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**RECENT AIA DESIGN-BUILD CHANGES
FROM THE OWNER'S PERSPECTIVE**

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I. INTRODUCTION

This paper is an overview, from the Owner's perspective, of some of the potential issues with the AIA's new standard form, the "AIA Document A141-2004, Standard Form of Agreement Between Owner and Design-Builder" ("A141") and its related family of documents.¹

In reviewing the new AIA Design-Build documents, the Owner's focus is toward: (1) ensuring its expectations regarding the physical parameters of the Project²; (2) managing the Owner's quality, functionality and performance objectives³; (3) controlling the amount to be paid for design and construction services; (4) managing cash-flow and preventing liens; (5) controlling the duration and sequencing of the design and construction; (6) allocating responsibility for the risks of what can go wrong during and after completion of the project; and (7) redressing the imbalance associated with the fact that the design professional is contractually aligned with the builder and no longer the Owner's gatekeeper. Due to this shift in contractual allegiance, the Owner cannot look to the designer as its advocate when it comes to such crucial issues as aesthetics, value engineering, changes made during construction, or the other Architectural responsibilities in the traditional design-bid/negotiation-delivery model.^{4, 5}

When modifying the new AIA Design-Build documents the overall drafting challenge is to identify the various issues that will or could arise, develop mutually agreeable solutions in advance, and effectively memorialize them. An illustrative checklist that demonstrates some of the issues Owners may have with design-build is attached as **Schedule 1**.

Historically, the AIA's design-build family was based on the former AIA Document A191-1996 ("A191"). The A191 did not come close to meeting the Owner's requirements. The resulting drafting efforts for the benefit of the Owner required substantial modifications and/or supplements. A particular focus of modifications to the A191 was the creation of a form of

general conditions that would define the respective rights and responsibilities of the Owner and the Architect during the progress of the design, as well as during the construction.

From the Owner's perspective, the new A141 family of documents is a significant improvement over the A191 family. The A141 family is more balanced in reflecting concerns of the Owner than the A191 family, and will therefore require fewer modifications by Owners. In addition, the boilerplate standard terms and conditions incorporated in the A141 ("AIA Document A141-2004 Exhibit A Terms and Conditions") ("A141, Exhibit A"), is a composite document derived primarily from two existing AIA forms with which Owners are already familiar: the "General Conditions of the Contract for Construction, AIA Document A201-1997" ("A201"), and the "Standard Form of Agreement Between Owner and Architect with Standard Form of Architect's Services, AIA Document B141-1997" ("B141"). With the A141 family, Owners' attorneys will likely find they can readily adapt similar modifications to those that they typically suggest when reviewing a contract based on the A201 or the B141.⁶ A summary of the sections A141, Exhibit A, with references to A201 or B141 sections from which they appear to have been derived, is attached as **Schedule II**.

II. CLAUSES AND CONCEPTS THE OWNER WILL WANT TO NOTE – AN OVERVIEW

Owners should focus on the following boilerplate provisions in the A141 when implementing a Design-Builder project delivery system based on the A141.

A. Defining the "Design-Build Documents". The Owner's rights and responsibilities throughout the A141 are linked to what are referred to as the "Design-Build Documents," an important definition that can easily be glossed over during review. A141, § 1.1.1, reads:

[T]he Design-Build Documents consist of this Agreement between the Owner and Design-Builder (hereinafter the "Agreement") and its attached Exhibits; Supplementary and other Conditions; Addenda issued prior to execution of the Agreement; the Project

Criteria, including changes to the Project Criteria proposed by the Design-Builder and accepted by the Owner, if any; the Design-Builder's Proposal and written modifications to the Proposal accepted by the Owner, if any; other documents listed in this Agreement; and modifications issued after execution of this Agreement.

A141, Article 8, provides for a more detailed "enumeration" of the Design-Build Documents; however, only the A141 and its Exhibit A are automatically included within the "Design-Build Documents." A141, §§ 8.1.1 and 8.1.7. The Owner must therefore take pains to ensure that the blanks in Article 8 are completed and exhibits are created to the extent necessary to include within the Design-Build Documents all documents necessary to meet the Owner's requirements for the Design-Builder's undertaking. Of particular significance in this regard are appropriate documents establishing the: "Project Criteria"; acceptable elements of the Design-Builder's proposal; cost parameters⁷; comprehensive insurance requirements⁸; and appropriate modifications to A141, Exhibit A.

B. Establishing the Project Criteria and the Role of the Owner's Consultant. Unlike the A191 boilerplate, which presupposed that the Owner would engage the Design-Builder to construct a project based on design and construction criteria the Design-Builder itself had developed during a preliminary ("Part I") stage, the A141 assumes the Owner will prepare these scope criteria for the project. The A141 refers to this scope description generically as the "Project Criteria". A141, Exhibit A, § 1.1.2:

The Project Criteria are identified in Section 8.1.3 of the Agreement and may describe the character, scope, relationship, forms, size and appearance of the Project materials and systems and, in general, their quality levels, performance standards, requirements or criteria, and major equipment layouts. The Project Criteria are, in effect, the scope of the Design-Builder's undertaking.

The importance of a detailed preparation of the “Project Criteria” cannot be underestimated, as this will set the objective benchmark against which the Design-Builder’s performance will be measured.⁹ It is therefore surprising that the AIA did not provide a standard form of exhibit for this purpose. Even a template exhibit form would have added to the utility of the A141.

As it stands, the Owner must make sure it appropriately completes, and follows the directions given in, A141, § 8.1.3 which reads: “The Project Criteria, including changes to the Project Criteria proposed by the Design-Builder, if any, and accepted by the Owner consist of the following (either list the applicable documents and their dates below or refer to an exhibit attached to this Agreement).”

The AIA assumes the Owner will engage an independent consultant to assist with development of the Project Criteria and created another member of the A141 family to memorialize contracts between Owners and their Consultants: “AIA Document B142 Standard Form of Agreement Between Owner and Consultant” (“B142”).¹⁰ The B142, with its Exhibits, provides an extensive array of the issues the Owner should consider as it drafts, or engages the Consultant to draft, the Project Criteria, as well as to assist the Owner as an independent advisor and/or representative.

Owners will not, however, want to execute a B142 without giving it careful attention and making numerous modifications. Among other things, the B142 has a mutual waiver of consequential damages that is inappropriate and should be deleted or modified. B142, § 3.5.

C. The Design-Builder’s Proposal. From the Owner’s perspective, proposals should never be incorporated by reference into the Design-Build Documents. The Design-Builder’s freestanding Proposals often carry within them qualifications or exceptions that are inconsistent

with the other Design-Build Documents. These qualifications and exceptions and are often overlooked during preparation of a contract and simply incorporated without modification. Qualifications in proposals are particularly dangerous when they reduce the anticipated scope of the work from that set forth in the Project Criteria. Often the proposals use terms that are different from terms defined in the Design Build Documents. In order to minimize the chance for such inconsistencies, and resulting disagreements, the Owner should review the proposal, determine which portions are acceptable, and incorporate the acceptable portions of the proposal in the body of the Design-Build Agreement. Normally, this review will lead to modification of just the Project Criteria, the Contract Sum, the Contract Times, or one of the Exhibits. The result of this process will be a focus on how the proposal interrelates, and possibly conflicts with, other provisions of the Design-Build Documents, leading to a more effectively coordinated set of documents that are consistent with the Owner's expectations.

D. Substantial Completion. A141, Article 3 provides for insertion of a commencement date (or use of a notice of commencement), a date for Substantial Completion, and an advisory in small italics to insert any agreed upon liquidated damages. Owners should bear in mind that a liquidated damages provision is essential if they desire to hold the Design-Builder accountable for delay, unless they modify the waiver of consequential damage provision in A141, Exhibit A, § 4.1.10, as discussed in Section N, below.

With respect to Substantial Completion, Owners will welcome the important new provision that allows the Owner to initially determine the Substantial Completion Date (A141, Exhibit A, § 9.8.5), and the new form to be used by the Owner for that purposes (the "Acknowledgement of Substantial Completion of a Design Build Project" G704/DB). Another positive development relating to Substantial Completion is the right given to the Owner to

determine the extent to which the Contract Time will be extended by Change Order A141 for delays. Exhibit A, § 8.3.1

Interestingly, the A141 presupposes that the parties will establish a firm Substantial Completion Date at the time the Agreement is executed. The A141 is not geared towards readily allowing the Owner and Design-Builder to develop the Project Criteria with the Contract Time to be determined at a later date. Therefore, it would seem that the A141 will not be the contract of choice for those design-build projects in which the Owner and Design-Builder undertake to work progressively to develop the Project Criteria with the price and time for construction to be determined later.

E. Compensation. The A141 has been drafted to be compatible with the three standard pricing methods for design-build: lump sum, cost plus a fee without upper limit; and cost plus a fee not to exceed a guaranteed maximum price. This compatibility is accomplished in A141, § 4.1, which contains check boxes in which the Parties elect whether the “Contract Sum” will be a “Stipulated Sum,” “Cost of the Work plus Design-Builder’s Fee,” or “Cost the Work plus Design-Builder’s Fee with a Guaranteed Maximum Price.” The AIA contemplates that if the contract is based on the Cost of the Work, the A141, Exhibit B (“Determination or Definition of the Cost of the Work”) will apply. A141, § 4.3.1. The definitions of Cost found in Exhibit B are substantially similar to those in the AIA contracts providing for “Cost plus” compensation.¹¹

F. Instruments of Service. Another improvement for the A141 is a provision that the Owner will receive a license to reproduce and use the Instruments of Service for the Project. Owners may want to go further with this provision and enforce a final transfer of ownership in Instruments of Service. Under the standard language Owners will need to ensure the Design-

Builder obtains equivalent licenses from the Architect and any other design professionals under contract with the Design-Builder.

G. Dispute Resolution. The A141 requires that all initial decisions of claims will be determined by a “Neutral” who will be selected by the Owner (unless the parties otherwise agree). Continuing disputes will be resolved by one of the dispute resolution alternatives selected by the parties using the check boxes in A141 (arbitration, litigation, or “other”), but not until after a mandatory mediation administered by the American Arbitration Association. The AIA has also enhanced the value to Owners of the arbitration alternative by providing in A141, Exhibit A, § A.4.4.3 for the joinder in arbitration of parties “with whom the Owner or Design-Builder has a contractual obligation to arbitrate disputes which does not prohibit consolidation or joinder.” Joinder has long been urged by Owners, who generally prefer the economy of having all common issues among necessary parties resolved in one proceeding.

Joinder is permitted only where the party to be joined has consented. A141, Exhibit A, § 4.4.3; see also, B142, § 3.4.3.3; B143, § 3.4.3.3. As such, in order to actually bind all participants in the design-build project to the arbitration proceeding, the Owner must include in the Design-Build Agreement a requirement that the Design-Builder include a consent to joinder provision in its agreements with its subcontractors (e.g., the Architect and Contractor), which in turn should be required to include an equivalent consent in their agreements with other lower tier participants.

H. The Owner-Architect Relationship. A141’s provision that the Architect’s duties are solely for the benefit of the Design-Builder is contrary to the Owner’s expectation that it is the intended beneficiary of Architect’s professional skills and certifications, as in the traditional design-bid/negotiation-build relationship. Exhibit A, § A.3.2.1. For those Owners who want

assurances the Architect is working for the Owner's benefit, the A141 comes up short. Indeed, Exhibit A, § A.3.2.1, specifically provides that the Architect's duties are "in the sole interest of and for the exclusive benefit of the Design-Builder," and contains no requirement that the Architect furnish any errors and omissions coverage or other insurance for the Project. Owners who want the design-build agreement to ensure they will have direct recourse against Architects (and other lower tier participants), will want to strike §A.3.2.1 and modify §A.3.2.2, relating to the Design-Builder's agreement with the Architect, in order to specifically grant the Owner status as a third-party beneficiary, and require the Architect to furnish insurance, including errors and omissions coverage.

Owners desiring to enhance their visibility with the Architect should also consider additions to Exhibit A obligating the Design-Builder to engage the Architect to furnish the design and construction documents, perform traditional construction administration duties, provide that that the Architect certify each payment application, and participate in determining and verifying of the Design-Builder's Substantial Completion.

I. Subcontracts. A major disappointment to Owners will be the A141 documents' failure to characterize the Design-Builder's agreements with the Architect and the Contractor as "Subcontractors." The A141 defined the Architect as an architect "having a direct contract with the Design-Builder" (A141, Exhibit A, § 1.1.3), and the Contractor as a contractor "that has a direct contract with the Design-Builder to perform all or a portion of the construction" (A141, Exhibit A, § 1.1.4). From the Owner's viewpoint, the Architect and Contractor are "Subcontractors" to the Design-Builder and should be treated as such in the Design-Build Documents. Owners concerned with this distinction should modify A141, Exhibit A, to redefine the A141's reference to the "Architect" as the "Design Subcontractor," to the "Contractor" as the

“Construction Subcontractor,” and to lower tier design consultants and construction entities as design or construction “sub-subcontractors.”

A141 standing alone is also not consistent with Owner’s expectation that the Design and Construction Subcontractors, their subcontractors, and other lower tier participants should be accountable to the Owner for their respective portions of the Design-Builder’s design and construction responsibility. Owners want assurances they will have recourse against Subcontractors and other lower tier participants in the event the Design-Builder is not able to respond, and therefore should require the Design-Builder to include in its agreements with Architect and Contractor (i.e., the Design and Construction Subcontracts) provisions (i) granting the Owner status, among other things, as an intended third-party beneficiary, additional insured, and indemnitee of the Design and Construction Subcontractors, (ii) establishing minimum insurance requirements for all major lower tier participants, (iii) consenting to joinder in Owner/Design-Build arbitration, (iv) coordinating with requirements established by lenders providing financing for the Project, and (v) requiring Subcontractors to insert equivalent provisions in their agreement with Sub-subcontractors.¹² Without these protections, Owners may have limited recourse against the design and construction Subcontractors and Sub-subcontractors for construction defects and claims resulting from breaches of contract, especially in states that apply the economic loss rule.

J. Pre-Construction Design and Course of Construction Design Services. Design services to be furnished by the Design-Builder are summarized in A141, Exhibit A, § A.3.2 (“Design Services and Responsibilities”). From the Owner’s perspective, this one page summary is insufficiently brief, and needs elaboration to memorialize the Owner’s expectations that the Design-Builder will in fact furnish “Design-Builder Services.” Because of this concern about

managing the design, the Owner will want to modify the section to provide for progressive evolution of the design in consultation with the Owner, paralleling the more traditional phasing structure, with the right for input, evaluation and authorization to proceed from stage to stage. The Owner will want to pay particular attention to A141, Exhibit A, §§ A.3.2.1-A.3.2.11 submittals to the Owner for review of draft design and construction documents as necessary to obtain the Owner's approval, as well as to interact with construction pricing consultants and others to the extent the Owner wants to be involved with cost control.

To the extent the Design-Builder is responsible for furnishing geotechnical services or other consulting services, the text should be modified to provide for that as well. A141, Exhibit A, §§ A.2.2.2 and A.2.2.10 require the Owner to furnish surveys, geotechnical engineers, reports, legal services and other information. With respect to geotechnical matters the risk is that that the geotechnical engineer's recommendations are insufficient for the structural design upon which it is based. Of all parties to the project, the structural consultant is in the best position to select the consultant, define the scope of its services, and identify questions in the report that require follow up testing and reporting. As between the Owner and the Design-Build team, the Design-Build team is clearly in the best position to manage this risk, and to be accountable for the consequences of its failure to do so. Therefore, the Owners should consider deleting and/or modifying A141, Exhibit A, §§ A.2.2.1 and A.2.2.10, and revising A141, Exhibit A, Article A.3, to provide that the Design-Builder will furnish the geotechnical services, or, if the Owner has arranged for geotechnical services, that the Design-Builder will, after review of those reports and any additional tests/reports it may require as a condition of its acceptance, adopt the report as if it had been originally obtained by the Design-Builder.

K. Course of Construction Design Services. A surprising omission from A141, Exhibit A, is the language addressing the need for the Design-Builder to furnish design services in connection with construction. The Owner will want to make significant modification to A.3.3.3 (“construction”) to provide not only that the construction work will be in accordance with the construction documents that the Owner has accepted, but also that the Design-Builder will engage the Architect to furnish all necessary course of construction A/E services, including shop drawing review, responding to RFIs, and in interpreting and modifying, as necessary, the instruments of services.¹³

L. Owner’s Obligation to Review Design Documents Construction Documents, and Other “Submittals”. Owners will want to carefully review and modify the provisions of A141, Exhibit A, that obligate the Owner to take action on “submittals,” a term that carries with it the potential for misunderstanding. A141, Exhibit A, § A.2.3.1, reads:

The Owner shall review and approve or take other appropriate action upon Design-Builder’s submittals, including but not limited to design and construction documents required by the Design-Build Documents, but only for the limited purpose of checking for conformance given in design concepts expressed in the Design-Build Documents.

A141, Exhibit A, § 2.3.2 goes on to state that the Owner is obligated to take one of 5 actions in connection with the review: (1) determine the “documents or submittals are in conformance with the design-build documents and approve them,” (2) determine these are in conformance “but request changes in the documents or submittals which shall be implemented by a Change” in the Work, (3) determine that the documents or submittals “are not in conformity with the Design-Build Documents and reject them,” (4) determine that the “documents or submittals are not in conformity with the Design-Build Documents but accept them by implementing a change in the Work,” or (5) “determine that the documents or submittals are not in conformity with the design-

build documents but accept them and request changes which shall be implemented by a Change in the Work.” This section may literally require the Owner to retain design professionals who are qualified to perform the revisions indicated, and we suspect Owners will want to consider modifying this clause in almost every case,¹⁴ as well as modifying the B142 (“B142-2004 Exhibit B-Consultant’s Scope”), to provide for review by the Consultant of the Design-Builder’s submittals.

Owners must “review” design documents, construction documents and submittals.

“Design Document” are defined in A141, Exhibit A, § A.3.2.5, which provides:

The Design-Builder shall provide to the Owner for Owner’s written approval design documents sufficient to establish the size, quality and character of the project. . . .

“Construction Documents” are defined in A.3.2.6 to be those “that set forth in detail the requirements for construction of the project.” A141, Exhibit A, § A.3.2.6.

A141, Exhibit A, § 3.3.1 makes it clear that:

[T]he Design-Builder shall perform no portion of the Work for which the Design-Build Documents require the Owner’s review of submittals, such as Shop Drawings, Product Data and Samples until the Owner has approved each submittal.

A “submittal,” therefore, is defined by implication as whatever is identified in the “Design-Build Documents” as a submittal that must be furnished to the Owner for approval. Thus, a “Submittal” can include a “shop drawing, product data and samples, and similar documents.”

A141, Exhibit A, § A.3.3.1.

Since submittals are to be submitted to the Owner for review, it only makes sense that the topic of who reviews submittals on behalf of the Owner would also have been addressed. Unfortunately, it was not addressed in the new documents very clearly and those Owners who do not want responsibility for receipt and/or review of shop drawings and other submittals will need

to modify the agreements to make that desire clear. Conversely, to the extent an Owner wishes to have some degree of oversight and the opportunity for control, the agreements must be modified to provide for the extent to which Owners will receive and/or have opportunity to review and comment upon shop drawings, product data, samples, or other similar documents. In any event, the Owner's obligation to compare submittals with the "Design-Build Documents" should be modified to require only that the Owner make a comparison with the "Project Criteria," and the Owner should not be required to "approve," but rather to "accept" the documents it has agreed to review.

Another question relates to the time within which the Owner will have to take action under A141, Exhibit A, § A.2.3, which provides that "[t]he Owner's action shall be taken with reasonable promptness as to cause no delay in the activities of the Design-Builder or separate contractors." The Owner would do well to establish a minimum default time for review in the revision to Exhibit A, § A.2.3.

While the AIA has taken some pains to limit the Owner's liability, provided that the Owner undertakes a review of the nature indicated, the Owner nevertheless seems to be called upon to undertake some level of due diligence, and with it, a resulting increase in potential liability.

A141, Exhibit A, § A.2.3.2 requires that the Owner take one of five actions on "submittals required by the Design-Build Documents." Under A141, Exhibit A, § A.2.3.1, the Owner's review is limited "for the purpose of checking for conformance of information given and the design concept expressed in the Design-Build Documents" (subject to exceptions noted in A141, Exhibit A, § A.2.3.1). Therefore, as long as the Owner limits itself to the five actions, the Design-Builder will remain primarily responsible for compliance with the Design-Build

Documents. A141, Exhibit A, § A.2.3.4 provides:

[T]he Owner's review and approval of the Design-Builder's documents or submittals shall not relieve the Design-Builder of responsibility for compliance with the Design-Build Documents, unless a) the Design-Builder has notified the Owner in writing of the deviation prior to approval by the Owner or, b) the Owner has approved a Change in the Work reflecting any deviation from the requirements of the Design-Build Documents.

M. Key Personnel. The Owner normally selects a Design-Builder based on representations regarding the key personnel who will be responsible for the design and construction. Owners approve other key personnel who will manage or furnish important components of the design or construction. Those Owners will want to include provisions in the agreement (i) identifying the promised key personnel; (ii) granting the Owner the right to approve additional key personnel; and (iii) require that they not be reassigned or replaced without the Owner's approval.

N. Consequential Damages Waiver. The A141 inappropriately limits the Design-Builder's liability through the following: a mutual waiver of consequential damages (A141, Exhibit A, § 4.1.10); inadequate indemnification (A141, Exhibit A, §§ 3.17.1 and 3.17.2); and limitations of actions (A141, Exhibit A, § A.13.6.1). The mutual waiver of consequential damages clause (which mirrors A201 § 4.3.10) is among the most objectionable to Owners. Owners believe the mutual waiver of consequential damages clause provides disproportionate benefits to the other party and inappropriately allocates to the Owner substantial risks which the other party is better able to manage, all without corresponding benefit or consideration to the Owner. If anything, the objection to the waiver of consequential damages will take on greater meaning in the design-build context, where the Owner views the Design-Builder as the single point of responsibility for design and construction of the entire Project. Owners should endeavor to eliminate this text and related provisions, such as those found in A141, Exhibit A, § A.3.17.1

(no indemnity for damage to the work), and A141, Exhibit A, § A.11.4.3 (waiver of consequential damages for loss of use of Owner's property).

O. Owner's Duty to Give Updates on Financial Arrangements. A141, Exhibit A, § A.2.2.8, obligates the Owner to provide financial assurances to the Design-Builder whenever requested:

The Owner shall, at the request of the Design-Builder, prior to execution of the Design-Build Contract and promptly upon request thereafter, furnish to the Design-Builder reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Design-Build Documents.

Failure of the Owner to furnish this evidence "upon the Design-Builder's request" is grounds for termination of the agreement under A141, Exhibit A, §A.14.1.1.4. Owners generally consider this requirement, which is derived from A201, § 2.2.1, to be an unwarranted interference with their internal affairs and lender relations. Owners will want to negotiate significant limits on their duties under this subparagraph, perhaps by way of defining "reasonable evidence," by limiting the Design-Builder's right to request assurances to specified events (such as unexcused failure of the Owner to make payment), and by creating reciprocal rights in favor of the Owner.

P. Safety Disclaimer. A141, Exhibit A, § A.3.3.7 deserves passing attention because it mirrors A 201, § 3.3.1, which is also often objected to by Owners. The concern is that the Design-Builders ought not to be permitted to shift liability to the Owner merely by giving notice that a specified procedure "may not be safe". The Design-Builder is in the best position to propose solutions to safety issues and should be responsible for its own negligence, including negligence in following directions from the Owner. Owners therefore should either delete this disclaimer, or modify it to obligate the Design-Builder to propose a solution to any safety issues

raised. Furthermore, responsibility for safety issues should be, at a minimum, based on comparative negligence.

Q. Scheduling. Owners will want to modify A141, Exhibit A, § A.3.9, which simply requires the Design-Builder to generate and submit a schedule “promptly after execution of the Design-Build Contract.” Much more preferable would be a requirement to agree to a schedule before execution of the Design-Build Agreement, including anticipated milestones for various stages of design, approval windows, construction and other critical dates/durations of the schedule. The A141 should include this initial schedule as an exhibit. Such provisions are especially important since proper management of the design schedule can be critical to the success of the Project.¹⁵

R. Indemnification. The indemnification provision in the new Design-Build family, A141, Exhibit A, § A.3.17.1, mirrors the AIA’s general approach, which limits the Owner’s right of indemnity for third-party claims to a specific subset of third-party claims arising from insurable negligence claims (“bodily injury, sickness, disease or death, or injury to or destruction of tangible property other than the Work itself, but only to the extent caused by the negligent acts or omissions of the Design-Builder”). Owners should negotiate modifications to encompass indemnification for other claims, such as intellectual property infringement, liens, hazardous materials, governmental fines and penalties, breach of contract of the Design-Builder and its lower tier design and construction professionals, property damage to the work itself, and consequential damages.¹⁶ The B142, the standard agreement between Owner and Consultant, by contrast, has no indemnity. Owners will want to insert indemnities in their Owner-Consultant Agreements in appropriate cases.

S. Insurance. The A141's insurance provisions, A141, § 8.1.9; A141, Exhibit C; and A141, Exhibit A, §A.11, are objectionable to Owners due to their ambiguity. A141, Exhibit A, §A.11, requires only that the Design-Builder furnish "such insurance as will protect the Design-Builder" from a category of claims that, as identified in A141, Exhibit A, §A.1.2.1, are essentially limited to workers compensation, personal injury and bodily harm. In addition, there is no requirement for professional errors and omissions insurance at any level, nor do the liability insurance requirements in Exhibit A, § A11.2, set minimum amounts required for coverage, quality standards for carriers, or address other matters of concern to the prudent Owner. The A141's insurance requirements are also deficient in their failure to require that any insurance be furnished by the Architect, Contractor, or any other participant under the Design-Builder. Owners should insist that not only the Design-Builder, but also the Architect, Contractor, and all other lower tier participants who furnish any of the Work provide specified insurance, including (where applicable) professional errors and omissions insurance.

T. Hazardous Materials. A141, Exhibit A, §§ A.10.3 and A.10.4, which call for the Owner to indemnify the Design-Builder for environmental matters, to the extent the Design-Builder is not negligent, is an improvement over the A201 approach, which requires the Owner to indemnify the Contractor for environmental matters unless the Contractor is solely negligent (A201, § 10.5). However, the Owner's view is that this indemnity does not go far enough given the special relationship of the Design-Builder to the design as well as construction of the Project. The Owner should require a corresponding indemnification from the Design-Builder to the Owner for the Design-Builder's negligence or failure to fulfill a responsibility related to hazardous materials.

Another concern to Owners is A141, Exhibit A, § 10.4, which reads:

The Owner shall not be responsible under Section A.10.3 for materials and substances brought to the site by the Design-Builder unless such materials or substances were required by the Design-Build documents.

Because the Design-Builder is responsible for generating the design and construction documents, it will be primarily responsible for determining the “requirements of the Design-Build Documents” that may specify the use of hazardous materials or substances. It is not appropriate for the Design-Builder to be relieved from responsibility for furnishing materials or substances that its design professionals required in the first place. The Owner should modify this text to hold the Design-Builder responsible for the materials its design professionals specified.

U. Contractual Statute of Repose. A141, Exhibit A, § A.13.6, contains a specific provision that defines when the statutory limitation provisions commence. Owners generally object to this type of provision, which is derived from A201, § 13.7, and B141, § 1.3.6, because it can prevent claims that would have otherwise been timely in a state where the “discovery” rule applies. Owners prefer to have existing limitations under state law apply and, therefore, almost uniformly delete this provision.

V. Lender Considerations. A141, Exhibit A, § A.13.2.2, allows an Owner to assign the Design-Build contract to its institutional lender without prior consent of the Design-Builder. Owners generally find it necessary to modify the A201 equivalent of this section (AIA-A201, § 13.2.2) to reflect the typical requirements lenders impose as conditions to financing construction projects. Lenders, for example, will require the other party to agree or consent to an assignment to the lender without the qualification found in A201, § 13.2.2, to the effect that the lender must agree to assume all of the contract obligations of the Owner.

W. Termination For Convenience. A141, Exhibit A, § A.14.4 mirrors its equivalents in A201 and B141 allowing the Design-Builder reasonable profit and overhead on Work not excluded if the Owner terminates the Design-Builder for the Owner's convenience. In a convenience termination situation this is an unnecessary project expense and a windfall to the Design-Builder. For that reason, Owners will likely find A141, Exhibit A, A.14.4 objectionable unless modified to exclude or limit the unearned profit and overhead to be paid to the Design-Builder.

X. Confidentiality and Non-Disclosure. The need to preserve the confidentiality of information received by the Design-Builder and its consultants in the course of developing the project is a major concern for most Owners. This can be especially important when the Design-Builder learns the Owner's plans and perspectives during the programming and design stage. Owners often require confidentiality and nondisclosure agreements, and it is somewhat surprising that the A141 fails to contain one, especially since the B143 obligates the Architect to hold confidential information specifically designated by the Design-Builder as confidential. Owners concerned about preserving confidentiality and nondisclosure should consider developing a comparable provision in A141, drawing upon the concept as it appears in B143, § 2.3.5. See also, B142, § 3.6.5 and B143, § 2.3.5.

IV. CONCLUSION

There is much to be said for the AIA's new generation of design-build documents. The flexibility of pricing and dispute resolution, as well as the detailed "Terms and Conditions" add much definition to the project. Most of the new terms and provisions should not be controversial and thus the new generation of documents will require significantly less modification from the Owner's perspective than was required when the A191 was utilized. Nevertheless, Owners will

need to approach use of the A141 with caution. The A141 will not be suitable for projects that are at such an early stage of project planning that the Design-Builder is unwilling to commit to the firm date for Substantial Completion as provided in A141, §3. Owners should consider alternative forms, perhaps the Owner-Consultant B142 for development of the Project Criteria. Moreover, as noted above, many of the provisions of A141 will require careful evaluation and modification as appropriate to result in an integrated contract that effectuates accountability to the Owner by participants at all tiers. Owners accustomed to modifying A201 will find this task easier, because of the substantial similarities between A141 and A201.

The Owner is best advised to structure an approach using the A141 suite with a template based on A141, A141 Exhibit A, A141 Exhibit B, and a custom set of exhibits to address insurance and other parameters. The Owner also should not accept the A141's approach to subcontract between the Design-Builder and Contractor and the Architect if the Design-Builder is planning on using the forms prepared by the AIA for these subcontracts, i.e., A142 ("Standard Form of Agreement between Design-Builder and Contractor"), or the B143 ("Standard Form of Agreement Between Design-Builder and Architect").

A thorough review of the entire A141 family of documents and negotiation of appropriate modifications of the standard contract provisions is highly recommended. As modifications are negotiated with the Design-Builder under A141 and A141, Exhibit A, the agreements with lower tier participants should also be carefully reviewed and modified as appropriate to ensure that the Owner will benefit from an integrated, coordinated, consistent set of documents. The new A141-based documents have made such a review and coordination far more efficient for Design-Build projects than would have been possible with the A191.

SCHEDULE I

Major Owner Issues In Negotiating Design-Build Contracts

| Concept | Owner's Design-Build Objectives |
|--|--|
| Project Criteria - minimum parameters for service, longevity, functionality, and operational performance objectives - life cycle costs | Focus on detailed criteria; establish and set minimum parameters that are enforceable (See Susan McClendon, "Specifying Performance Before the Design Begins", the Construction Specifier, August 2001, p. 44) |
| Confidentiality/Non-Disclosure Clause | Establish need at the commencement and establish terms, if appropriate, before and during negotiation. |
| Managing Design Development | Establish design schedule; schedules with milestones; parameters; Owner Review & authorization to proceed |
| Cost Management | Lump sum or GMAX; contingencies, allowances, unit prices; changes |
| Managing Cash Flow | Coordinate with Lender requirements, Prompt Payment Statutes |
| Duration of Design and Construction | Schedules; time limits; accountability for failure to meet milestones |
| Document Control/Use/Ownership | Right to use (preferably own) work product |
| Course of construction quality control | Alternate gate keeper functions; provide for role of Owner's Consultant; establish dual agency of A/E. |
| Allocating responsibility for what can go wrong before completion | |
| Changes | Establish procedures and controls; no work furnished before change is authorized. |
| Avoidable Delays | Define and allocate responsibility for management and consequences for failure to do so |
| Unavoidable Delays | Define-Delineate between Owner-caused and force Majeure delays and remedies for each |

| Concept | Owner's Design-Build Objectives |
|--|---|
| Default & Termination for Cause | Define the process |
| Notice of Claims | Written notice & short trigger for initial notice |
| Insurance | CGL, Worker's Compensation, Employer's Liability; Errors & Omissions; Builders Risk |
| Allocating responsibility for what can go wrong after completion | |
| Defects | Appropriate warranty |
| Mitigating Economic Loss Rule | Minimum Owner protection requirements in Subcontract and Sub-subcontracts |
| Third Party Claims | Appropriate Indemnities |
| Insurance | Products & Completed Operations; Errors & Omissions tail coverage |
| Dispute Resolution | Determine ADR; If Arbitration, consider emergency procedures; joinder of lower tier entities. |
| Termination for Convenience | Establish clear right; alternative termination fee, if any |

SCCHEDULE II

Exhibit A, Terms & Conditions

AIA Document A141-2004

| <u>Section</u> | <u>Topic</u> | <u>Probable AIA Source</u> |
|----------------|---|----------------------------|
| A.1.1.1 | Basic Definitions | A201, 1.1 |
| A.1.1.2 | Project Criteria | New |
| A.1.1.3 | Architect | A201, 4.1.1 |
| A.1.1.4 | Contractor | A201, Article 3 |
| A.1.1.5 | Subcontractor | A201, 5.1.1 |
| A.1.1.6 | The Work | A201, 1.1.3 |
| A.1.1.7 | The Project | A201, 1.1.4 |
| A.1.1.8 | Neutral Gender | New |
| A.1.2.1 | Design-Builder to notify Owner if Owner's instruction would violate laws | A201, 3.7.4 |
| A.1.2.2 | Design-Builder to rely on Project Criteria; compliance with applicable laws, regulations & codes obligation of Design-Builder | A201, 3.2.2 |
| A.1.3.1 | Capitalization | A201, 1.3.1 |
| A.1.4.1 | Interpretation; Omission of Modifying Words | A201, 1.4.1 |
| A.1.4.2 | Interpretation; Technical Terms in accordance with well known technical or construction industry meanings | A201, 1.2.3 |
| A.1.5.1 | Signing of Design-Build Documents | A201, 1.5.1 |
| A.1.5.2 | Execution as representing Design- | A201, 1.5.2 |

| <u>Section</u> | <u>Topic</u> | <u>Probable AIA Source</u> |
|----------------|--|----------------------------|
| | Builder has visited Site | |
| | | |
| A.1.6.1 | Ownership of Instruments of Service – Design-Builder & Architect | B141, 13.2.1 |
| A.1.6.2 | Owner’s Conditional License to Use Instruments of Service | Adapted for B141, 13.2.2 |
| A.1.6.3 | Electronic Exchange of Instruments of Service | B1141, 13.2.4 |
| A.1.6.4 | Owner’s License to Use Instruments of Service upon termination not due to Owner’s default | New Concept |
| A.1.6.5 | Submission to meet official requirements is not in derogation of reserved rights | B141, 13.2.3 |
| A.2.1.1 | Definition of Owner; Owner’s Designated Representative | A201, 2.1.1 |
| A.2.1.2 | Owner to furnish title information | A201, 2.1.2 |
| A.2.2.1 | Owner to furnish information or service with reasonable promptness | A201, 2.2.4 |
| A.2.2.2 | Owner’s responsibility for surveys | A201, 2.2.3 |
| A.2.2.3 | Owner to furnish results of prior tests, inspections & investigations | Adapt from B141, 12.2.5 |
| A.2.2.4 | Owner may obtain independent review of Design-Builder’s work product | <u>New</u> |
| A.2.2.5 | Owner to cooperate with Design-Builder in securing permits <u>but</u> Owner is not to pay for the fees | NEW: A201, 3.7.1 |
| A.2.2.6 | Design-Builder entitled to rely on surveys furnished by Owner under | A201, 2.2.3 |

| <u>Section</u> | <u>Topic</u> | <u>Probable AIA Source</u> |
|----------------|--|---|
| | A.2.2.2 | |
| A.2.2.7 | Owner to give notice of defect or nonconformity | B141, 4.10 |
| A.2.2.8 | Owner to furnish evidence of financing | A201, 2.2.1 |
| A.2.2.9 | Owner Communications with Subcontractors through Design-Builder | A201, 4.2.4 |
| A.2.2.10 | Owner to furnish Geotechnical | B141, § |
| A.2.2.11 | Owner to promptly obtain essential easements | A201, 2.2.2 |
| A.2.3.1 | Owner to Review Submittals& Inspection | Adapted from Architect's Responsibility under A201, 4.2.7 |
| A.2.3.2 | Owner action on Submittals | New Concept |
| A.2.3.3 | Design-Builder shall submit proposed changes to previously approved submittals | A201, 3.3.1 |
| A.2.3.4 | Owner's review & approval shall not relieve Design-Builder of compliance with Design-Build Documents | Adapted from last sentence of A201, 4.2.7 |
| A.2.3.5 | Owner may visit site; Owner is not responsible for means & methods | Adapted from B141, 2.6.2.1 and A201, 4.2.7 |
| A.2.3.6 | Owner not responsible for acts, errors or omissions of Design-Builder | A201, 4.2.3 |
| A.2.3.7 | Owner may reject nonconforming Work | A201, 4.2.6-modified |
| A.2.3.8 | Owner-on site project representative | A201, 4.2.10 |
| A.2.3.9 | Owner shall inspect to determine dates of Substantial Completion & | A201, 4.2.9-modified |

| <u>Section</u> | <u>Topic</u> | <u>Probable AIA Source</u> |
|-----------------------|---|-----------------------------------|
| | Final Completion | |
| A.2.4.1 | Owner's right to Stop Work | A201, 2.3.1 |
| A.2.5.1 | Owner's right to carry out Work | A201, 2.4.1 |
| | | |
| A.3.1.1 | The Design-Builder referred to as singular | A201, 3.1.1-modified |
| A.3.1.2 | Design-Builder to perform Work in accordance with Design-Build Documents | A201, 3.1.2 |
| A.3.2.1 | Architect Services are in sole interest of Design-Builder | New |
| A.3.2.2 | Agreements between Design-Builder & Architect shall be in writing & disclosed to Owner | New |
| A.3.2.3 | Design-Builder responsible for acts & omissions of its employees | A201, 3.3.2 |
| A.3.2.4 | Design-Builder to report errors, inconsistencies, omissions to Owner | A201, 3.2.2 |
| A.3.2.5 | Design Development | A141, 2.4.3 |
| A.3.2.6 | Preparation of Construction Documents | A141, §2.4.4 |
| A.3.2.7 | Owner to meet with Design-Builder to review progress of design documents & construction documents | New |
| A.3.2.8 | Design-Builder to prepare & file documents necessary for governmental approvals | A201, 3.7.1 |
| A.3.2.9 | Design-Builder to furnish certifications to Owner from | New |

| <u>Section</u> | <u>Topic</u> | <u>Probable AIA Source</u> |
|----------------|---|--|
| | Design-Builder's professionals | |
| A.3.2.10 | Owner requests for design professional's certifications other than those furnished pursuant to A.3.2.9 | A141, 13.7.8 |
| A.3.3.1 | Design/Builder to perform no work until Owner has approved the construction, or any submittals the Owner is to approve per the Design/Build Documents | A201, 3.2.17 |
| A.3.3.2 | Construction to be per approved submittals | A201, 3.12.8 |
| A.3.3.3 | Specific notice to Owner of revising in submittals other than those requested by Owner on previous submittals | A201, 3.12.9 |
| A.3.3.4 | Delegation of design to Construction Contractors | A201, 3.2.10 |
| A.3.3.5 | Design-Builder sole control over means & methods | A201, 3.3.1 (1 st sentence) |
| A.3.3.6 | Design-Builder keep Owner informed | |
| A.3.3.7 | Design-Builder responsible for supervision & direction of Work | A201, 3.3.1 |
| A.3.3.8 | Design-Builder responsible for inspections of Work | A201, 3.3.3 |
| A.3.4.1 | Design-Builder responsible for labor, services, facilities, etc. necessary for the Work | A201, 3.4.1 |
| A.3.4.2 | Owner approval of substitutions of specified materials | A201, 3.4.2 |
| A.3.4.3 | Design-Builder to enforce discipline among its employees | A201, 3.4.3 |

| <u>Section</u> | <u>Topic</u> | <u>Probable AIA Source</u> |
|----------------|--|----------------------------|
| | | |
| A.3.5.1 | Warranty | A201, 3.5.1 |
| | | |
| A.3.6.1 | Taxes | A201, 3.6 |
| | | |
| A.3.7.1 | Permits, Fees & Notices | A201, 3.7.1 |
| A.3.7.2 | Notices/Laws | A201, 3.7.2 |
| A.3.7.3 | Design-Builder responsible for compliance with applicable laws, etc. | A201, 3.7.3 |
| A.3.7.4 | Design-Builder to assume responsibility for Work contrary to applicable laws, etc. | A201, 3.7.4 |
| | | |
| A.3.8.1 | Allowances | A201, 3.8 |
| A.3.8.2 | Design-Builder allowances, costs | A201, 3.8.2 |
| A.3.8.3 | Owner to timely select materials & equipment | A201, 3.8.3 |
| | | |
| A.3.9.1 | Progress Schedule | A201, 3.10.1 |
| A.3.9.2 | Design-Builder to keep current schedule of submittals submitted to Owner | A201, 3.10.2 |
| A.3.9.3 | Design-Builder to conform to most recent schedules | A201, 3.10.3 |
| | | |
| A.3.10.1 | Documents & Supplies at Site | A201, 3.11 |

| <u>Section</u> | <u>Topic</u> | <u>Probable AIA Source</u> |
|----------------|--|----------------------------|
| | | |
| A.3.11.1 | Shop Drawings | A201, 3.12.1 |
| A.3.11.2 | Product Data | A201, 3.12.2 |
| A.3.11.3 | Samples | A201, 3.12.3 |
| A.3.11.4 | <u>NOT</u> Design-Build Documents | A201, 3.12.4 |
| A.3.11.5 | Design-Builder to review for compliance | A201, 3.12.5 |
| A.3.11.6 | Effect of Design-Builder Approval | A201, 3.12.6 |
| | | |
| A.3.12.1 | Use of Site | A201, 3.13 |
| | | |
| A.3.13.1 | Cutting & Patching | A201, 3.14.1 |
| A.3.13.2 | Design-Builder not to alter or damage work previously done without Owner's written consent | A201, 3.14.2 |
| | | |
| A.3.14.1 | Cleaning Up | A201, 3.14.1 |
| A.3.14.2 | Owner's right to clean up | A201, 3.14.2 |
| | | |
| A.3.15.1 | Owner access to Work | A201, 3.16.1 |
| | | |
| A.3.16.1 | Royalties, patents & copyrights | A201, 3.17 |
| | | |
| A.3.17.1 | Indemnity | A201, 3.18.1 |
| A.3.17.2 | No limit of liability | A201, 3.18.2 |

| <u>Section</u> | <u>Topic</u> | <u>Probable AIA Source</u> |
|----------------|--|-----------------------------|
| | | |
| A.4.1.1 | Claims | A201, 4.3.1 |
| A.4.1.2 | Time Limit on Claims | A201, 4.3.2 |
| A.4.1.3 | Continuous Performance | A201, 4.3.3 |
| A.4.1.4 | Claims for Concealed or Unknown Conditions | A201, 4.3.4 |
| A.4.1.5 | Claim-Additional Cost | A201, 4.3.5 |
| A.4.1.6 | Claim for cost to be filed per A.10.6 | A201, 4.3.6 |
| A.4.1.7 | Claim-Additional Time | A201, 4.3.7 |
| A.4.1.8 | Personal Injury | A201, 4.3.8 |
| A.4.1.9 | Material Change in quote of unit prices | A201, 4.3.9 |
| A.4.1.10 | Mutual Waiver of Consequential Damages | A201, 4.3.10 A141, 1.3.6 |
| A.4.1.11 | Effect of change in codes, laws, regulations or official interpretations | A141, 1.3.3.2.2 |
| | | |
| A.4.2.1 | Decision by Neutral | A201, 4.4.1 |
| A.4.2.2 | Decision by Owner | New |
| A.4.2.3 | Initial decisions shall be in writing | A201, 4.4.5 |
| A.4.2.4 | Owner right to notify Surety | A201, 4.4.7 |
| A.4.2.5 | Mechanic's Lien | A201, 4.4.8 |
| | | |
| A.4.3.1 | Mediation | A201, 4.5 |

| <u>Section</u> | <u>Topic</u> | <u>Probable AIA Source</u> |
|-----------------------|---|-----------------------------------|
| A.4.3.2 | Resolution of Claims | A201, 4.4 |
| A.4.3.3 | Mediation location; Mediator's Fees | A201, 4.5.3 |
| | | A201, 4.6 |
| A.4.4.1 | Arbitration | A201, 4.6.3 |
| A.4.4.2 | Time for demand for arbitration | A201, 4.6.4 |
| A.4.4.3 | Joinder of parties to arbitration | New |
| A.4.4.4 | Timely assertion of Claim | A201, 4.6.5 |
| A.4.4.5 | Judgment on Final Award | A201, 4.6.6 |
| | | |
| A.5.1 | Design-Builder to furnish names to Owner | A201, 5.2.1 |
| A.5.2 | Owner right to object to proposed contracts of Design Builder | A201, 5.2.2 |
| A.5.3 | Time and price consequences of Owner objection | A201, 5.2.3 |
| A.5.4 | Owner approval of changes | A201, 5.2.4 |
| A.5.5 | Contingent Assignment of Subordination | A201, 5.4.2 |
| | | |
| A.6.1.1 | Construction by Owner | A201, 6.1.1 |
| A.6.1.2 | "Separate Contractor" | A201, 6.1.2 |
| A.6.1.3 | Coordination with Owner's separate contractors | A201, 6.1.3 |
| | | |
| A.6.2.1 | Mutual Responsibility | A201, 6.2.1 |

| <u>Section</u> | <u>Topic</u> | <u>Probable AIA Source</u> |
|----------------|---|----------------------------|
| A.6.2.2 | | A201, 6.2.2 |
| A.6.2.3 | Owner reimbursement for costs of separate contractor | A201, 6.2.3 |
| A.6.2.4 | Remedy of Damage | A201, 6.2.4 |
| A.6.2.5 | Cutting & Patching responsibilities (A.3.13) | A201, 6.2.5 |
| | | |
| A.6.3.1 | Owner's right to cleanup | A201, 6.3.1 |
| | | |
| A.7.1.1 | Changes | A201, 7.1.1 |
| A.7.1.2 | Issuance of Change Order or CCD | A201, 7.1.2 |
| A.7.1.3 | Changes shall be performed per the Design-Build Documents | A201, 7.1.3 |
| | | |
| A.7.2.1 | Change Orders | A201,7.2.1 |
| A.7.2.2 | Reimbursement of Design-Builder for change order proposals not accepted | NEW |
| A.7.2.3 | Pricing of Change Orders | A201, 7.2.2 (3?) |
| | | |
| A.7.3.1 | Construction Change | A201, 7.3.1 |
| A.7.3.2 | CCD shall be used if there is not total agreement on a change order | A201, 7.3.2 |
| A.7.3.3 | Pricing of CCDs | A201, 7.3.3 |
| A.7.3.4 | Pricing of CCDs | A201, 7.3.4 |
| A.7.3.5 | Pricing of CCDs | A201,7.3.5 |

| <u>Section</u> | <u>Topic</u> | <u>Probable AIA Source</u> |
|----------------|---|----------------------------|
| A.7.3.6 | Pricing of CCDs | A201, 7.3.6 |
| A.7.3.7 | Pricing of CCDs | A201, 7.3.7 |
| A.7.3.8 | Pricing of CCDs | A201, 7.3.8 |
| A.7.3.9 | Pricing of CCDs | A201, 7.3.9 |
| | | |
| A.7.4.1 | Minor Changes – Owner has authority to require | A201, 4.2.8 |
| | | |
| A.8.1.1 | Contract Time | A201,8.1.1 |
| A.8.1.2 | Date of Commencement | A201, 8.1.2 |
| A.8.1.3 | Date of Substantial Completion | A201, 8.1.3 |
| A.8.1.4 | Day | A201, 8.1.4 |
| | | |
| A.8.2.1 | Time is of essence | A201, 8.2.1 |
| A.8.2.2 | Construction not to commence prior to insurance effectiveness | A201, 8.2.2 |
| A.8.2.3 | Design-Builder to proceed expeditiously | A201, 8.2.3 |
| | | |
| A.8.3.1 | Excusable Delays | A201, 8.3.1 |
| A.8.3.2 | Claims for delay as provided in A.4.1.7 | A201, 3.2 |
| A.8.3.3 | Claim relating to time does not preclude recovery of damages for delay under other provisions | A201, 8.3.3 |
| | | |

| <u>Section</u> | <u>Topic</u> | <u>Probable AIA Source</u> |
|----------------|---|----------------------------|
| A.9.1.1 | Contract Sum | A201, 9.1.1 |
| A.9.2 | Schedule of Values | A201, 9.2.1 |
| A.9.3 | Application for Payment | A201, 9.3 |
| A.9.3.1 | Submittal of Applications for Payment | A201, 9.3.1 |
| A.9.3.1.2 | No payment for work not done | A201, 9.3.1.2 |
| A.9.3.2 | Payments for Materials | A201, 14.1.3 |
| A.9.3.3 | Title To Work other than Instruments of Service | A201, 9.3.3 |
| | | |
| A.9.4.a | Acknowledgment of Application for Payment | A201, 9.4.1 |
| | | |
| A.9.5.1 | Decision to Withhold Payment | A201, 9.5.1 |
| A.9.5.2 | Payment of amount withheld | A201, 9.5.2 |
| | | |
| A.9.6 | Progress Payment | A201, 9.6 |
| A.9.6.1 | Owner payment to Design-Builder | A201, 9.6.1 |
| | | |
| A.9.6.2 | Prompt payment to Architect & other consultants | A201, 9.6.2 |
| | | |
| A.9.6.3 | Prompt Payment to Construction Subcontractors | A201, 9.6.2 |
| A.9.6.4 | No Owner oversight of payment to Contractor | A201, 9.6.4 |

| <u>Section</u> | <u>Topic</u> | <u>Probable AIA Source</u> |
|----------------|---|----------------------------|
| A.9.6.5 | Prompt Payment to material suppliers | A201, 9.6.5 |
| A.9.6.6 | Progress payment not acceptance of Work | A201, 9.6.6 |
| A.9.6.7 | Design-Builder to hold funds received for Subcontractors | A201,9.6.7 |
| | | |
| A.9.7 | Failure of Payment | A201, 9.7.1 |
| | | |
| A.9.8 | Substantial Completion | A201, 8.1.3 |
| A.9.8.1 | Substantial Completion definition | A201, 8.1.3 |
| A.9.8.2 | List of items to be completed before final payment | A201, 9.8.2 |
| A.9.8.3 | Owner inspection to determine Substantial Completion | A201, 9.8.3 |
| A.9.8.4 | Dispute resolution (Article A.4) | A201, 4.4 |
| A.9.8.5 | Owner's Acknowledgment of Substantial Completion | A201, 9.8 |
| A.9.8.6 | Payment of retainage | A201, 9.8.5 |
| | | |
| A.9.9 | Partial Occupancy or Use | A201, 9.9 |
| A.9.9.1 | Consent of insurer | A201, 9.9.1 |
| A.9.9.2 | Joint inspection | A201, 9.9.2 |
| A.9.9.3 | Partial occupancy does not constitute acceptance of noncomplying work | A201, 9.9.3 |
| | | |

| <u>Section</u> | <u>Topic</u> | <u>Probable AIA Source</u> |
|-----------------------|--|-----------------------------------|
| A.9.10 | Final Completion & Final Payment | A201, 9.10 |
| A.9.10.1 | Final payment upon acceptance of Work | A201, 9.10.1 |
| A.9.10.2 | Design-Builder submittals prior to final payment | A201, 9.10.2 |
| A.9.10.3 | Surety/Bonds | A201, 9.10.3 |
| A.9.10.4 | Exceptions to waiver of Claims by Owner | A201, 9.10.4 |
| A.9.10.5 | Acceptance of final payment constitutes waiver | A201, 9.10.5 |
| | | |
| A.10.1.1 | Safety Precautions & Programs | A201, 10.11 |
| | | |
| A.10.2 | Safety of Persons & Property | A201, 10.2 |
| A.10.2.1 | Precautions | A201, 10.2.1 |
| A.10.2.2 | Compliance with applicable laws, etc. | A201, 10.2.2 |
| A.10.2.3 | Safeguards | A201, 10.2.3 |
| A.10.2.4 | Hazardous materials | A201, 10.2.4 |
| A.10.2.5 | Remedy of damage & loss | A201, 10.2.5 |
| A.10.2.6 | Responsibility for prevention of accidents | A201, 10.2.6 |
| A.10.2.7 | No overloading | A201, 10.2.7 |
| | | |
| A.10.3 | Hazardous Materials | A201, 10.3 |
| A.10.3.1 | Stop Work | A201, 10.3.1 |

| <u>Section</u> | <u>Topic</u> | <u>Probable AIA Source</u> |
|----------------|---|----------------------------|
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| A.11.4.6 | Design-Builder to be given copy of property insurance | A201, 11.4.6 |
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| A.13.4 | Rights & Remedies | A201, 13.4 |
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| A.13.6 | Commencement of Statutory Limitation Period | A201, 13.7 |
| A.13.6.1 | Before Substantial Completion; Between Substantial Completion & Final Application for Payment; After Final Application for Payment | A201, 13.7.1 |
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| A.14.1 | Termination by the Design-Builder | A201, 14.1 |
| A.14.1.1 | Termination due to Stopping of Work | A201, 14.1.1 |
| A.14.1.2 | Termination due to suspensions, delays, etc. | A201, 14.1.2 |
| A.14.1.3 | Termination on 7 days' notice | A201, 14.1.3 |
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| A.14.2 | Termination by the Owner for Cause | A201, 14.2 |
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| <u>Section</u> | <u>Topic</u> | <u>Probable AIA Source</u> |
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| A.14.2.3 | No payment to Design-Builder | A201, 14.2.3 |
| A.14.2.4 | Unpaid balance | A201, 14.2.4 |
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| A.14.3 | Suspension by the Owner for Convenience | A201, 14.3 |
| A.14.3.1 | Owner may suspend | A201, 14.3.1 |
| A.14.3.2 | Adjustment of Contract Sum & Contract Time | A201, 14.3.2 |
| | | |
| A.14.4 | Termination by the Owner for Convenience | A201, 14.4 |
| A.14.4.1 | Owner may terminate for convenience | A201, 14.4.1 |
| A.14.4.2 | Design-Builder's actions | A201, 14.4.2 |
| A.14.4.3 | Entitlement to receive payment | A201, 14.4.3 |

End Notes:

¹ The AIA's new "family" of Design-Build documents based on the A141 are:
Exhibits to the A141

AIA Document A141-2004 Exhibit A (Terms and Conditions)
AIA Document A141-2004 Exhibit B (Determination of the Cost of the Work)
AIA Document A141-2004 Exhibit C (Insurance and Bonds)

AIA Document B142 ("Standard Form of Agreement Between Owner and Consultant" When the Owner using the Design/Build Method of Project Delivery")
AIA Document B142-2004 Exhibit A (Initial Information)

AIA Document A142-2004 ("Standard Form of Agreement Between Design-Builder and Contractor")
AIA Document A142-2004 Exhibit A (Terms and Conditions)
AIA Document A142-2004 Exhibit B (Preconstruction Services)
AIA Document A142-2004 Exhibit C (Contractor's Scope of Work)

AIA Document B143-2004 (Standard Form of Agreement Between Design-Builder and Architect)
AIA Document B143-2004 Exhibit A (Initial Information)
AIA Document B143-2004 Exhibit B (Architect's Services)

AIA Document G704/DB-2004 (Acknowledgment of Substantial Completion of a Design/Build Project)

For purposes of this paper "Design-Build" is defined as a method of project delivery in which a single entity is engaged to furnish not only the design, but also the construction of a project according to project criteria that are mutually agreed upon by the Owner and the Design-Builder.

² A. Elizabeth Patrick, "The Dark (Down) Side of Design-Builder: Managing the Risks", 18 No 4 Practical Real Estate Lawyer 15 (American Law Institute 2002)

³ Definition and Quality are often lumped together in the general term "Scope". See generally Patrick, Note ____, *Supra*.

⁴ Kenneth M. Cushman and Joyce K. Hackenbach, "Construction Project Risk Allocation: The Owner's Perspective" 480 PLI/Real (Practicing Law Institute 2002)

⁵ The need to replace the designer's traditional gatekeeper functions appears to be the price that must be paid by the Owner for the advantages that are perceived to result from design-build, including the time saving efficiencies associated the ability of design and construction entities to function as an integrated team serving under a common employer, and the corresponding advantage that design-build liberates the Owner from *Spearin* for design, so that the Owner will be able to look to the Design-Builder as the single point of responsibility for all deficiencies, whether design or construction. See, generally, Carl J. Cinco, "When Specialty Designs Cause Building Disasters: Responsibility for Shared Architectural and Engineering Services", 84 Neb L. Rev 162 (2005), pp 170-171]

⁶ The Owners and Lenders Division of the American Bar Association's Forum on The Construction Industry informally polled its members to identify which clauses they found most in need of change when negotiating changes to the A201 or B141 on behalf of owners and lenders. The results, from those responding, referred to as the "Owner's Top 10" for each document, are can be found at: <http://www.abanet.org/dch/committee.cfm?com=CI109001>. These lists are posted solely for informational purposes and do not reflect the opinion of the American Bar Association, the Forum on the Construction Industry, or any of its Divisions

⁷ The A141 family includes a template for structuring definitions of "Cost" where the Contract Sum is based on the Cost of the Work. AIA Document A141 Exhibit B Determination of the Cost of the Work

⁸ For a discussion of the anticipated role of the Owner's Consultant, see AIA Document A1451-2004 "Insurance and Bonds" that includes an abbreviated template to assist in structuring Project insurance requirements.

⁹ See Talal Abi-Karam, "Managing Risk in Design-Build", 2001 WLNR 4 923581; "AACE International Transactions", Dec 31, 2001), p. 8; Cushman & Joyce, note 4 *Supra*

¹⁰ Howard G. Goldberg, "The New AIA Design Documents Designed with the Owner in Mind"; Under Construction (ABA Construction on the Construction Industry); March 2005; "The New AIA Design Build Family of Documents", © 2005 Victor O. Schinner & Company Inc. (2005).

¹¹ See, for example, Ross J. Altonan "Owner's Amending A111-1997: Standard Form of Cost-Plus Agreement Between Owner and Contractor", §§ 8.9-8.13 (Glover, Alternative Clauses to Standard Construction Contracts, Ch. 11) (Aspen, 1998)

¹² Owners strive to accomplish this result with clauses similar to the following: "Design-Builder's agreements with Architect, engineers, other design professionals and consultants, construction subcontractors, suppliers, materialmen, and other vendors (each such agreement, whether for a portion of the Professional Design Services or a portion of the Construction Services, is

referred to as a “Subcontract”; collectively, “Subcontracts”) shall: (a) be in writing; (b) state that the Owner is an intended third party beneficiary of the agreement, without liability for benefits received; (c) incorporate the terms of this Agreement; (d) bind and obligate the person or entity to Design-Builder as Design-Builder is bound and obligated to Owner; (e) obligate the person or entity to be joined in any arbitration or other dispute resolution proceeding in which Owner or Design-Builder are parties and which arises out of or relates to the Subcontractor’s agreement; (f) be contingently assigned to and assumable by Owner, at Owner’s option, in the event this Agreement is terminated; (g) contain the Subcontractor’s express consent to the assignment of all or any part of this Agreement by the Owner to a lender, as provided in the Agreement; (h) provide an indemnity that is equivalent to Design-Builder’s indemnity given in this Agreement and names Owner as well as Design-Builder as an indemnified party; and (i) contain any additional provision required by this Agreement. Each agreement between Design-Builder and a Subcontractor shall require the Subcontractor to include the provisions of this Paragraph in its sub-subcontracts. Owner shall have the right to receive copies of all agreements with Subcontractors, upon demand to verify compliance with requirements of this Paragraph.”

¹³ An Owner who wants the Design-Build Agreement to require inclusion of the Architect during construction administration should consider creation of a new Exhibit A, § 3.3.6 to develop the following concept: ”§ A.3.3.6. The Design-Builder shall engage the Architect to furnish all course of construction professional design services (including, without limitation, review and approval of Product Data, Samples, Shop Drawings and other submittals from Contractor, Sub-contractors and Sub-subcontractors, responding to RFIs, furnishing of interpretation, certifying requests for payment to the Owner, and preparation of Instruments of Service) necessary for the timely and proper prosecution of the Work.

¹⁴ For a discussion of the liability that can result from undertaking the obligation to review submittals and shop drawings, see Carl J. Circo, “When Specialty Design Causes Building Disasters: Responsibility for Shared Architectural & Engineering Services”, 84 Neb. L. Rev. 162 (2005).

¹⁵ A somewhat typical provision sought by Owners reads: ”Attached as Exhibit X is the preliminary design schedule, which shall apply until modified by the Design Schedule to be prepared as provided in this Section. Prior to completion of the 60% Preliminary Design, the Design-Builder shall prepare for the Owner’s review and approval a comprehensive revision to the schedule relating to the design and permitting activities required for efficient completion of the Pre-Construction Services. This revised schedule (the “Design Schedule”) shall indicate date(s) of (or, where applicable, periods of elapsed time allowed for) Owner approvals, dates when specific information is required by the Design-Builder from the Owner, anticipated approval periods required for public authorities having jurisdiction over the Project, and a preliminary outline of the anticipated schedule for construction and completion of the Construction consistent with the Substantial Completion and Final Completion Dates.

¹⁶ A form of indemnity sophisticated Owners in Arizona strive for might read along the following lines: “To the fullest extent permitted by Law, Design-Builder shall indemnify, defend and hold harmless the Owner and its officers, directors, employees, agents, representatives, affiliates and agents (individually, an “Indemnified Party”; collectively, the “Indemnified Parties”) for, from and against any and all third party claims, demands, causes of action, damages (including consequential and punitive damages to the extent imposed against City or Owner), judgments, penalties, settlements and all other losses arising from the performance or nonperformance of this Agreement (hereinafter individually or collectively referred to as a “Claim” or “Claims”) and all attorneys’ fees, consultants’ fees, court costs (whether or not taxable by statute), and expenses incurred by each Indemnified Party. This indemnity is in addition to and shall not be deemed to limit any other indemnity given by Design-Builder, and extends to the maximum extent permitted by Law and includes, but is not limited to, any Claim, just or unjust, of any kind, nature or description whatsoever, whether sounding in a tort, warranty, contract (including breach of this Agreement), equity, a statute, or any other theory of liability, and whether the Claim is based on an alleged death, personal injury, sickness, conversion, breach of warranty (express or implied), breach of representation, defective work not remedied, lien, stop notice, property damages (including property damages to the Work), patent infringement, copyright infringement, loss of use and all other economic loss, release of a petroleum byproduct or other substance regulated by applicable Law, legal violations or other claimed damages. This indemnity shall apply even if the Claim results in part from an Indemnified Party’s negligently or knowingly acting or failing to act, but in that event the Indemnified Party shall not be indemnified for that portion of the Claim that results from its negligently or knowingly acting or failing to act, it being expressly understood that an Indemnified Party’s failure acting or failing to act in reliance on promises, representations or agreements made by Design-Builder in the performance of the Services shall not be considered negligently or knowingly acting or failing to act by an Indemnified Party.”