, as specifically delineated in the Contract Documents and loan documents attached to the Agreement as Exhibit [x]. Such application shall be a sworn statement, duly notarized, and properly supported by such data substantiating the Contractor’s right to payment required under Exhibit __ the Owner and Architect may reasonably require, such as copies of requisitions from the Subcontractors and suppliers, and shall reflect retainage if provided for in the Contract Documents.

The Owner should also take into account the timeframe within which it must pay the Contractor under the A101/A201. For instance, under the A101/A201, the Owner may be required to make a progress payment to the Contractor within fourteen (14) days of the Architect’s issuance of a Certificate of Payment; however, the loan documents may require that the lender be provided fourteen (14) days to review and approve the issued Certificate of Payment prior to its release of loan funds. As you can see, the lack of alignment in the timing for progress payments may lead to
a situation arising where the Owner is contractually obligated to make a payment to the Contractor, but the lender has not released loan funds in order for the Owner to make such a payment. Thus, Section 9.6 of the A201 should be amended as follows:

After the Architect has issued a Certificate for Payment, the Owner shall make payment in the manner and within the time provided in the Contract Documents, specifically including the loan documents attached to the Agreement as Exhibit [x], and shall so notify the Architect.

C. Evidence of Owner’s Financial Ability

Section 2.2 of the A201 provides a framework for the Contractor to verify that the Owner is financially capable of meeting its payments obligations under the construction contract. Those provisions state:

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

§ 2.2.2 Following commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner’s obligations under the Contract only if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) the Contractor identifies in writing a reasonable concern regarding the Owner’s ability to make payment when due; or (3) a change in the Work materially changes the Contract Sum. If the Owner fails to provide such evidence, as required, within fourteen days of the Contractor’s request, the Contractor may immediately stop the Work and, in that event, shall notify the Owner that the Work has stopped. However, if the request is made because a change in the Work materially changes the Contract Sum under (3) above, the Contractor may immediately stop only that portion of the Work affected by the change until reasonable evidence is provided. If the Work is stopped under this Section 2.2.2, the Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor’s reasonable costs of shutdown, delay and start-up, plus interest as provided in the Contract Documents.
§ 2.2.3 After the Owner furnishes evidence of financial arrangements under this Section 2.2, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

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

The Contractor, however, may seek to obtain more security in the terms of the contract instead of simply relying on vague, undefined verbiage like “reasonable” and “evidence”. Section 2.2.2 of the A201 may be amended, as follows, to provide the Contractor the ability to determine, whether the evidence provided by the Owner is, in its sole discretion, sufficient.

Following commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence, sufficient evidence, which the Contractor in its discretion deems reasonable, that the Owner has made financial arrangements to fulfill the Owner’s obligations under the Contract only if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) the Contractor identifies in writing a reasonable concern, reasonable concern, which the Contractor in its discretion deems reasonable, regarding the Owner’s ability to make payment when due; or (3) a change in the Work materially changes the Contract Sum. If the Owner fails to provide such evidence, as required, within fourteen days of the Contractor’s request, the Contractor may immediately stop the Work and, in that event, shall notify the Owner that the Work has stopped. However, if the request is made because a change in the Work materially changes the Contract Sum under (3) above, the Contractor may immediately stop only that portion of the Work affected by the change until reasonable evidence is provided. If the Work is stopped under this Section 2.2.2, the Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor’s reasonable costs of shutdown, delay and start-up, plus interest as provided in the Contract Documents.
The above provision, as amended, is Contractor-friendly. A compromise provision may include replacing the subjective “reasonable” standard in favor of a more specific provision that states precisely what constitutes “reasonable evidence” and “reasonable concern.”

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; for the purposes of this Section, one or more letters from a financial institution indicating the assets (cash or undrawn credit) available to the Owner for the Project shall be deemed reasonable evidence of the Owner’s financial ability to fulfill its obligations under the Contract. The Owner shall be required to present such documentation to the Contractor if (1) the Owner fails to make payments to the Contractor as the Contract Documents require or (2) the Contractor identifies in writing a reasonable concern regarding the Owner’s ability to make payment when due, or (3) a single change order increases the Contract Sum more than five percent (5%), or multiple change orders result in an aggregate increase of the Contract Sum more than ten percent (10%) is increased by in the Work materially changes the Contract Sum. If the Owner fails to provide such evidence, as required, within fourteen days of the Contractor’s request, the Contractor may immediately stop the Work and, in that event, shall notify the Owner that the Work has stopped. However, if the request is made because a change in the Work materially changes the Contract Sum under (3) above, the Contractor may immediately stop only that portion of the Work affected by the change until reasonable evidence is provided. If the Work is stopped under this Section 2.2.2, the Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor’s reasonable costs of shutdown, delay and start-up, plus interest as provided in the Contract Documents.

II. IMPROVING THE DELAY PROVISIONS IN A201 SECTION 8.3

The A101 and A201 only thinly address potential changes in the Contract Time, a surprising lack of focus given the degree to which delays arise on many projects, present substantial risks to Owners and Contractors, are not covered by insurance, and generate many Claims. The primary method for preventing claims for additional Contract Time is to clearly define clear benchmarks for the circumstances which entitle the Contractor to extensions of time and the length of such extensions.
The A101/A201 forms leave the determination regarding addition Contract Time, in the event of a potential Claim, to the Architect—and the court or arbitrator reviewing the Architect’s decision—without providing any meaningful guidance to either the Architect or the reviewing finder of fact. If the Contractor or Owner disagree with the Architect, the only option is to make a Claim under Article 15 of the A201. The language dealing with Claims for additional time in Article 15, however, is similarly sparse.

Regarding Disputes, Section 8.3 of the A201 is surprisingly vague for such an important provision in any Owner-Contractor agreement. Specifically, Section 8.3 provides for the following:

If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, or an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor’s control; (4) by delay authorized by the Owner pending mediation or binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine. Claims relating to time shall be made in accordance with applicable provisions of Article 15. This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

Construction projects frequently suffer from delays in substantial completion. Therefore, all standard form construction contracts set a deadline for the Contractor to achieve substantial completion of the Work.

In the AIA form contracts, the “Contract Time” is a fixed number of calendar days after the “Date of Commencement” within which the contractor must achieve “Substantial Completion” of the “Work.” The contracts define the Work as the portion of a “Project” assigned to the Contractor. In short, the project is the entire project, which may require work from one or more different contractors. The portion of the project assigned to a given contractor is the Work of the
contractor’s contract with the owner. Substantial Completion occurs when the Owner can use the Work (NOT the project) for its intended purpose, and often correlates with obtaining a temporary or permanent certificate of occupancy from the local inspection department. Substantial Completion must not be confused with final completion. Typically, the Contractor will achieve Substantial Completion, but have a list of items to complete or correct (a “punch list” in construction speak) and a series of closeout requirements, such as training the Owner’s personnel, providing record drawings and specifications (often called “as-built” drawings, showing the differences between what the contractor built in the field and the original design), and many other requirements. When the Contractor completes the punch list and all close out requirements, the Contractor achieves Final Completion and the Owner must make final payment (typically, releasing any remaining amount held as retainage that is owed to the contractor).

A. Delay

A delay occurs when the Contractor fails to achieve Substantial Completion of the Work on or before the end of the Contract Time, as adjusted from time-to-time by change orders or claims. Because delays are expensive to both the Owner and Contractor alike, they frequently lead to disputes about which party is financially responsible for the losses resulting from a delay. Thus, every construction lawyer needs to understand how delays typically arise on construction projects, the consequences of delays, how the standard form contracts allocate the risk of delays, and what steps an Owner’s construction lawyer can take to minimize the risks and costs of delays to the owner. As indicated more fully below, the AIA forms do not adequately address delay, and construction lawyers need to make the AIA forms’ provisions dealing with delay much more robust than the standard language.
Understanding delay requires a basic (if obvious) conceptual framework. Delays can be caused by the actions of the Owner, Contractor or Architect, force majeure events, or result from unforeseen or unknown conditions. The financial responsibility for delays caused by these risks generally falls to the Owner, hence the term “owner delays.” Some delays are caused by natural events, such as weather, and are the fault of neither the Owner nor the Contractor. Finally, any delays not allocated to the Owner as no fault delays (such as unusual weather) are Contractor delays, for which the Contractor must take financial responsibility.

Weather (and other no fault) delays are “excusable delays”—that is, since neither party is at fault, the Contractor should receive an extension of the contract time, but no additional compensation from the owner. “Compensable delays” are Owner delays—since the risk of delay is allocated to the Owner, the Contractor receives both additional time and additional compensation. All other delay risks are allocated to the Contractor, and the Contractor receives neither additional time nor additional compensation for such delays. Depending on the terms of the Agreement, the Owner may recover actual or liquidated damages for delay when the Contractor is behind schedule on a project without an excusable or compensable delay.

Contractors are generally liable to the Owner for costs incurred by an Owner that the Contractor should have reasonably foreseen at the time the Agreement was made, unless the Contractor can show that responsibility for this type of loss was disclaimed in the Contract. Note well, however, that the AIA standard contracting forms include a mutual waiver of consequential damages that limits the Owner’s ability to recover from many types of delay damages that the Owner may suffer as a result of a delay, but do not substantially limit the Contractor’s ability to recover additional compensation for delays.

Examples of reasonably foreseeable delays include:
• normal and foreseeable weather conditions;
• improper scheduling by the contractor;
• inadequate workforce staffing;
• poor supervision; and
• delays associated with the repairs of the contractor’s defective work.

Excusable delays, on the other hand, are delays attributable to circumstances beyond the Contractor’s control and, importantly, not caused by the fault or neglect of the Contractor or third parties for whom the Contractor is responsible (such as subcontractors). Excusable delays may be compensable or noncompensable. Compensable delays are delays for which the Contractor may recover damages for the extra costs it incurs as a result of the delay. Noncompensable delays, however, are delays under which the Contractor may be entitled to an adjustment of time, but not to the Contract Sum.

B. Common Issues

Under the A201, the Contractor is excused from liability only for delays that are caused by the actions or inactions of the Owner, Architect, or other parties working directly with the Owner as well as other events beyond the Contractor’s control. The Contractor, however, assumes liability for delays arising from labor shortages unrelated to labor disputes, failure of the Contractor’s subcontractors or material suppliers to perform on time, correction or replacement of defective work or materials, or weather impacts that are abnormal for the area. If the delay is excusable under the Contract terms, the Contractor is typically entitled to a time extension to complete the Contract. Construction lawyers should adjust the standard AIA language to provide concrete guidance as to when delays are compensable or excusable, and how the Architect (who is defacto assigned responsibility as the initial decision maker) should decide whether and how much time or money to allow the Contractor.
With respect to Owner delays, absent contractual provisions negating such duties, an Owner generally has (a) a duty to coordinate and schedule the work of all contractors with whom it has a direct contract, and (b) a duty not to delay, hinder, or interfere with the work of the contractor. In the past, the following events have been found to result in Owner delays, leading to the Owner being assessed damages:

- Failure to provide suitable access to the construction site;
- Defective plans, resulting in delays;
- Failure to ready the construction site in time for the contractor to begin work;
- Failure to make timely payments;
- Failure to provide a written order for additional work requested;
- Failure to approve drawings necessary for the job within a reasonable time; and
- Ordering a hold or suspension of the work.

Delay claims, generally, are also subject to a number of outside factors that may affect the calculus regarding whether a delay is excusable or inexcusable, including Force Majeure and weather delays. A Force Majeure delay, as defined in the Contract, allows a party, either the Owner or Contractor, to suspend or terminate the performance of its obligations when certain circumstances beyond its control arise, making performance inadvisable, commercially impracticable, illegal, or impossible. A typical list of force majeure events for a construction project include war, riots, fire, flood, hurricane, typhoon, earthquake, lightning, explosion, strikes, lockouts, slowdowns, prolonged shortage of energy supplies, and acts of state or governmental action prohibiting or impeding any party from performing its respective obligations under the Contract.

Weather Delays are weather conditions that are out of a Contractor’s control. However, normal weather conditions are “foreseeable” and inexcusable; stated another way, the Contract assumes that the Contractor is expected to achieve Substantial Completion under normal weather conditions, and unless the weather conditions are abnormal, the Contractor does not receive
additional time. Additionally, Contractors must mitigate the effects of adverse weather conditions by, for example, covering or heating work areas or diverting standing water to minimize the impact of weather conditions on the time required to complete the Work.

Many construction contracts reference a “critical path” in reference to a construction schedule. The “critical path” in a construction schedule refers to the shortest path that construction activities may take, considering the minimum durations of each task and the logical dependencies that prevent one task from starting until a prior task is complete. Construction schedules are complex and full of dependent and interdependent tasks. In most cases, effective scheduling will have a minimum duration and a maximum duration (or, an “early finish” or “late finish”). If all durations where minimum durations, tasks “on” the critical path would be those that, unless completed within the minimum duration, would extend the date of substantial completion. The difference between the minimum duration of the schedule (that is, everything goes perfectly and the contractor completes each task in sequence within the minimum time) and the maximum duration (typically, the contract time) is the “float” time in the schedule.

Allocating the risk of delay requires, at least to some extent, deciding which party will “own” the float time in the schedule. The AIA documents seem to allocate the float to the Contractor (indirectly), but are unclear. Practitioners normally determine from the contract language which of these three basic allocations of the float a specific contract uses: (1) Owner owns the float time, (2) Contractor owns the float, or (3) the float belongs to the first party to use it. When the Owner owns the float, the Contractor does not get an extension of time or additional compensation unless and until Owner or weather delays not concurrent (see concurrent delays, below) with Contractor delays exceed the entire duration of the float time available at the start of the project. When the Contractor owns the float time, the Contractor gets an extension of time
(and sometimes compensation) on a day-for-day basis whenever an Owner or weather delay occurs, regardless of whether the delay will cause the project to be late. In these contracts, concurrency of a contractor’s delay with an owner or weather delay does not matter. Finally, when no one owns the float time, the contractor gets an extension of time (and maybe additional compensation) when a delay occurs if the delay will consume the remaining float in the schedule calculated as of the time of the delaying event. Section 8.3 of the A201 seems to allocate the float to the Contractor:

If the Contractor is delayed at any time in the commencement or progress of the Work by [an Owner delay, force majeure event, or unusual weather], . . . then the Contract Time shall be extended . . .

This is mandatory language in the event of an excusable delay without regard to whether the float is/was sufficient to absorb the delay. BUT, the last phrase of the sentence sets the length of the extension to “such reasonable time as the Architect may determine.” Thus, although the A201 requires the Owner to grant an extension of time for some length of time, the Architect retains the discretion to select something other than a day-for-day extension. If the Contractor owns the float, the extension is day-for-day, and so the A201 both allocates the float to the Contractor and takes it away.

Finally, the A201 is silent on concurrent delay. The only provision that could relate to concurrent delay is the phrase allowing the Architect to determine the length of a “reasonable” extension. Again, however, the A201 does not mention concurrent delay, nor does it guide the Architect’s discretion in applying concepts of concurrent delay when determining how long a “reasonable” extension is under the circumstances.
C. Handling Change Orders to Resolve Delays

Supplementing the inadequate language in Section 8.3 of the A201 is the easiest way to avoid disputes over delays. Provisions like those below will aid the parties in navigating the difficulties of efficiently dealing with delays during a project:

Unless otherwise agreed in writing, execution of a Change Order implementing an agreement between the Owner and the Contractor as to an extension of the Contract Time under Section 8.3.2, an increase in the Contract Sum under Section 8.3.3, or both shall constitute a final, binding resolution of all of the Contractor’s Claims for extensions of the Contract Time or increases in the Contract Sum associated arising from or relating to the delay described in the Change Order, except to the extent expressly and specifically reserved therein.

The Owner may, in lieu of promptly granting an extension of the Contract Time under Section 8.3.2, direct the Contractor in writing to accelerate the progress of the Work, in which event Contractor’s right to an adjustment to the Contract Time for the applicable delays will be suspended pending either the Parties signing a Change Order memorializing their agreement to an adjustment to the Contract Sum and Contract Time, if any, as a result of the acceleration or, in the event they cannot agree on such adjustments, resolution by the dispute resolution procedures in the Contract. The increase in the Contract Sum due to acceleration shall not exceed the sum (the "Acceleration Cost") of (a) the actual cost incurred by the Contractor for Extraordinary Measures reasonably necessary to accelerate with respect to the specific delay for which Owner directed the Contractor to accelerate, and (b) the Contractor’s permissible markup for Change Order Work under the Contract Documents. The Acceleration Cost is the sole and exclusive remedy of the Contractor for acceleration expenses. The Contractor shall maintain adequate records to demonstrate Acceleration Cost and shall bear the burden of proving the Acceleration Cost. A delay or refusal of the Owner to grant an extension of the Contract Time, if later determined to be wrongful or improper, shall be deemed to be an election to accelerate under this Section. Contractor waives all rights to compensation for wrongful refusal of the Owner to grant an extension of the Contract Time except as set forth in this Section.

Section 8.3 is a frequent source of disputes. It leaves decisions about the impact and risks of delay to the Architect, and ultimately to the courts, providing minimal guidance to either as they attempt to resolve disputes fairly. It does not say who is due what as a result of any specific delay or how
an extension should be calculated. It does not address float in the Project Schedule, or distinguish
between the impacts of different delay causes, such as weather or force majeure, nor does it
describe how to resolve concurrent delays. Section 8.3 needs a complete rewrite.

One solution to the problems described above appears in the following example:

§ 8.3.1 DEFINITIONS.

§ 8.3.1.1 Delay. The term "delay" means the loss of one or more working days due
to an event or circumstance on the Project.

§ 8.3.1.2 Owner Delay. The term "Owner Delay" refers to a delay of the
Contractor’s commencement or progress of the Work (a) by an act or neglect of the
Owner, of the Architect, of an employee, agent, or consultant of either, or of a
separate contractor employed by the Owner or its subcontractors or suppliers; (b)
by Owner-directed changes in the Work; (c) by labor disputes, fire, unusual delay
in deliveries, (d) unavoidable casualties; (e) by delay authorized by the Owner
pending dispute resolution; (f) a delay caused by an Owner directive under Section
14.3.2, below; (g) by force majeure events; or (h) by other causes that the Owner
and the Contractor reasonably agree may justify delay.

§ 8.3.1.3 Weather Delay. The Project Schedule, includes the Normal Weather
Days set forth in the Agreement as working days per month during which the
progress of work activities on the critical path of the Project Schedule are
anticipated to be adversely affected by weather. A "Weather Day" is a working day
on which the Contractor cannot perform work activities on the critical path of the
most current Project Schedule for at least four hours due to adverse weather
(including precipitation, temperature, and/or winds) or due to the continuing effects
of adverse weather. A Weather Day does not include force majeure events, such as
hurricanes, floods, and blizzards. Weather Days include days of actual inclement
weather and subsequent "dry-out," "mud," "snow/ice" or "clean-up" days resulting
from such adverse weather if there is a resulting hindrance to site access or
performance of site work and Contractor has taken reasonable measures to avoid
such hindrance. A "Weather Delay" occurs when the number of Weather Days
exceeds the Normal Weather Days stated in the Agreement on a monthly basis with
the length of the Weather Delay being the difference between the number of
Weather Days and the Normal Weather Days.

§ 8.3.1.4 Contractor Delay. The term "Contractor Delay" means any delay that is
not an Owner Delay or a Weather Delay.

§ 8.3.1.6 Concurrent Delay. The term "Concurrent Delay" means the extent to
which a delay caused by one or more Owner Delays or Weather Delays that
overlaps with a delay caused by one or more Contractor Delays at the same time.
A delay may include portions of time that are a Concurrent Delay and other portions
of time that are an Owner Delay, Contractor Delay, and/or Weather Delay, in which event the delay will be apportioned to each such category of delay.

§ 8.3.1.9 Excusable Delay/Compensable Delay. An "Excusable Delay" is a Weather Delay or an Owner Delay that (a) is not a Concurrent Delay, (b) is on the critical path of scheduled activities for the Project, and (c) the delay (or a portion of the delay) would cause the Contractor to be unable to complete the Work within the Contract Time because the float in the schedule has been consumed with respect to the critical path during some or all of the delay. A Compensable Delay is an Excusable Delay that is also an Owner Delay.

§ 8.3.2 Except as provided by Section 8.3.7, the Contractor shall be entitled to an extension of the Contract Time for each Compensable Delay and for each Excusable Delay. Extensions will be in calendar days determined by adding the number of working days of delay to the Contract Time plus such weekend days and holidays as may be necessary to afford the Contractor the additional working days without overtime, weekend, or holiday work.

§ 8.3.3 Except as provided by Section 8.3.7, the Contractor shall be entitled to an adjustment in the Contract Sum for each Compensable Delay in such amount as the Owner and the Contractor may agree, or if they cannot agree, as calculated in Section 8.3.4. The Owner and the Contractor shall implement adjustments to the Contract Time or the Contract Sum under this Section 8.3 by Change Order. If they cannot agree, the parties shall use the Claim and dispute resolution process of Article 15.

§ 8.3.4 If, and to the extent that, the Contractor is entitled to an increase in the Contract Sum and the Owner and the Contractor cannot agree on the amount of such adjustment, the amount of compensation shall be determined as follows:

.1 sum all increases in subcontract prices resulting from change orders to existing subcontracts reasonably necessary as a result of the Compensable Delay;

.2 if new subcontracts result from a Compensable Delay, then sum the portions of the subcontract prices of each new subcontract, but only to the extent reasonably necessary as a result of the Compensable Delay;

.3 if the Contractor self-performed Work using its own forces or provided additional supervision during the period of the Compensable Delay, then sum the additional direct material and labor costs (including labor burden) to the extent reasonably necessary as a result of the Compensable Delay(s);

.4 if reasonably necessary for the Contractor to incur additional or extended general conditions costs, including without limitation, costs and expenses for equipment, supplies, tools, supervision, administration, maintenance,
storage, protection, insurance, security, and other services during the period of the Compensable Delay, sum the amounts incurred by the Contractor as were reasonably necessary as a result of the Compensable Delay;

.5 sum the figures determined in Sections 8.3.4.1 through 8.3.4.4; and,

.6 if the Contractor has provided payment and performance bonds under Article 17 of the Agreement, add to the figure determined in Section 8.3.4.5 any adjustments (additive or deductive) to the Contractor’s actual cost of providing bonds required by the change in the Contract Sum; and,

.7 using the amount determined in Section 8.3.4.5 (i.e., cost exclusive of bonding expenses), calculate the amount of overhead and profit to the Contractor under the Agreement and these General Conditions, and add it to the sum determined in Section 8.3.4.6.

If the Contractor is entitled to additional compensation under Section 8.3.3, then the result determined in Section 8.3.4 shall be the maximum amount of additional compensation to which the Contractor is entitled, if any.

§ 8.3.5 Except as provided in this Section 8.3, the Contractor waives all claims against the Owner, for foreseeable and unforeseeable general, consequential and special damages for delay, including without limitation lost profits, direct project overhead, loss of use, home office overhead, lost opportunity costs, impact damages and other indirect losses. The increase in the Contract Sum calculated in Section 8.3.4 shall be the Contractor’s sole and exclusive remedy for any delay in the Work, and the Contractor waives all other monetary compensation or damages of any kind or nature arising from or relating to the delay.

§ 8.3.6 Unless otherwise agreed in writing, execution of a Change Order implementing an agreement between the Owner and the Contractor as to an extension of the Contract Time under Section 8.3.2, an increase in the Contract Sum under Section 8.3.3, or both shall constitute a final, binding resolution of all of the Contractor’s Claims for extensions of the Contract Time or increases in the Contract Sum associated arising from or relating to the delay described in the Change Order, except to the extent expressly and specifically reserved therein.

§ 8.3.7 The Owner may, in lieu of promptly granting an extension of the Contract Time under Section 8.3.2, direct the Contractor in writing to accelerate the progress of the Work, in which event Contractor’s right to an adjustment to the Contract Time for the applicable delays will be suspended pending either the Parties signing a Change Order memorializing their agreement to an adjustment to the Contract Sum and Contract Time, if any, as a result of the acceleration or, in the event they cannot agree on such adjustments, resolution by the dispute resolution procedures in the Contract. The increase in the Contract Sum due to acceleration shall not exceed the sum (the "Acceleration Cost") of (a) the actual cost incurred by the
Contractor for Extraordinary Measures reasonably necessary to accelerate with respect to the specific delay for which Owner directed the Contractor to accelerate, and (b) the Contractor’s permissible markup for Change Order Work under the Contract Documents. The Acceleration Cost is the sole and exclusive remedy of the Contractor for acceleration expenses. The Contractor shall maintain adequate records to demonstrate Acceleration Cost and shall bear the burden of proving the Acceleration Cost. A delay or refusal of the Owner to grant an extension of the Contract Time, if later determined to be wrongful or improper, shall be deemed to be an election to accelerate under this Section. Contractor waives all rights to compensation for wrongful refusal of the Owner to grant an extension of the Contract Time except as set forth in this Section.

Once the parties have agreed on provisions similar to the above, they must next look to how to handle the damages caused by such delays.

**D. Damages for Delay**

In addition to addressing claims for extensions of time under Section 8.3, Section 15.1.7 contains a waiver of consequential damages. This waiver is similar to that contained within B101, the Owner-Architect Agreement. Owner damages for delay are available, but the consequential damages waiver severely limits their type and amount unless the Owner modifies the waiver to exclude actual damages for delay or provides for liquidated damages in Section 4.5 of the A101. From the Contractor perspective, the waiver of consequential damages is important because it limits the risk to the Contractor of Owner delay damages (discussed below) and helps Contractors to quantify the risk posed by delays on the project (i.e., the sum of the liquidated damages payable to the Owner and the Contractor’s extended general conditions costs).

From the Owner perspective, the waiver of consequential damages is unhelpful. A mutual waiver of consequential damages rarely benefits the Owner. The waiver excludes many of the real losses to the Owner caused by Contractor delays without subjecting Contractor’s to a similar waiver. Most of the Owner’s exposure for project delays comes from the Contractor’s direct damages: extended general conditions, higher trade work costs, and loss of profit and overhead
on those items). The “mutual” waiver of consequential damages, therefore, hurts the Owner in a delay situation without hurting the Contractor proportionately. Moreover, liquidated damages frequently underestimate the real losses to the Owner resulting from a delay in completion. When the Owner does attempt to set liquidated damages at a level consistent with the real losses the Owner is likely to suffer, Contractors balk because the dollar amounts dwarf their fees.

Owners should, therefore, start the negotiation by carving out Owner damages for delay from the mutual waiver of consequential damages. Thus, the Owner keeps the consequential damages waiver in the agreement, does not request liquidated damages, and carves out a specific set of expected harms for delay from the provision. A solid start for the Owner would: (a) except a specific set of actual damages to the Owner for delay from the definition of consequential damages (these vary by owner type), (b) list items of potential harm to the Owner in the event of a Contractor delay, and (c) expressly state that these items of harm are foreseeable and within the contemplation of the parties at the time of contracting.

Initially, Contractors are elated when they see no liquidated damages stated in the A101. On further consideration, however, they conclude that the amendment to the consequential damages provision poses too much unquantifiable risk and they reverse their positions. They realize that the exception for the Owner’s damages for delay and provision for actual damages rather than liquidated damages presents an unlimited and potentially much larger risk than the Contractor is willing to take for the fee expected on the project. At this point, the Contractor returns to ask the Owner to set liquidated damages and to restore the full mutual consequential damages waiver. What follows is a negotiation about the amount of the liquidated damages and other features, including caps, grace periods, graduated amounts, and other techniques for
anticipating and liquidating the Owner’s losses in the event that the Contractor fails to complete the Work on time.

Had the Owner asked for a price after setting liquidated damages, the Contractor would have increased its price to take out some of the risk to the Contractor without alerting the Owner to that behavior. If the Contractor is asking for liquidated damages, however, it has usually already quoted the price, and will have limited success raising the price merely to mitigate the risk now posed by liquidated damages that the Contractor requested.

III. CHANGE ORDERS

Negotiating change orders is its own topic of discussion and somewhat beyond the scope of this presentation and paper. However, good contract drafting requires elimination of ambiguities. Drafters should specifically delineate how change orders will impact the Contract Sum and Project Schedule (i.e. time extensions). Typically, changes orders are handled based on the cost of the changed work. To avoid disputes over change order amounts, the contract should specifically delineate how overhead and profit will be calculated on Contractor change order work, including any limitations on additional overhead and profit to the Contractor included within the subcontractor’s cost of work.

Examples of prior Owner/Contractor experiences are provided below, for purposes of discussion:

**A101 Initial Owner Position:**

For increases in the Work made by the Owner, the Contractor’s markup shall be one percent (1%) of the estimated cost of such increases. There shall be no decrease in the Contractor’s profit or fee for deductive change orders, unless otherwise stated in this Agreement, unless otherwise stated in this Agreement.

**A101 Initial Contractor Position:**
For increases in the Work made by the Owner, the Contractor’s markup shall be ten percent (10%) of the estimated cost of such increases. There shall be no decrease in the Contractor’s profit or fee for deductive change orders, unless otherwise stated in this Agreement, unless otherwise stated in this Agreement.

A101 Compromise position:

For increases in the Work made by the Owner, the Contractor’s markup shall be five percent (5%) of the net change, additive or deductive, in the cost of the Work.

Drafters should limit how much overhead and profit subcontractors may add to their internal costs for changed Work. For example:

Fifteen percent (15%) for overhead and profit on Work performed by Subcontractor’s own forces and seven and one-half percent (7.5%) for overhead and profit on Work performed under a Subcontract to the Subcontractor. Sub-subcontractors to the Subcontractor are allowed the same mark-up percentages as the Subcontractor to the Construction Manager.

IV. REDUCTION OF RETAINAGE

Negotiations over the amount of retainage that an Owner may withhold from Contractor payments generally follow a familiar pattern. First, the Owner requests 10% retainage on the entire Contract Sum. The Owner does not offer to reduce the retainage, making the entire amount of it the “final payment” after final acceptance of the Work by the Owner and the Architect. Second, the Contractor “chisels” at the Owner’s position in various ways: (1) asking for smaller percentages of retainage (e.g., 5%); or more familiar, (2) asking for provisions to reduce retainage at specific points in the project, such as after 50% completion or substantial completion; and/or (3) excluding specific types of expenses from the retainage requirement, such as Contractor direct-purchase materials (the Owner trades retainage to get materials at a lower cost because they are not subject to trade contractor markups).

Negotiations on these points often prove unfruitful because the Owner worries that the retainage it holds at a given point will not be enough to cover losses or exposure on the Project if
the Contractor defaults. In addition to providing financial statements or a bond, one approach is to agree to a retainage rate at the start of the work (e.g. 10%) and to discontinue retention once a cap (e.g. 5%) is reached. Thus, after 50% completion, the Owner would stop retaining anything unless additive change orders increase the Contract Sum and the ratio of retainage to work completed drops automatically as the Contractor submits new payment applications until it reaches 5% at substantial completion. The following chart illustrates the effects on a hypothetical $1 million contract with no change orders:

<table>
<thead>
<tr>
<th>Completion</th>
<th>0%</th>
<th>25%</th>
<th>50%</th>
<th>60%</th>
<th>75%</th>
<th>80%</th>
<th>100%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applied For</td>
<td></td>
<td>250,000</td>
<td>500,000</td>
<td>600,000</td>
<td>750,000</td>
<td>800,000</td>
<td>1,000,000</td>
</tr>
<tr>
<td>Retained ($)</td>
<td>-</td>
<td>25,000</td>
<td>50,000</td>
<td>50,000</td>
<td>50,000</td>
<td>50,000</td>
<td>50,000</td>
</tr>
<tr>
<td>Retained (%)</td>
<td>0.00%</td>
<td>10.00%</td>
<td>10.00%</td>
<td>8.33%</td>
<td>6.67%</td>
<td>6.25%</td>
<td>5.00%</td>
</tr>
<tr>
<td>Reduction ($)</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>10,000</td>
<td>25,000</td>
<td>30,000</td>
</tr>
<tr>
<td>Balance to Finish</td>
<td>1,000,000</td>
<td>750,000</td>
<td>500,000</td>
<td>400,000</td>
<td>250,000</td>
<td>200,000</td>
<td>-</td>
</tr>
</tbody>
</table>

Retainage is addressed in Article 5 of the A101.

To implement an automatic reduction of retainage, insert the retainage percentage in Section 5.1.7.1 and add the following language: “Notwithstanding any other provision in this Agreement, the Owner may not withhold aggregate retainage of more than 5% of the Contract Sum, as adjusted by Change Orders at the time of the Application for Payment.”

It is also important to note that the retainage provisions in the contract between the Contractor and any subcontractors, should match the retainage provision in the contract between the Owner and the Contractor. This ensures that the Contractor is not forced to make payments to their subcontractors in amounts greater than they receive from the Owner.

Additionally, the Contractor must be cognizant of its obligations to pay its subcontractors pursuant not only to its subcontracts, but also state and local prompt payment acts or “Little Miller Acts.” Many subcontracts set out the subcontractors right to payment based on either “pay if paid”
or “pay when paid” provisions. A "pay when paid" clause requires the Contractor to pay its subcontractors within a certain number of days of its receipt of payment from the Owner. These types of provision are generally interpreted as a timing mechanism for payment and often will not excuse the Contractor from paying its subcontractors, regardless of whether it has been paid by the Owner. In contrast, a "pay if paid" clause only obligates the Contractor to pay its subcontractors if, and only if, it is first paid by the Owner. These types of provisions are interpreted as creating a condition precedent for the Contractor’s payment obligation to the subcontractor. Though, increasingly, pay if paid clauses are disfavored by both state courts and state legislatures.

Lastly, the Contractor should verify that its state does not have a prompt payment act that requires it to make payments to its subcontractors within a certain period of time of receiving payment from the Owner. These requirements come in the form of a state prompt payment act or for federally funded programs under a state’s “Little Miller Act.” For instance, under North Carolina’s “Little Miller Act,” the Owner “shall be paid in full within 45 days after respective prime contracts of the project have been accepted by the owner.” Similarly, the same statute requires “…the prime contractor shall pay the subcontractor based on work completed or service provided under the subcontract…[w]ithin seven days of receipt by the prime contractor of each periodic or final payment.”

V. WARRANTY/CORRECTION OF WORK

Section 3.5 of the A201 lists the Contractor’s warranties to the Owner. With respect to quality of construction, the Contractor’s warranty is simple:

The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of Work the Contract Documents require or permit. Work, materials, or equipment not conforming to
these requirements may be considered defective. The Contractor’s warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Construction Manager, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage.

This warranty is not constrained by time, and warranty claims (absent something else) continue until the expiration of the statutes of limitation or repose.

Section 12.2.2.1 of the A201, often confused as a “warranty” by Contractors, is not a warranty at all. Instead, it provides that the Contractor will correct Work that does not conform to the Contract Documents when identified to the Contractor within the first year after substantial completion:

…any and all Work, within one year after the date of Substantial Completion of the Work, if such work was not completed in accordance with the Contract Documents.

To require the Contractor to correct nonconforming work, the Owner must take certain steps, including prompt notification of such defects to the Contractor and providing the Contractor the opportunity to correct such Work. Section 12.2.2.1 of the A201 specifically provides,

In addition to the Contractor’s obligations under Section 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 9.9.1, or by terms of any applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of notice from the Owner to do so, unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. During the one-year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty. If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or Architect, the Owner may correct it in accordance with Section 2.5.

This language raises at least two interesting problems. First, what is sufficient “notice”? Second, how absolute is the obligation to give notice to the Contractor within a year?
Unless modified, “notice” under Section 1.6 of the A201 requires the notice be in writing and “delivered in person, by mail, courier, or by electronic transmission if a method for electronic transmission is set forth in the agreement.” The reference to electronic transmission is new to the A201-2017. The new A101-2017 language defaults to the AIA E203-2013 (Building Information Modeling and Digital Data Exhibit), which in turn uses AIA G201-2013 (Project Digital Data Protocol Form) to provide actual information about e-mail communications. For most projects, the AIA E203-2013/G201-2013 combination is unnecessarily complicated. The parties can and should develop their own system for e-mail communications, as well as exceptions to its use (the best example being Claims under Article 15). Contractors may sit silent on the issue of electronic notice in the hopes of a “gotcha” moment in which the Owner waives claims for corrective work by failing to give proper written notice. This, frankly, will just lead to unhappy customers, and a provision for e-mail requests for correction of nonconforming Work makes sense in a way that allowing e-mail Claims under Article 15 may not make sense.

The second issue—the effect of the words “and to make a claim for breach of warranty”—should concern Owners even more. The apparent purpose of Section 12.2.2.1 is to require the Owner to give the Contractor an opportunity to correct nonconforming Work identified during the first year while the trade contractors who actually performed the nonconforming Work are still available and contractually obligated to correct it. If the Contractor had that opportunity and the Owner deprived the Contractor of it, then the Owner’s claim should (arguably) be waived. This is relatively uncontroversial, but the way in which the additional clause dealing with warranty claims is tacked to the end of the sentence makes it unclear whether all warranty claims are waived if the Owner does not give the Contractor written notice of the claim during the first year. In addition, the provision presents Owners with the “janitor problem”: what happens if the janitor
notices during the first year that a toilet paper holder in the ladies’ room was installed incorrectly, but fails to tell anyone in the project team that it needed to be fixed? What happens if the janitor hires a handyman to fix it without the Contractor receiving an opportunity to correct the defective work? In short, the provision presents two problems: (1) if the Owner is not an individual, should Owner’s require that management or the Owner’s representative be made aware of the defect? and (2) does the waiver of claims for breach of warranty apply regardless of whether the Owner was aware of the defect (i.e., does it cut off the warranties in Section 3.5 after a year or does the statute of limitations cut off such warranties when it expires?).

Thus, it is advisable to revise Section 12.2.1 of the A201 to require that an officer or manager of the Owner or the Owner’s representative have actual knowledge of the problem or deficiency. Furthermore, it is also prudent to strike the waiver of breach of warranty if the Owner, as defined above, was not aware of the problem or deficiency. Below is a revised version of Section 12.2.1 of the A201, with the above-mentioned changes.

In addition to the Contractor’s obligations under Section 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Section 9.9.1, or by terms of any applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of notice from the Owner to do so, unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner, for purpose of this section the Owner shall mean a Manager, Director, or Authorized Representative of the Owner, shall give such notice promptly after discovery of the condition. Knowledge of other employees of the Owner, shall not be imputed to the Owner for purposes of this provision of the Agreement. During the one-year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty. If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or Architect, the Owner may correct it in accordance with Section 2.5.
An elegant compromise that protects the Owner from the janitor problem generally, but protects the Contractor from the variant (janitor hires handyman to fix the defect during the one-year period) is to add language that waives the breach of warranty claim only if the Owner corrects the defective Work within the one-year period for correction of the Work without notifying the Contractor or giving the Contractor an opportunity to correct.

VI. CLAIMS AND DISPUTES

A. Notice and Timing Requirements

Pursuant to Article 15.1.3 of the A201, prior to Substantial Completion of the Work, the Owner and Contractor must initiate and give notice of all claims “within 21 days after occurrence of the event giving rise to such Claim or within 21 days after claimant first recognizes the condition giving rise to the Claim, whichever is later.” The AIA Forms do not, however, define adequately define how much notice is sufficient. Section 1.6 of the A101 requires a written instrument and identifies acceptable delivery methods for which notice is deemed to have been provided, but it does not specifically delineate what information a notice must contain to adequately notify the other party of a “notice of a claim.”

The AIA’s lack of a definitional section for notice is significant because the reason to require notice of a claim is to allow parties to mitigate their damages and to properly assess and document the Claim at or near the occurrence. Failure to provide proper notice, therefore, denies parties the opportunity to insulate themselves from damages arising from claims or to otherwise mitigate the damages stemming from those claims.

The 2017 revisions to the AIA Forms do not address these concerns and, in fact, may exacerbate the problem by providing for notice by “electronic transmission.” No client wants to receive a delay claim a year after the delay supported by “notice” in the form of a vague reference
to a schedule delay buried in three-page email thread. Consequently, if parties choose to allow notice by email, Section 1.6 of A101 should be revised to delineate additional and specific requirements for email notice of claims, such as requiring the email subject line reference the “notice of claim,” and require that actual claims be served in some specific way other than electronic transmission. Additionally, the parties should consider adding specific requirements for the content of a Claim, such as the date the claim arose; when the claim is expected to end; a general statement of the harm and magnitude of harm anticipated; and such supporting documentation for the claim as is readily available at the time of the Notice (even if incomplete).

B. Initial Decision Maker

Pursuant to Article 15 of the A201, all Claims between the Owner and Contractor, related to defective work, hazardous materials and substances, emergencies affecting safety of persons or property, and property loss are to be “referred to the Initial Decision Maker” [“IDM”] for a preliminary decision. The Architect serves as the IDM unless otherwise indicated in the Agreement. The IDM has thirty (30) days to decide the Claim. Thereafter, “either party may, within 30 days from receipt of an initial decision, demand in writing that the other party file for mediation.” If such a demand is made and “the other party fails to timely file for mediation, both parties waive their rights to mediate or pursue binding dispute resolution.” An initial decision is required as a condition precedent to mediation of any Claim, and mediation is then required as a condition precedent to further binding dispute resolution.

From the Contractor’s perspective, the Architect is the creature of the Owner. Essentially, then, the IDM provisions of the AIA Forms, coupled with the mandatory mediation and waiver provisions of Article 15, provide the Owner an opportunity—hiding behind the Architect—to withhold payment on any Claim, while requiring the Contractor to continue work for at least ninety
This ability to require work, without corresponding payment on the Claim, provides significant leverage to the Owner in negotiating Claims, particularly when the Contractor needs to receive payments to pay subcontractors and to avoid liens on the Project.

Consequently, Contractor’s counsel should consider whether the Contractor is willing to agree to an IDM at all or instead wishes to delete all references to the IDM and proceed with mandatory mediation. If the parties desire to utilize an IDM to facilitate early claim resolution without the need for formal proceedings, particularly during the Project, they may wish to consider naming an independent third-party as the IDM and recrafting the language to use the IDM much like a dispute resolution board would function on a large project. Alternatively, the parties may wish to rewrite the IDM provisions to treat the IDM’s decision as a settlement offer, to be accepted or rejected before proceeding to binding dispute resolution.

C. Alternatives to Litigation

1. Mediation

As discussed above, Article 15.3 requires the parties endeavor to resolve Claims by mediation as a condition precedent to binding dispute resolution. Mediation can be an effective tool for early dispute resolution; but it is seldom successful unless the parties are prepared to discuss and negotiate all claims on the Project. To proactively ensure the best result typically requires (a) that the parties identify all claims and defenses prior to mediation, and (b) exchange documents relevant to their claims/defenses before mediation.

Nothing in the AIA Form Documents or the mediation provision in Article 15 requires the parties to identify claims and defenses or to exchange documents and other information sufficiently before mediation within a timeframe that promotes productivity. Moreover, the requirement that mediation is a condition precedent to litigation or arbitration typically accelerates its timing, and
that exacerbates the impact of neither party fully understanding the claims, defenses, contentions, and evidence of the other party. Construction Counsel should consider revising Article 15 to make mediation concurrent with dispute resolution (rather than a condition precedent to commencement of dispute resolution) and including provisions that require pre-mediation information exchange and claim/defense definition.

2. *Arbitration vs. Litigation*

The choice between arbitration and litigation during a construction dispute is a dissertation topic in its own right, and has been the subject of debate among construction practitioners and scholars for decades. This paper will focus on two specific problems in negotiations: the joinder problem and ad hoc administration of arbitration.

As a contractual construct, arbitration always presents issues of joinder. The Owner seldom actually causes problems on a Project, but is typically responsible for the acts and omissions of the design team, and the design and the Architect’s administration of the Contract do frequently cause problems on a Project. Similarly, although the Contractor is financially responsible for the actions of its subcontractors, the subcontractors actually perform the Work and when they do so poorly, cause problems on Projects. The issue, then, is how to ensure that all parties who are potentially responsible for the actions leading to the dispute can be joined to the same proceeding. In litigation, this is simple. In arbitration, it is not as all of the relevant parties must agree to arbitrate disputes and be joined in related arbitrations involving other parties on the Project.

The A201 addresses joinder and consolidation in its standard provisions, within Article 15. This standard language is generally fine, as long as (a) the Architect has agreed to arbitrate disputes in which the Architect would be joined to an arbitration between the Owner and the Contractor,
and (b) the Contractor does not opt out of the joinder provisions in the A201 by including an alternate arbitration regime in its subcontracts.

It is worthy of note that professional liability insurance carriers routinely pressure architects not to agree to arbitration. As a result, the agreement between Architect and Owner—often prepared by the Architect long before the Owner has identified a Contractor—specifies litigation unless otherwise modified. The Owner, who typically later agrees to arbitrate disputes with the Contractor without first considering the coming joinder problem, is creating a situation in which the Owner may be subjected to inconsistent results in any subsequent dispute in which the Contractor blames the Architect.

By way of example, in an arbitration proceeding with the Contractor, the Owner may lose; in the Owner’s lawsuit against the Architect, the Architect may win. This result leaves the Owner with two inconsistent decisions that require the Owner to pay the Contractor for the Architect’s mistake in the arbitration award and provides the Owner with no means of recouping the loss from Architect because a jury reached the opposite conclusion. For this reason, Owners that do not set arbitration as the method of binding dispute resolution with the Architect should never agree to arbitrate with the Contractor. Similarly, if the Owner and Contractor agree to litigate disputes, the Contractor should also refuse to arbitrate disputes with subcontractors. Failure to do so leaves the party agreeing to litigate claims on one side while arbitrating them on the other, increasing the likelihood of inconsistent results and greatly complicating efforts to settle cases.40

The provisions of Article 15 of the A201 do not best address the arbitration process if AAA administration is removed, or where the parties “mutually agree to ad hoc” administration. If arbitration will be administered by an ad hoc arbitrator (as frequently occurs in some states, such as North Carolina), the Parties should address the following issues at a minimum:
• Timing for demand and any requirement for submissions with the demand;
• How the timing of the demand will show compliance with statutes of limitation and repose;
• The identity or selection of the arbitrator, including whether the arbitration will be conducted by a single arbitrator or panel and claim limits applicable to the selection;
• Which procedural rules will apply (AAA; International Center for Dispute Resolution; JAMS) and how the parties will modify them, including discovery (number of depositions, time limits, informal exchange of documentation, limits on written discovery, if any, etc.);
• Requirement for Scheduling Order;
• Motions Practice (number allowed and time limits);
• Consolidation and Joinder of Claims and Parties; and
• Confidentiality.

A chief complaint about arbitration is often that the process is easily delayed and turns into “arbigation,” rather than the streamlined, quick and efficient process it was intended to be. Good arbitration management and early drafting of essential arbitration agreement provisions in the Contract Documents ensures a more efficient arbitration process and that the expectation of the parties for a speedy resolution are more readily achieved.

3. **Referees and Special Masters**

A Referee is a neutral party appointed by the court, at the request of the Parties. The court order appointing the Referee generally sets forth the Referee's authority. Unless otherwise specified in an agreement between the Parties, the Referee will conduct him/herself in accordance with the applicable formal rules of procedure. The advantages of such a system are speed of trial, ease of scheduling the hearings, privacy of the proceedings, the ability of the Parties to select a Referee who has expertise in the types of issues in dispute, the flexibility of procedures, and the ability to appeal decisions or recommendations. The disadvantages are that the Parties have to pay their own costs of trial preparation and pay the costs of the Referee. Further, the Referee's decision lacks finality and can be appealed.
A Special Master is an individual with authority and time to control the discovery process (such as deciding objections to deposition questions, document disputes, and claims of privilege), to rule on all pretrial matters in lieu of a judge, and to facilitate settlement discussions. Special Masters may be requested by either or all the Parties or may be imposed unilaterally by a court. Payment for Special Masters is typically split between the Parties. The advantage of the Special Master system is that it can save a great deal of cost during the pretrial period with respect to needless discovery battles and help facilitate settlement discussions. One of the disadvantages of utilizing a Special Master to assist in dispute resolution is that the Court may grant too much authority to the Special Master, for example Summary Judgment Motions.

**CONCLUSION**

Overall, the new 2017 AIA Forms offer evolutionary improvements over the 2007 forms. These improvements are not limited to one document or form and although some are discussed herein, many are outside the purview of this paper.

Regardless of the new and improved AIA form documents, however, as a nationwide, industry standard, form documents the AIA Forms do not address the peculiarities of state laws. As such, the AIA Forms require state-specific adjustments to deal with state-specific peculiarities. Moreover, the risk allocation in the AIA Forms reflects the AIA’s priorities: protecting Architects first, and selling documents second. In general, the documents are excellent, but sophisticated Owners and Contractors generally prefer different risk allocations and, when using the AIA Forms, should adjust the language as necessary to yield the best allocation that can negotiated and obtained.

**NOTES**

1 For ease, all references to the AIA Forms are to the 2017 editions unless the text notes otherwise.

B101 § 3.1.2 (emphasis added).  

B101 § 3.1.4.  

B101 § 3.5.2.3.  

B101 § 3.1.4.  

B101 § 3.6.4.2; see also B101 § 3.6.4.3.  

B101 § 4.2.3.1.  

B101 § 4.2.  

B101 § 4.2.2.  

B101 § 4.2.3.  

B101 § 2.5.7; see also B101 § 2.5.8.  

B101 § 2.1 (emphasis added).  

B101 § 3.6.2.1.  

B101 § 3.6.2.1.  

B101 § 3.6.2.2.  

B101 § 3.6.4.  

B101 § 3.6.4.1.  

B101 § 3.6.4.2.  

B101 § 3.6.4.3.  

B101 § 3.6.4.4.  

Id.  

B101 § 3.6.5.1.  

B101 § 3.6.2.5.  

B101 § 3.6.2.3.  

B101 § 3.6.2.4.  

B101 § 7.1; see also B101 § 7.2.  

B101 § 7.2.  

B101 § 7.3.  

B101 § 9.7.2.  

Id.  

B101 § 10.7.  

B101 § 1.3.  

B101 § 1.3.1.  

B101 § 9.2.4.  


A201 § 15.2.6.1.  

Id.  

Id. at § 15.2.1.  

IdM has 30 days to decide claim and 15.3.2 stays litigation for 60 days pending mediation. Also, as a practical matter, it will take at least sixty (60) days following the initial decision to file for mediation, select a mediator, get counsel involved on an initial claim and document review, and get the mediation on the mediator’s and counsel’s calendar.  

For example, if the Owner agrees to arbitrate with the Contractor but to litigate with the Architect, and the Contractor asserts a Claim against the Owner for an alleged design defect, an
arbitrator would decide the merits of the Contractor’s claim, and then the Owner would have to prove the same thing to a jury. Not only does the Owner have to pay to try two the same case twice, the trial court may reach a different conclusion than the arbitrator. If all were in the same proceeding, the finder of fact would only find the Owner liable to the Contractor on the Contractor’s claim of design defect if it also found that the Architect was liable to the Owner for the same defect.