

What's New or Different in the 1997 B141?

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PREFACE

The American Institute of Architects recently released a "new" series of documents, including a revised edition of the B141 Owner/Architect Agreement which replaced the 1987 version. At the same time, the AIA also released revised versions of the C141 (Architect/Consultant Agreement) and A201 (General Conditions) documents. These and other related documents form a "family" of coordinated agreements which should be read and used together. From the perspective of the design professional, however, the B141 Owner/Architect Agreement represents the "cornerstone" document upon which other relationships are based and from which most responsibilities fundamentally arise. Given that level of importance, this paper will focus upon the ways in which the 1997 B141 has been materially changed from the 1987 document, with the goal being to provide the design professional with a workable understanding of those changes and the manner in which they may impact the A/E's services, relationships, rights, and responsibilities over the next decade.¹

OVERVIEW

The most obvious difference in the 1997 B141 is a change in format. The new agreement consists of two (or more) parts, each of which is individually executed. The first part is entitled the *Standard Form of Agreement between Owner and Architect in Multi-Part Format* (hereinafter "Standard Agreement. "). This document contains the basic terms and conditions of the parties' relationship and establishes their respective fundamental rights and responsibilities. One of the provisions identifies a second document which more fully sets forth the scope of services and other special terms and conditions governing the services to be performed. For use in that regard, the AIA has released a document entitled *Standard Form of Architect Services: Design and Contract Administration* (hereinafter "Standard Scope Document "). When that latter document is used in connection with the Standard Agreement, the result is an essentially updated/revised version of the 1987 B141. The AIA is expected to draft and release, over a period of time, additional "scope " documents which can be used with the Standard Agreement to provide the parties with an opportunity to define their relationships, rights and responsibilities in a more flexible manner. The parties, however, will be (and are now) free to draft their own "scope " documents, which can be combined with the Standard Agreement to provide a tailor-made agreement.

In addition to the Standard Agreement and Standard (or customized) Scope document, the new B141 can include one or more "reference " documents, which can be used to expand the descriptions of selected services. The AIA has drafted, and will continue to draft, standardized documents for such use or the parties are free to draft similar documents to suit their specific needs.

Aside from the change in format, the 1997 B141 documents contain substantive changes which will materially affect the rights and obligations of the contracting parties. The major changes will be generally addressed below. A more specific listing of the changes is set forth in the chart attached as Appendix A. A careful reading of the entire Agreement and consultation with counsel concerning any questions or issues which remain unclear should, however, precede any execution or use of these documents.

SIGNIFICANT CHANGES WITHIN THE STANDARD AGREEMENT

Article 1.1 Initial Information

Article 1.1 adds a new section under which the parties establish fundamental information, if available, about the project. Designated as "project parameters," the parties set forth agreed-upon information about such things as the proposed objective or use of the Project, a description of the Owner's Program, various physical, legal, financial, time and other "parameters" (as generally defined in document), and the proposed procurement or delivery method for the Project. This exchange of information encourages (indeed, requires) early communication between the parties about significant factors which will impact the completion of the Project.

Paragraph 1.1.6 provides that the information contained in section 1.1 may be reasonably relied upon in determining the Architect's compensation and that changes in that information may result in the negotiation of appropriate adjustments in schedule, compensation and Change in Services. For reasons set forth in 1.1.6, it is important to assure the completeness and accuracy of all information, because it forms the basis of compensation and various issues of responsibility. If any requested information is unknown or to be determined later, such facts should be noted. Subsequent additions or changes in pertinent information should likewise be documented, even if compensation is not impacted.

Article 1.2 Responsibilities of the Parties

Article 1.2 establishes basic responsibilities of the Owner and Architect. Some of the more significant changes will be noted below.

The Owner is now required to provide certain information concerning lien rights to the Architect within 15 days after receipt of a written request. (1.2.2.1). Correspondingly, paragraph 6.1 of the 1997 C141 requires the Architect to provide the Consultant with similar information within 21 days after receipt of a written request. All parties should act expeditiously in their handling of these requests, to assure that lien rights are not lost by any design professional.

The Owner is no longer permitted to "significantly" increase or decrease the budget or contingencies included in the budget, without the agreement of the Architect to a corresponding change in the project's scope and quality. (1.2.2.2). If budget, scope or quality are significantly changed, reference should be made to 1.3.3.2.4 (and related sections) concerning rights, if any, to additional compensation.

The Owner must provide prompt written notice to the Architect when the Owner becomes aware of any errors, omissions or inconsistencies in the Architect's Instruments of Service. (1.2.2.7). If any such notice includes a demand for money or services, (i.e., constitutes a "claim"), it should be reported to the Architect's insurance carrier. Even if no such demand is included, unless the problem can be and is resolved quickly and routinely without any cost impact or delay, the Architect should consider the appropriateness of reporting the situation to his or her insurance carrier, with any doubt being resolved in favor of submitting a report.

The Architect must now submit a schedule for performance of services, without the necessity of an Owner request. (1.2.3.2). Since the schedule "initially shall be consistent with the time periods established in

Subparagraph 1.1.2.6, " the necessity of establishing accurate and realistic "time parameters " as part of the "initial information " is highlighted. If those parameters are changed or the Owner seeks to significantly accelerate or extend the Architect's schedule for services, reference should be made to 1.3.3.2.4 (and related subparagraphs) concerning the Architect's rights, if any, to additional compensation.

The Architect must now specifically identify a designated representative (identified in 1.1.3) who will be authorized to act on the Architect's behalf. (1.2.3.3). Any change in that designated representative should be documented.

The Architect is required to maintain the confidentiality of information specifically designated as confidential by Owner, unless withholding such information would violate law, create risk of significant harm to the public or prevent Architect from establishing a claim or defense in a legal proceeding. (1.2.3.4). The Architect is also required to obtain a similar agreement from consultants, and those consultants must similarly obtain the same agreement from any subconsultant. (See 3.1.8 of the C141). To avoid misunderstandings as to information protected, the parties might consider requesting a "confidential" stamp on documents designated by Owner to be confidential. It is essential for each design professional to explain this new requirement to all involved employees and consultants.

Without the Owner's knowledge and consent, the Architect is prohibited from engaging in any activity or accepting any employment interest or contribution that would reasonably appear to compromise the Architect's professional judgment. A similar restraint on the Consultant is found in 3.1.9 of the C141.

There is now a specific contractual requirement that the Architect review laws, codes and regulations applicable to his services and to design the Project in accordance with requirements imposed by governmental authorities. (1.2.3.6). While perhaps implied, there were no similar provisions expressly stated in the 1987 B-141.

The Architect is entitled to rely on the accuracy and completeness of services and information furnished by Owner, but must provide prompt written notice to Owner when the Architect becomes aware of any "errors, omissions or inconsistencies " in such services or information. (1.2.3.7). Failure to provide prompt written notice may adversely impact an Architect's subsequent claims for fee adjustments or compromise the Architect's defenses to subsequent claims asserted by the Owner, Contractor or others.

Article 1.3 Terms and Conditions

Article 1.3 introduces several new concepts, as well as some new terms for old concepts. The most significant additions and changes will be addressed.

"Cost of the Work"

Paragraph 1.3.1 introduces the phrase "Cost of the Work, "to be used in place of the 1987 phrase, "Construction Cost. " Additionally, 1.3.1.2 adds "the costs of the management or supervision of construction or installation provided by separate construction manager or contractor, " to the definition of "Cost of the Work." Otherwise, the previous definition of "Construction Cost" (found in 5.1.2 of 1987 B141) remains the same. If the "initial information" section of the B141 is properly completed, 1.1.2.5.2

will establish a dollar figure for the "Cost of the Work" and as the later discussion concerning 2.1.7 ("Evaluation of Budget and Cost of the Work ") will show, that figure has significant potential impact on the A/E's responsibilities and services.

"Instruments of Service"

Article 6 of the 1987 B141 was entitled "Use of Architect's Drawings, Specifications, and Other Documents ", and provided certain basic information about the parties' respective rights to use those designated documents. Paragraph 1.3.2 of the 1997 B141 has collectively redefined those various documents as "Instruments of Service ", including within the definition for the first time, "those in electronic form." (See 1.3.2.1). In addition to the new terminology, the series of subparagraphs addressing "Instruments of Service" significantly revise and restate various rights of the parties concerning the use of such documents.

Initially, 1.3.2.2 provides that the execution of the Agreement results in the Architect granting the Owner a non-exclusive license to reproduce the Instruments "solely for purposes of constructing, using and maintaining the Project, " but makes that license subject to the Owner's compliance with all contractual obligations, "including prompt payment ". The Architect is further required to obtain similar non-exclusive licenses from consultants (accomplished through 8.2 of the C141). These licenses are terminated by any termination of the respective agreements prior to completion of the Project and, upon such termination, the Owner is required to return all originals and reproductions of such Instruments to the Architect within seven days and is prohibited from making further reproductions. The B141 provides further that, "if and upon the date the Architect is adjudged in default, " the original license shall be deemed terminated and replaced by a second, non-exclusive license permitting the Owner to authorize other "similarly credentialed design professionals " to reproduce and, where permitted by law, make changes, corrections or additions to the Instruments of Service solely for purposes of completing, using and maintaining the Project.

The B141 provides that, except for the licenses granted under subparagraph 1.3.2.2, no other license or right is granted or implied under the Agreement. (1.3.2.3). The Contract further provides that the Owner will not assign, delegate, sublicense, pledge or otherwise transfer any such license without the prior written agreement of Architect. This provision may result in a "new" lender's document seeking consent by the Architect of such transfers and, as drafted by the lenders, those documents may be unconditional and otherwise ignore the protections given to the Architect by 1.3.2.1-1.3.2.4. If the Architect is not otherwise opposed to the concept of allowing a transfer of the Owner's rights to the lender, he or she should be careful to assure that any such requested consent forms provide that the lender's rights under such licenses will be no greater than the Owner's, and will otherwise be subject to all conditions, requirements, etc. imposed upon the Owner in relation to such licenses. In signing any such consents to transfer, the Architect should also be mindful of the separate licenses granted by Architect's consultants (see 1.3.2.2) and should not sign any document purporting to consent to the transfer of those separate licenses without some written authority by the consultants allowing the Architect to take such an action.

The new provisions also address the exchange of documents in electronic format or other electronic data between the Architect and Owner, requiring that prior to the transfer of such data the Owner and Architect shall "by separate written agreement set forth the specific conditions governing the format. " (1.3.2.4). A similar provision in the C141 establishes the need for such a separate agreement between the Architect and Consultant before they exchange electronic information (See 8.4 of the C141). Careful consideration

(preferably involving consultation with counsel) should be given to the development of form agreements concerning the rights and liabilities resulting from the exchange of electronic data. Such forms can also be used to deal with any requests by contractors or fabricators for use of electronic data for shop drawings, etc.

"Change in Services"

Under the 1997 version of documents, there are no more "basic" or "additional" services. Instead, there are simply "services" and "change in services." Paragraph 1.3.3 of the B141 provides the general circumstances and procedures for accomplishing a change in services. Generally, in the absence of a prior mutual agreement in writing, the Architect is required to notify the Owner before providing such services. The Owner must then give prompt written notice to the Architect if the Owner deems that all or part of the proposed services are not required, in which event the Architect will have no obligation to provide those services.

Article 3.3 of the 1987 B141 (entitled "Contingent Additional Services ") is essentially replaced by 1.3.3.2, which provides that if any of seven listed circumstances affect the Architect's services, the Architect will be entitled to an appropriate adjustment in schedule and/or compensation. Eight other circumstances previously constituting "additional services" under the 1987 B141 document have been moved in the 1997 document to 2.8.2 (found in the Standard Scope Document). Generally, these two paragraphs more clearly state the circumstances for, and entitlement to, additional compensation for services beyond those originally contemplated. Where possible, the Architect should seek to utilize these provisions to receive appropriate additional compensation. To best achieve that result, all pertinent employees should be made aware of all the specified circumstances or activities which justify additional compensation and all such items should be monitored and documented, with the Owner being notified immediately in writing when it appears such activities take place.

Mediation

The parties will now be required to mediate any claim or dispute as a "condition precedent " to proceeding with arbitration or litigation. (1.3.4.1). Mediation is a non-binding procedure in which a neutral third party (mediator) seeks to aid the parties in achieving a negotiated settlement. Effective use of mediation can save significant litigation expenses and potentially salvage a client relationship. Additionally, some insurance carriers allow certain credits toward deductibles if a claim is resolved through mediation. Generally, the addition of this requirement is of great potential benefit to all parties.

Waiver of Consequential Damages

Under paragraph 1.3.6, the Owner and Architect "waive consequential damages for claims, disputes or other matters in question arising out of or relating to (the) Agreement. " Examples of consequential damages which may be considered as having been waived by the Owner include rental expenses, losses of use, financing, profit, business and reputation, and loss of management or employee productivity. Similar examples of such damages which may be considered waived by the Architect include home office expenses, losses of financing, business and reputation, and loss of profits, except anticipated profits provided for under Subparagraph 1.3.8.7.

Certifications

The 1987 B141 (paragraph 4.11) stated that the Architect would not be required to certify things that would "require knowledge or services beyond the scope of (the) Agreement." That language has been continued, with the important addition of language in paragraph 1.3.7.8 that the Architect is not required to execute certificates that would "require . . . responsibilities beyond the scope of (the) Agreement. " Generally, a lender/purchaser's purpose in requesting the Architect to certify things is to attempt the establishment of some relationship or duty between the lender/purchaser and the Architect so that the lender/purchaser might assert a direct action against the Architect in the event some problem arises. This could result in a "responsibility" (i.e. a real or potential liability to a third party) which was not in the scope of the original agreement. While business reality generally results in the execution of some form of a lender's/purchaser's certificate, the addition of this language should provide some additional aid to the Architect seeking to minimize the oppressive nature of a requested certificate.

Assignments

A caveat has been added to the previous rule that neither the Owner nor Architect could assign the agreement without the written consent of the other, providing that the Owner may assign the Agreement to an institutional lender providing financing for the Project, provided that in such event, "the lender shall assume the Owner's rights and obligations under (the) Agreement. " (1.3.7.9). Historically, lenders have often attempted to obtain the benefits of an assignment of the Owner's rights while avoiding the assumption of the Owner's corresponding obligations. Architects should use this new language to resist any requested consents where that assumption is not included.

Termination For Convenience

The Owner is now allowed to terminate the Agreement, upon not less than seven days written notice to the Architect, "for the Owner's convenience and without cause. " (1.3.8.5). In event of such a termination, 1.3.8.6 and 1.3.8.7 provide that the Architect will be compensated for services performed prior to termination, together with Reimbursable Expenses then due, plus Termination Expenses which include expenses directly attributable to the termination for which the Architect is not otherwise compensated, *plus* an amount for the Architect's anticipated profit on the value of the services not performed by the Architect.

Article 1.4 Scope of Services and Other Special Terms and Conditions

Article 1.4 identifies the various documents which combine to form the complete agreement between the Owner and Architect. Unless otherwise stated, the standard agreement and Standard Scope Documents are specified as the controlling documents.

Article 1.5 Compensation

The 1997 B141 has eliminated previously designated "phases " (compare Articles 2.3-2.7 of 1997 B141 with Articles 2.2-2.6 of 1987 B141) and has, as a result, gotten away from the concept of compensation



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being paid as a percentage in relation to the completion of phases (compare 1.5.1 of 1997 B141 to 11.2 of 1987 B141). Pages 9-15 of the gray cover booklet which accompanies the 1997 B141 provide extensive information, including a detailed worksheet, for determining compensation.

The rates and multiples for services set forth in the agreement shall now be adjusted "in accordance with (the A/E's) normal salary review practices. " (1.5.6). The 1987 edition limited such adjustments to additional services, allowed only "annual " adjustments, and made no reference to adjustments for the Architect's consultants.

Paragraph 1.5.9 provides a fill-in-the-blanks space for the parties to designate the number of months within which the services are to be completed, with the agreement that services provided beyond that time will be compensated as a change in services (unless the necessity for the extension was caused through the fault of the Architect).

SIGNIFICANT CHANGES WITHIN THE STANDARD SCOPE DOCUMENT

Article 2.1 Project Administration Services

Article 2.1 represents a new category of service which incorporates, to a great extent, many provisions previously addressed in Articles 2.2 (Schematic Design Phase), 2.3 (Design Development Phase) and 2.4 (Construction Documents Phase) of the 1987 B141, with a major difference being the elimination of "phases ", as such, in the 1997 document. Article 2.1 has also incorporated and revised the provisions previously set forth in Article 5.2 (Responsibility for Construction Costs) of the 1987 B141. Finally, Article 2.1 has added language which essentially confirms many of the practices and procedures which may have been previously undertaken by Architects in the rendering of their services, but which were not formalized as contractual undertakings. Given these various circumstances, and since Article 2.1 represents an entirely new section, it should be read carefully and special note should be made of any requirements which are different from, or in addition to, the Architect's understanding of previous responsibilities.

The most significant new concept is found in 2.1.7, under a sub-section entitled "Evaluation of Budget and Cost of the Work. " With its six subparagraphs, paragraph 2.1.7 provides for greater involvement by the Architect in connection with budgetary matters, including estimates of the Cost of the Work. Paragraph 2.1.7.1 provides that when the Project requirements have been sufficiently identified, the Architect will prepare a preliminary estimate of the Cost of the Work, which "may be based on current area, volume or similar conceptual estimating techniques. " As the design progresses, the Architect must update and refine the preliminary estimate and advise the Owner of any adjustments to previous estimates indicated by changes in the Project requirements or general market conditions. If the Architect's estimates exceed the Owner's budget, the Architect should make appropriate recommendations to the Owner to adjust the Project's size, quality or budget, and the Owner must cooperate in making such adjustments. In preparing estimates for Cost of the Work, the Architect will be permitted to: include various contingencies for bidding and pricing; determine various matters relating to elements of construction to be included in the Contract Documents; make reasonable adjustments in the scope of the Project; and include alternate bids as needed to meet Owner's adjusted budget. If the budget for the Cost of the Work is exceeded by the lowest bona fide bid or negotiated proposal, the Owner will have four options: 1) an increase in the Project budget; 2) an authorization for rebidding or renegotiating the construction contract; 3) terminating the Agreement; or, most significantly, 4) the Owner can have the project scope and quality revised as required to reduce the Cost of the Work. If the Owner chooses, under 2.1.7.5.4, to revise the project

scope and quality, the Architect is required to modify the documents, without additional compensation, to bring the bids or negotiated proposals within the budget. However, the Agreement provides that "the modification of such documents shall be the limit of the Architect's responsibility under this paragraph 2.1.7."

Article 2.2 Supporting Services

While designated under a new heading, there are no new requirements in Article 2.2 which were not previously found in Article 4 of the 1987 B141 ("Owner's Responsibilities "). There is, however, a provision which allows any of the otherwise Owner-provided services to be specifically designated in 2.8.3 as being the Architect's responsibility.

Article 2.3 Evaluation and Planning Services

Article 2.3 represents a newly defined category of service. The three subparagraphs generally concern reviews of, and comments upon, the "preliminary project information " provided in Article 1.1.

Paragraph 2.3.1 continues the general requirement that the Architect provide a preliminary evaluation of all information furnished by Owner, including Owner's program, schedule requirements and budget, but adds language that the Architect will ascertain that such information is consistent with the Project requirements and will notify Owner of any other information or consultant services that may be reasonably needed for the Project. While the Architect was required to make some preliminary evaluations under 2.2.2 of the 1987 B141, the new affirmative requirements imposed on the Architect by the second sentence of this section should be carefully reviewed.

The Architect is now required to provide a preliminary evaluation of the site, based upon information provided by Owner concerning site conditions, and upon the Owner's program, schedule and budget. (2.3.3). There were no similar requirements in previous versions of the B141, and there is minimal indication given in this section concerning the scope, depth, content of such evaluation, or how it is to be presented. Clearly, however, if there are, special features known about the site conditions, or the Owner's program, schedule or budget which may adversely impact construction at the Project site, those issues should be addressed.

The Architect must also review the Owner's proposed method of contracting for construction services and notify the Owner of anticipated impacts that such method may have on the Owner's program, financial, and time requirements and the scope of the Project. (2.3.3). Paragraph 1.1.2.7 establishes as a project parameter, the "proposed procurement or delivery method ". The Architect must be conversant in the pros and cons of that method of contracting for construction and must notify the Owner of anticipated impacts on the Project from the use of that method. Although there is no stated form by which the "notification" should be given, all parties will be better served if it is in writing. For reference purposes, a good review of various methods for project delivery can be found in Section 2.1 of *Volume 2 of the AIA's Architect's Handbook of Professional Practice* ("Delivery Approaches ").

Article 2.4 Design Services

Article 2.4 generally combines and incorporates the fundamental requirements previously set forth in paragraphs 2.1-2.4 of the 1987 B141. As stated previously, however, the concept of "phases" has been eliminated.

The requirements for Schematic Design Documents which will include the establishment of a conceptual design illustrating scale and relationship of Project components; a conceptual site plan, if appropriate; preliminary building plans, sections, and elevations, and; preliminary selections of major building systems and construction materials. (2.4.2.1).

Paragraph 2.4.3.1 provides requirements for Design Development Documents, which will illustrate and describe the refinement of the design, establishing scope, relationships, forms, designs, and appearance by means of plans, sections, elevations, typical construction details and equipment layouts. The Design Development Documents will also include specifications that identify major materials and systems and generally establish their quality levels.

Paragraph 2.4.4.1 provides requirements for Construction Documents, which will set forth the requirements for construction, through Drawings and Specifications that "establish in detail the quality levels of materials and systems required for the Project. " Additionally, during the development of the Construction Documents, the Architect will assist the Owner in the development and preparation of specifically described bidding and procurement information, the Conditions of the Contract for Construction, and a Project Manual.

Article 2.5 Construction Procurement Services

Article 2.5 represents a major expansion of, and formal elaboration upon, the Architect's role in assisting the Owner in the procurement of construction services. Article 2.5 ("Bidding or Negotiation Phase ") of the 1987 B141 (which stated only that the "Architect. . . shall assist the Owner in obtaining bids or negotiated proposals and assist in awarding and preparing contracts for construction ") has been replaced by fifteen sections in the 1997 document (2.5.1-2.5.5.5). The Architect should review these various sections very carefully to determine how the required activities may impact his or her services and budget for providing services under the Agreement.

Article 2.6 Contract Administration Services

As with the 1987 version, the Architect will provide administration of construction contract as set forth in Article 2.6 and in the "edition of AIA Document A201. . . current as of the date of this Agreement. "(2.6.1.1). Some of the more significant changes in specific requirements will be discussed.

Requests for Information

The Architect must review "properly prepared, timely requests " by the Contractor for additional information about the Contract Documents, which requests must be in a "form approved by the Architect and shall include a detailed written statement that indicates the specific drawings or specifications in need of clarification and the nature of the clarification requested. " (2.6.1.5). The Architect should consider preparing a good form for required use by the Contractor. The Architect should also document and notify the Owner of any abuse or misuse by the Contractor of the RFI process, and seek additional compensation as appropriate (see 2.8.2.2).

Evaluations of the Work

The Architect will make site visits "at intervals appropriate to the stage of the Contractor's operations, or as otherwise agreed. . . .in Article 2.8. " (2.6.2.1). Paragraph 2.8.1.2 provides the Architect with a previously unavailable "fill-in-blanks " way to establish the contractually required number of site visits, with any "extra " visits being compensated as a Change in Services. As a new requirement, the Architect must report to the Owner known deviations from the most recent construction schedule submitted by the Contractor. To fulfill that obligation, it will be necessary for the Architect (and Consultants) to document and maintain the most recently submitted schedule, to have the observer of work compare the status of work with that schedule, and to report any significant deviations from that schedule.

Contractor-Provided Design Services

If the Contract Documents specifically require the Contractor to provide design services or certifications by a design professional related to systems, materials or equipment, the Architect must specify appropriate performance and design criteria that such services must satisfy. (2.6.4.3). Shop drawings and other submittals related to the Work which have been designed or certified by design professionals retained by the Contractor must bear such other professional's written approval when submitted to the Architect. Architect will be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such other design professionals. (See also, 3.12.10 of the A201). An Architect should not accept a shop drawing or other submittal relating to such work if it does not bear the other design professional's seal or, where appropriate, written approval.

Changes in the Work

The provisions concerning procedures for changing the work have been revised, containing more detail as to what should be submitted by the Contractor and the options available to the Architect upon the receipt of a request for a Change Order. (See 2.6.5 of the B141.).

Project Completion

At the completion of the Project, the Architect "shall receive from the Contractor and forward to the Owner: (1) consent of surety or sureties, if any, to reduction in or partial release of retainage, or the making of final payment; and (2) affidavits, receipts, releases and waivers of liens or bonds indemnifying the Owner against liens. " (2.6.6.4). The Architect's only obligation of this type under the 1987 B141 (2.6.14) was to "receive and forward to the Owner for the Owner's review and records written warranties

and related documents required by the Contract Documents and assembled by the Contractor. . . " While the new language appears to place a significant additional requirement on the Architect, 9.10.2 of the A201 document provides assistance, requiring the Contractor to provide these various documents before "final payment (or) any remaining retained percentage shall become due. "

Document Retention

The Architect is now contractually required to maintain certain records including the Contractor's applications for payment (2.6.3.3), a record of submittals and copies of submittals supplied by the Contractor (2.6.4.2) and records relative to changes in the Work (2.6.5.4). There is no specific time period designated for the required retention of these various documents. Design professionals should, preferably with the advice of counsel, consider these and other legal factors in the establishment of some standard document retention program.

Article 2.7 Facility Operations Services

Article 2.7 provides a new category of service, which extends beyond Substantial Completion. The Architect is required to meet with the Owner promptly after Substantial Completion to review the need for facility operation services. Additionally, upon request of the Owner and prior to expiration of one year from the date of Substantial Completion, the Architect will meet with the Owner to review the facility operations and performance and make appropriate recommendations to the Owner. It is important to document any problems or deficiencies noted in connection with the operation and performance of the facility, as well as any recommendations made concerning any such problems or deficiencies.

Article 2.8 Schedule of Services

Paragraph 2.8.1 adds provisions that certain services "beyond (specified) limits shall be provided by the Architect as a Change of Services in accordance with Paragraph 1.3.3. " The parties thereafter agree (through fill-in-the-blanks forms) on limits for the number of times the Architect must (1) review each submittal; (2) visit the site during construction; (3) inspect any portion of the Work to determine whether it is substantially complete in accordance with the Contract Documents; and/or (4) inspect any portion of the Work to determine final completion. This provides an opportunity for the Architect to exercise some cost control over these aspects of services. The Architect should consider establishing some type of form to document these various activities and should promptly communicate with the Owner when it appears that any limits will be exceeded. It is important to make sure all pertinent employees are aware of these limits and that everyone's record keeping is coordinated.

Article 2.9 Modifications

The parties are provided space, at the end of the contract, to modify the Standard Scope Document in any way desired. (2.9.1).

CONCLUSION

The "new" AIA documents were drafted with the stated intention of providing design professionals with an opportunity to meet, and fulfill, present-day client demands for a more active role in project management

and cost control. With opportunity and responsibility, however, comes a certain level of increased exposure to risk and resulting liability. The 1997 B141 has added some layers of protection to offset this increased exposure, but it will be necessary for the design professional to "guard " those provisions from deletion during contract negotiations - or to receive adequate, additional compensation for the increased level of risk. If that can be accomplished, and if risk management and general business practices are consistently reviewed to assure that the execution of services under the contract is completed in a prudent, yet efficient, manner, the "new" B141 should provide the design professional with an opportunity to compete and prosper in the decade to come.

¹The views expressed within the paper represent interpretations of the author, expressed before any court has had an opportunity to review any portion of the contract. For that reason, design professionals (and their counsel) might use this paper as a guide toward better understanding of the document, but should not forego a cover-to-cover reading of the Agreement nor an independent assessment of the manner in which the document will affect their practice.

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APPENDIX A

OUTLINE OF SIGNIFICANT ADDITIONS TO, OR CHANGES IN, AIA DOCUMENT B141 - 1997

Standard Form of Agreement Between Owner and Architect with Standard Form of Architect's Services

Article 1.1 Initial Information

- 1.1.1** "Agreement is based on the. . .information and assumptions " set forth in Article 1.1.
- 1.1.2** Establishes fundamental information about Project, including: proposed objective or use; description of Owner's Program; physical, legal, financial, time and other "parameters "; and proposed procurement or delivery method.
- 1.1.3** Identification of: designated representatives; persons or entities, in addition to Owner's Designated Representative, required to review Architect's submittals; Owner's other consultants and contractors; and consultants retained by Architect.
- 1.1.4** Space for "other important initial information ".
- 1.1.5** Contract administration services, if any, will be under *AIA Document A201*,

unless otherwise stated.

- 1.1.6** Information contained in section 1.1 may be reasonably relied upon in determining Architect's compensation; changes in information may result in negotiation of appropriate adjustments in schedule, compensation and Change in Services.

Article 1.2 Responsibilities of the Parties

- 1.2.1** Parties must "cooperate " and "endeavor to maintain good working relationships. "
- 1.2.2.1** Owner must provide full information in timely manner regarding requirements for, and limitations on, the Project; must also provide certain information concerning lien rights to Architect within 15 days after receipt of written request.
- 1.2.2.2** Owner will not significantly increase or decrease budget or contingency amounts without agreement of Architect to corresponding change in Project's scope and quality.
- 1.2.2.7** Owner must provide written notice to Architect if/when Owner becomes aware of errors, omissions or inconsistencies in Architect's Instruments of Service.
- 1.2.3.1** Scope of Architect's services will be set forth in Article 1.4.
- 1.2.3.2** Architect must submit schedule for performance of services, which will be consistent with time periods established in Subparagraph 1.1.2.6.
- 1.2.3.3** Architect's Designated Representative is authorized to act on Architect's behalf.
- 1.2.3.4** Architect must maintain confidentiality of specifically designated information, unless it would violate law, create risk of significant harm to public or prevent Architect from establishing claim or defense in legal proceeding; Architect must require similar agreements from consultants.
- 1.2.3.5** Architect will not, without Owner's knowledge and consent, do anything that would reasonably appear to compromise professional judgment.
- 1.2.3.6** Architect must review laws, codes and regulations applicable to services and design Project in accordance with requirements imposed by governmental authorities.
- 1.2.3.7** Architect may rely on accuracy and completeness of services and information furnished by Owner; will provide written notice to Owner if/when Architect becomes aware of errors, omissions or inconsistencies in such services or information.

Article 1.3 Terms and Conditions

- 1.3.1** Introduces phrase "Cost of the Work, " to replace "Construction Cost. "
- 1.3.1.2** "Cost Of The Work " includes costs of management or supervision of

construction or installation provided by separate construction manager or contractor.

- 1.3.2** Introduces phrase "Instruments Of Service, " to replace "Drawings, Specifications and Other Documents. "
- 1.3.2.1** Documents "in electronic form " are included as Instruments of Service.
- 1.3.2.2** Execution of Agreement results in Architect granting Owner license to reproduce Instruments for construction, use and maintenance of Project; license is subject to Owner's compliance with all contractual obligations; Architect must obtain similar licenses from Consultants; licenses are terminated by termination of Agreement prior to completion of Project; upon termination of license, Owner is prohibited from making further reproductions and must return all originals and reproductions to Architect; if Architect is adjudged in default, original license is deemed terminated and replaced by second license permitting Owner to authorize other design professionals to reproduce and, where permitted by law, change Instruments for completion, use and maintenance of Project.
- 1.3.2.3** Owner will not assign or otherwise transfer license without prior written agreement of Architect; Owner can authorize contractors/suppliers to reproduce applicable portions of Instruments necessary for performance of their Work; Owner cannot use Instruments for future additions or alterations to this or other Projects, without prior written agreement; any unauthorized use of Instruments is at Owner's risk and without liability to Architect.
- 1.3.2.4** Prior to exchange of documents in electronic format or other electronic data, Architect and Owner will, by separate written agreement, set forth governing conditions.
- 1.3.3** Introduces phrase "Change in Services, " to replace "Additional Services. "
- 1.3.3.1** Change in Services can result from mutual agreement in writing, circumstances beyond Architect's control, or if services are affected as described in section 1.3.3.2; in absence of mutual agreement in writing, Architect must notify Owner prior to providing such services and Owner must give prompt written notice if all or part of such services are deemed not required, in which event Architect will have no obligation to provide such services; except for change due to fault of Architect, Change in Services will entitle Architect to adjustment in compensation and reimbursable expenses.
- 1.3.3.2** If any of seven listed circumstances affect Architect's services, Architect is entitled to appropriate adjustment in schedule and compensation; the only listed circumstance not contained in 1987 B141 as "additional service " is "change in the information contained in Article 1.1 ".
- 1.3.4.1** Mediation is condition precedent to arbitration or litigation.
- 1.3.4.2** Mediation will be in accordance with *Construction Industry Mediation Rules*

of American Arbitration Association, unless otherwise agreed.

- 1.3.4.3** Parties will split mediation expenses.
- 1.3.5.1** Arbitration clause incorporates initial requirement of mediation.
- 1.3.6** Owner and Architect waive claims for consequential damages; Architect must obtain similar waivers from consultants.
- 1.3.7.3** Statutes of limitations will commence to run no later than date on which Architect's services are substantially completed.
- 1.3.7.7** Architect will have reasonable access to completed Project to make photographic or artistic representations for use in Architect's promotional or professional materials.
- 1.3.7.8** Architect is not required to execute certificates that require responsibilities beyond scope of Agreement.
- 1.3.7.9** Owner may assign Agreement to institutional lender financing Project, provided lender assumes Owner's rights and obligations under Agreement; Architect must execute all consents reasonably required to facilitate such assignment.
- 1.3.8.5** Owner may terminate Agreement with Architect, upon seven days written notice, for convenience and without cause.
- 1.3.8.6** In event of termination which is not Architect's fault, Architect will be compensated for services performed prior to termination, plus Reimbursable Expenses and Termination Expenses.
- 1.3.8.7** "Termination Expenses " are in addition to compensation for services, and include expenses directly attributable to termination for which Architect is not otherwise compensated, plus amount for Architect's anticipated profit on value of services not performed.
- 1.3.9.1** No deduction shall be made from Architect's compensation on account of cost of changes in the Work, except those for which Architect "has been adjudged to be liable. "
- 1.3.9.2** "Reimbursable Expenses " include expenses of professional liability insurance dedicated exclusively to Project.

Article 1.4 Scope of Services and Other Specific Terms and Conditions

- 1.4.1** Enumerates documents comprising Agreement between Owner and Architect.
- 1.4.2** Space to add special terms and conditions.

Article 1.5 Compensation

- 1.5.1** Space to specify how compensation will be computed.
- 1.5.2** Space to establish calculation of adjustments to compensation.
- 1.5.3** Space for computation of compensation for Architect's consultants, in

event of Change in Services.

- 1.5.5** Space to identify any "Reimbursable Expense " not listed specifically in 1.3.9.2.
- 1.5.6** Specified rates and multiples for services shall be adjusted in accordance with Architect's or consultant's normal salary review practices.
- 1.5.9** Space for fill-in-blank agreement of months for completion of Architect's services, after which an extension of services will be compensated (assuming the delay was not fault of Architect).

STANDARD FORM OF ARCHITECT'S SERVICES: DESIGN AND CONTRACT ADMINISTRATION

Article 2.1 Project Administration Services

- 2.1.1** Architect will consult with Owner, research applicable design criteria, attend Project meetings, communicate with members of Project team, and issue progress reports.
- 2.1.2** Architect will prepare and update a "Project Schedule ".
- 2.1.3** Architect will consider various, specified items things in developing design.
- 2.1.4** Architect will, upon Owner's request, make presentation explaining design of Project.
- 2.1.5** Architect must submit design documents to Owner, at intervals appropriate to design process, for evaluation and approval.
- 2.1.7.1** Architect will prepare preliminary estimate of Cost of the Work, which may be based on current area, volume or similar conceptual estimating techniques; as design progresses, Architect will update and refine preliminary estimate and advise Owner of necessary adjustments; if Architect's estimates exceed Owner's budget, Architect will make recommendations to Owner to adjust Project's size, quality or budget, and Owner will cooperate in making such adjustments.
- 2.1.7.3** In preparing estimates for Cost of the Work, Architect may include: various contingencies; determine various matters relating to elements of construction; make reasonable adjustments in scope of Project; and include alternate bids as may be necessary to adjust the estimated Cost of the Work to meet Owner's budget.
- 2.1.7.4** Budget for Cost of the Work will be adjusted if bidding or negotiation is not commenced within 90 days after Architect submits Construction Documents to Owner.
- 2.1.7.5** If budget for Cost of the Work is exceeded by lowest bona fide bid or negotiated proposal, Owner will have four options, including: increase Project budget; authorize rebidding or renegotiating construction contract; terminate Agreement; have Project scope and quality revised as required to reduce Cost of the Work.

- 2.1.7.6** If Owner chooses to revise Project scope and quality to reduce Cost of the Work, Architect will modify documents, without additional compensation, to bring bids or negotiated proposals within budget; modification will be limit of Architect's responsibility.

Article 2.2 Supporting Services

- 2.2** Essentially repeats many requirements previously designated as "Owner's Responsibilities " in Article 4 of 1987 B141.

Article 2.3 Evaluation and Planning Services

- 2.3.1** Architect must provide preliminary evaluation of information furnished by Owner, ascertain that such information is consistent with Project requirements, and notify Owner of other information or consultant services reasonably needed for Project.
- 2.3.2** Architect must provide preliminary evaluation of site, based upon certain information provided by Owner.
- 2.3.3** Architect must review Owner's proposed method of contracting for construction services and notify Owner of anticipated impacts on program, financial and time requirements, and scope of Project.

Article 2.4 Design Services

- 2.4.2.1 Schematic Design Documents** will include: establishment of conceptual design illustrating scale and relationship of Project components; conceptual site plan, if appropriate; preliminary building plans, sections, and elevations; and preliminary selections of major building systems and construction materials.
- 2.4.3.1 Design Development Documents** will: illustrate and describe refinement of design, establishing scope, relationships, forms, designs, and appearance by means of plans, sections, elevations, typical construction details and equipment layouts; and include specifications that identify major materials and systems and generally establish their quality levels.
- 2.4.4.1** Architect will provide **Construction Documents** based on updated budget for cost of the Work; documents will set forth, in detail, requirements for construction.
- 2.4.4.2** During development of Construction Documents, Architect must assist Owner in development and preparation of specifically described bidding and procurement information, and conditions of the Contract for Construction; Architect will also compile **Project Manual** that includes Conditions of the Contract for Construction and Specifications, and may include bidding requirements and sample forms.

Article 2.5 Construction Procurement Services

- 2.5.2** Architect will assist Owner in establishing list of prospective bidders or contractors.

- 2.5.3** Architect will assist Owner in bid validation or proposal evaluation, and in determination of successful bid or proposal; if requested by Owner, Architect will notify prospective bidders or contractors of bid or proposal results.
- 2.5.4.2** If requested, Architect will arrange for procuring reproduction of Bidding Documents for distribution to prospective bidders (Owner to pay reproduction costs).
- 2.5.4.3** If requested, Architect will distribute Bidding Documents to prospective bidders and request their return upon completion; will maintain log of distribution and retrieval and amounts of deposits, if any, received from and returned to prospective bidders.
- 2.5.4.4** Architect will consider requests for substitutions, if permitted by documents, and prepare and distribute addenda identifying approved substitutions.
- 2.5.4.5** Architect must participate in, or organize and conduct, a pre-bid conference for prospective bidders.
- 2.5.4.6** Architect must prepare responses to questions from prospective bidders and provide clarifications and interpretations of Bidding Documents to all prospective bidders in form of addenda.
- 2.5.4.7** Architect must participate in, or organize and conduct, the opening of bids and document and distribute bidding results.
- 2.5.5.2** Architect must arrange for procuring reproduction of proposal documents for distribution to prospective Contractors.
- 2.5.5.3** If requested, Architect will organize and participate in selection interviews with prospective Contractors.
- 2.5.5.4** Architect will consider requests for substitutions, if permitted by Proposal Documents, and prepare and distribute addenda to all prospective contractors identifying approved substitutions.
- 2.5.5.5** If requested, Architect will assist Owner during negotiations with prospective contractors and prepare summary report of negotiation results.

Article 2.6 Contract Administration Services

- 2.6.1.1** Architect will provide administration of construction contract as set forth in Article 2.6 and A201; modifications to General Conditions will be enforceable only to extent consistent with this Agreement or approved in writing by Architect.
- 2.6.1.2** Responsibility to provide Contract Administration Services terminates upon issuance of final Certificate for Payment; Architect is entitled to Change in Services if/when Contract Administration Services extend 60 days after

date of Substantial Completion.

- 2.6.1.5** Architect will review properly prepared, timely requests by Contractor for additional information about Contract Documents; request will be in a form approved by Architect and will include a detailed written statement that indicates specific drawings or specifications in need of clarification and nature of clarification requested.
- 2.6.1.6** If deemed appropriate, Architect can prepare supplemental Drawings and Specifications in response to requests for information.
- 2.6.2** Introduces term "Evaluation " in place of "Observation ".
- 2.6.2.1** Architect will visit site at intervals appropriate to stage of Contractor's operations, or as agreed in Article 2.8.
- 2.6.2.2** Architect will report known deviations from Contract Documents and from most recent construction schedule submitted by Contractor.
- 2.6.2.4** Owner shall endeavor to communicate with Contractor through Architect.
- 2.6.3.3** Architect must maintain record of Contractor's Applications for Payment.
- 2.6.4.2** Architect must maintain record of submittals and copies of submittals supplied by Contractor.
- 2.6.4.3** If Contract Documents require Contractor to provide design services or certifications by design professional, Architect will specify appropriate performance and design criteria; shop drawings and other submittals related to Work designed or certified by design professionals retained by Contractor will bear such other professional's written approval when submitted to Architect; Architect is entitled to rely upon adequacy, accuracy and completeness of services, certifications or approvals performed by such other design professionals.
- 2.6.5.1** Architect will prepare any necessary Drawings and Specifications to describe any changes in Work (See section 2.8.2.3 for corresponding Change in Services).
- 2.6.5.2** Architect will review properly prepared, timely requests by Owner or Contractor for changes in Work, including adjustments to Contract Sum or Contract Time; properly prepared request will be accompanied by sufficient supporting data and information to permit Architect to make determination without extensive investigation or preparation of additional drawings or specifications; if Architect determines requested change is not materially different from requirements of Contract Documents, Architect may issue order for minor change in Work or recommend that requested change be denied.
- 2.6.5.3** If Architect determines implementation of requested change would/may cause adjustment in Contract Time or Contract Sum, Architect should make recommendation to Owner, who may authorize further investigation; Architect will estimate additional cost and time resulting from change,

including additional costs attributable to design fees; with Owner's approval, Architect will incorporate estimates into appropriate document for Owner's execution or negotiation with Contractor.

- 2.6.5.4** Architect must maintain records concerning changes in Work.
- 2.6.6.1** Architect will issue final Certificate for Payment, based upon final inspection indicating Work complies with requirements of Contract Documents.
- 2.6.6.2** Architect's inspection should be conducted with Owner's designated representative to check conformance of Work with requirements of Contract Documents and to verify accuracy of list submitted by Contractor of work to be completed or corrected.
- 2.6.6.3** When Work is found to be substantially complete, Architect will inform Owner about balance of Contract Sum remaining to be paid Contractor, including amounts needed to pay for final completion or correction of Work.
- 2.6.6.4** Architect will receive from Contractor and forward to Owner: consent of sureties, if any, to reduction in or partial release of retainage or to making of final payment; and affidavits, receipts, releases and waivers of liens or bonds indemnifying Owner against liens.

Article 2.7 Facility Operations Services

- 2.7.1** Architect will meet with Owner promptly after Substantial Completion to review need for facility operation services.
- 2.7.2** Upon request of Owner, and prior to expiration of one year from date of Substantial Completion, Architect will meet again with Owner to review facility operations and performance and to make appropriate recommendations to Owner.

Article 2.8 Schedule of Services

- 2.8.1** Parties agree, through fill-in-blanks forms, on number of times Architect must: review each submittal; visit site during construction; inspect any portion of Work to determine substantial completion and/or inspect any portion of Work to determine final completion; services beyond specified numbers will be provided as Change in Services.
- 2.8.2** Eight categories of service are specified which will be provided as Change in Services; categories not listed in 1987 B141 as some form of additional service include: review of submittals out of sequence from submittal schedule agreed to by Architect; and responses to RFI's where information is available to Contractor.
- 2.8.3** Fill-in-blank chart for parties to specify additional services to be provided by Architect (for cross reference, see section 2.2.1).

Article 2.9 Modifications



ProNet Practice Notes

- 2.9.1** Space for Parties to identify and itemize modifications to Standard Form of Architect Services.