

Small Project Practitioners Webinar, November 6, 2012

Q&A

We have provided responses below to the questions that we received during the “Everything You Need to Know: AIA Contract Documents for Small Firms” webinar on November 6, 2012. Please note that we may have consolidated and re-worded some of your questions to provide more general applicability for others viewing these responses as well.

A number of questions were directed to receiving a copy of the presentation deck and reviewing the webinar again. All attendees should have received a copy of the deck. It has also been posted on the Small Project Practitioners Knowledge Community web site. The webinar is available at www.aia.org/docucation and you may view it again free of charge.

Q1: Could you comment on pros and cons of the use of property liens, where the owner grants the right to file at the beginning of the project?

Real Property liens arise from many sources. For example, project lenders often secure repayment of their loans by filing liens against the property. It sounds as though your question relates to what are commonly referred to as “mechanic’s liens”. Mechanic’s liens are normally derived from statutes that authorize persons or entities who provide labor or material for a project, to file a lien against the property if they have not been paid for the labor or materials furnished. Architectural services can fall within the scope of some mechanic’s lien statutes. Generally speaking, mechanic’s liens can be an effective way to get paid for labor or materials provided to the project. A timely filed lien can create an impediment to other actions involving title to the property (including sale of the property or project) and ultimately may result in forced sale of the property and project to satisfy the lien amount. Because the exact terms of the Mechanic’s Lien statutes vary from state to state, and the pros and cons of filing and enforcement will also vary state to state and project by project, competent legal counsel should be consulted.

Q2: I’m still suggesting use of A107-1997 because later documents seem overly complicated and involved for basic residential projects. For an owner-architect agreement, I use my own two-page document because it is very simple & straightforward. Am I missing something?

You may want to take another look at A107™-2007 and B104™-2007. You might also look at B105™-2007, a two-page owner-architect agreement for use with A105™-2007.

In 2007, the AIA Contract Documents program developed owner-architect agreements and owner-contractor agreements in the design-bid-build delivery model with a sliding scale in mind, taking into account variables such as project complexity and cost. B101™-2007 is the flagship owner-architect agreement, for projects ranging in size and complexity from medium to very large and complex. B103™-2007 was developed for the more complex and costly projects. Those two agreements are intended to be paired, depending on the method of payment to the contractor, with either A101™-2007 (stipulated sum), A102™-2007 (Cost plus fee with GMP) or A103™-2007 (Cost plus fee without GMP). Those documents all use A201™-2007 for the General Conditions document, and they are more complicated than A107™-1997.

B104™-2007 is an owner-architect agreement intended for projects of limited scope and it is intended to be used in conjunction with A107-2007. A107-2007 is a stand-alone agreement because it contains its own internal general conditions and does not require the addition of a separate general conditions document. This agreement was formerly written for use only where the basis of payment is a stipulated sum. In 2007, the AIA revised the agreement to accommodate two additional payment methods: cost of the work plus a fee, with or without a guaranteed maximum price. The owner and contractor are asked to select the payment method in the agreement using a check box. If either of the two cost-plus payment methods is selected, then the parties will complete, and incorporate into the agreement, Exhibit A, which provides the detail for the Cost of the Work.

A107-2007 revises the 1997 edition of A107 to parallel 2007 revisions made in other AIA Documents. Most of the significant differences in content between the 2007 edition and the 1997 edition of A107 are listed below.

Title: The title of this document is revised for brevity and to focus on its use for projects that do not rise to the level of complexity that would require a more detailed agreement paired with A201-2007, General Conditions of the Contract for Construction.

Format: A table of articles is added and sections are re-ordered to correspond to the sequence of sections in other AIA owner-contractor agreements, and in A201-2007. Exhibit A supplements the base agreement by providing additional information related to the Cost of the Work. Exhibit A is required only if the parties choose one of the cost-plus payment methods.

Article 3: A checkbox is added where the parties may select the Contract Sum and the associated method of payment. The Stipulated Sum now makes provision for allowance prices; the new Cost of the Work with a Guaranteed Maximum Price may include “unit prices,” “allowances,” and “alternates”.

Article 4: Section 4.1.4 now includes a fill point where the parties may indicate whether retainage will be withheld, and if so, under what terms.

Article 5: As in A107™-1997, an initial decision is a condition precedent to mediation, and is a condition precedent to any binding form of dispute resolution. However, arbitration is not mandatory under A107-2007 so the parties must select the binding method of dispute resolution from three choices: arbitration, litigation or another method that the parties must identify. New Section 5.1 provides a checkbox for selecting, or stating, the method of binding dispute resolution to be followed for any dispute not settled through mediation.

Article 9: Section 9.7 adds an Allowances section which explains which costs may be included in them. Section 9.8, adds a new requirement for the Contractor to submit a construction schedule.

Article 13: Section 13.2 adds provisions for the Contractor to obtain interim payments in the event the Owner and Architect issue a Construction Change Directive.

Article 14: New provisions are added to address payment procedures that are unique to stipulated sum and guaranteed maximum price contracts.

Article 15: New Section 15.4.2 requires the Contractor to prepare a “punch” list prior to Substantial Completion. New text in Section 15.4.3 requires the Architect to conduct an inspection for the purposes of determining Substantial Completion.

Article 17: The insurance provisions now require the Contractor to obtain general liability insurance for completed operations and to include the Owner and Architect as additional insured during the Contractor’s operations, and the Owner as an additional insured during completed operations. These changes reflect industry practices. New Section 17.4 permits the Owner to require performance and payment bonds, and to stipulate their requirements in bidding documents.

Article 20: This article now permits the Owner to terminate the Contract for its convenience, and sets forth the Owner’s financial duties to the Contractor in that event.

Article 21: This is a new article that consolidates claims and disputes procedures. Section 21.5 allows for consolidation of arbitrations and joinder of parties in arbitrations, if the parties have selected arbitration as the method of binding dispute resolution.

A detailed comparative of the 1997 and 2007 versions of A107, showing all edits in track changes format, is available at <http://www.aia.org/groups/aia/documents/pdf/aias076820.pdf>.

In 2007 the AIA also published B105™-2007, which consists of a cover page and two pages of basic business terms. B105 adopts A105 by reference as it sets forth the Architect’s responsibilities during the Construction Phase. B105 is intended to be used for a residential or small commercial project that is modest in size and brief in duration. B105–2007 and A105–2007, Standard Form of Agreement Between Owner and Contractor for a Residential or Small Commercial Project, comprise the Small Projects family of documents.

You are strongly encouraged to review samples of each of these documents at www.aia.org/smallprojects.

Q3: What are drawbacks to using older (e.g. 1990s) documents?

The AIA Contract Documents library is consistently updated. Major families of documents are normally reviewed and revised on a 10-year cycle. This review and revision process allows us to update the documents to account for changes in industry practices as well as changes in the law. If someone continues to use older documents, at the very least they lose the benefit of the updates. When AIA documents are reviewed and revised, the predecessor documents are retired. When a document is retired we stop printing paper copies, and after a sunset period (usually 18 months) software users can no longer access new drafts of the documents and can no longer finalize existing drafts. So, unless someone buys up a significant supply of documents, eventually they will no longer be able to legally access older documents. (Photocopying of our documents for use on multiple projects is a copyright violation.)

Q4: Why don't AIA documents contain a limitation of liability provision, and what do you recommend when an insurance carrier requires that one be included?

AIA Contract Documents do not contain limitation of liability provisions as part of the standard form language. However, discussion of limitation of liability provisions and model language for two types of such provisions that may be used in owner-architect agreements is provided in AIA Document B503™-2007, Guide for Amendments to AIA Owner-Architect Agreements, which is available to download for free at www.aia.org/contractdocs/reference. Because of the legally sensitive nature of limitation of liability provisions, parties are cautioned to consult with legal counsel as to the specific application of local laws to such provisions.

Q5: Please comment on ethical concerns when using the design-build delivery method with the architect as the contractor, and identify any avenues available in AIA documents to avoid conflict of interest issues.

It is not clear what ethical concerns you have in mind. In any event, the AIA Contract Documents program does not generally address ethical concerns as this relates more to a matter of practice than contractual relationships. You might consider contacting the AIA's National Ethics Council. Here is a link to their web page: <http://www.aia.org/about/ethicsandbylaws/index.htm>. In addition, you might follow up with the AIA's Project Delivery Knowledge Community at <http://network.aia.org/projectdelivery/home/>. The Project Delivery Knowledge Community used to be referred to as the Design-Build knowledge community and may be able to direct you to the resources you are looking for.

Q6: Why is there a termination without cause for owners in the AIA documents but they do not cover architects terminating the agreement?

Owners are permitted to terminate an agreement for their convenience (without cause) because an owner can have legitimate and justifiable reasons to terminate an agreement even if the architect has not breached the terms of the agreement. For example, if the owner's funding for a project falls through, the owner will need to terminate the contract because it can no longer go forward with the project. A termination for convenience, however, is not without cost to the owner as the owner is required to reimburse the architect for amounts earned prior to the termination as well as an amount of lost profit on the project, which we refer to in our agreements as Termination Expenses. With respect to an architect terminating an agreement, AIA owner-architect agreements allow the architect to terminate for cause if the owner substantially breaches the agreement. The architect cannot, however, terminate for convenience. This is because the benefit to the architect in being able to terminate for convenience does not outweigh the potential harm to an owner if the architect leaves a project without cause.

Q7: What happened to AIA document B155-1993?

B155™-1993, Owner/Architect Agreement for a Small Project, was replaced by B105-2007, Owner/Architect Agreement for a Residential or Small Commercial Project. Publication of B155 was discontinued in May 2009. As was the case with B155, B105-2007 is geared toward use on residential or commercial projects that are modest in size and brief in duration. B105-2007 is

intended for use with A105–2007, which it incorporates by reference. B105 is extremely abbreviated and is formatted more informally than other AIA agreements. Some of the differences between B155 and B105 are noted in the B105 instructions:

CHANGES FROM THE PREVIOUS EDITION

AIA Document B105–2007 is the successor to AIA Document B155™–1993. B105 incorporates alterations proposed by architects, contractors, owners, and consultants. Significant change is made to the document format to streamline and simplify it by removing paragraph numbering. The following are some of the changes made to the contents from B155–1993.

Title. The title of this document is changed to be more specific about its potential uses.

Article 1. The Architect’s standard of care is revised. The description of the Architect’s responsibilities is rewritten for clarity. A fill point is added for a description of any consulting services to be provided by the Architect.

Article 2. Language is added to the Owner’s responsibilities with respect to providing timely decisions and information, and requiring the Owner to furnish consulting services required for the Project that are not provided by the Architect.

Article 3. The definition of the Architect’s instruments of service is now clarified as “drawings, specifications and other documents” prepared by the Architect. Language is added providing that the Owner’s right to use the instruments of service ceases upon completion of the Project and that transmission of copyright-protected information is authorized.

Article 4. An addition is made to provide for mutual termination upon seven days’ notice if the Project is suspended for more than 90 days.

Article 5. A statement is added that nothing in the Agreement creates a contractual relationship with, or a cause of action in favor of, a third party against the Owner or the Architect.

Q8: What are the issues relating to ownership of drawings? This is always very contentious, with owners demanding that they own the drawings and not satisfied with having rights to use the drawings for the project.

This can be a contentious topic. The position taken in the AIA Contract Documents is that the architect and the architect’s consultants are deemed the authors and owners of their respective Instruments of Service, and they retain all common law and statutory rights, including copyright. The owner receives a license to use the Instruments of Service solely and exclusively for constructing, using, maintaining, altering and adding to the Project. Most owners are satisfied with the license. However, in recognition that some owners may wish to obtain ownership of the Instruments of Service, a discussion of some of the issues associated with transferring ownership, as well as model language on that topic, is provided in B503™-2007, Guide for Amendments to AIA Owner/Architect Agreements. B503 can be downloaded for free at <http://www.aia.org/contractdocs/aiab081440> and the relevant discussion can be found in Article 8.

Q9: As Design-Build becomes a more popular delivery method, is there a smaller version of the A141 Owner/Design-Builder agreement that would be more appropriate for use on a small project?

Currently, A141 is the only Owner/Design Builder agreement that the AIA publishes. The Design-Build Documents are, however, currently being evaluated for update in 2014 and we are considering the applicability of the documents to smaller projects.

Q10: How is the legal community viewing placing responsibility for costs on the owner?

We are not sure exactly which costs you are referring to. In general, lawyers hired to represent a particular client will often seek to shift risk and expense away from their client. Accordingly, attorneys who represent owner interests in a particular project will often try to shift the risks and costs of construction to other project participants. However, many attorneys and their clients also recognize the value in starting with, and/or developing, a fair and balanced contract. Among other things, working with contract terms that fairly apportion risk and cost often result in prompt contract negotiation, lower pricing, and a more collaborative and cooperative work environment.

Q11: It was my understanding that pro bono work with the intention of getting future work was against AIA regulations. Given the B106 owner-architect pro bono agreement, is this understanding incorrect?

There are several issues that may be related to this question, such as whether an architect has sufficient experience to take on a particular pro bono project and whether an architect may be performing pro bono work in order to try to obtain additional work for compensation. These issues and many others related to pro bono work are discussed in the AIA's "Institute Guidelines to Assist AIA Members, Firms and Components in Undertaking Pro Bono Service Activities." The Guidelines can be downloaded free of charge at www.aia.org/probonoguidelines. You may also want to review the AIA National Ethics Council Advisory Opinion at the following link: <http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aia077541.pdf>.

Q12: Is there a standard form used for joint projects between small firms, or for small firm/large firm shared projects?

You might consider AIA Document C101™–1993, Joint Venture Agreement for Professional Services. C101–1993 is intended for use by two or more parties to provide for their mutual rights and obligations in forming a joint venture. It is intended that the joint venture, once established, will enter into an agreement with the owner to provide professional services. The parties may be all architects, all engineers, a combination of architects and engineers, or another combination of professionals. The document provides a choice between two methods of joint venture operation. The "division of compensation" method assumes that services provided and the compensation received will be divided among the parties in the proportions agreed to at the outset of the project. Each party's profitability is then dependent on individual performance of pre-assigned tasks and is not directly tied to that of the other parties. The "division of profit and loss" method is based on each party performing work and billing the joint venture at cost plus a nominal amount for

overhead. The ultimate profit or loss of the joint venture is divided between or among the parties at completion of the project, based on their respective interests.

Q13: What If I want contractor payment options as in B104 while using A105 or B 105? Should that lead me to use a more rigorous document class?

AIA Document A105–2007, Standard Form of Agreement Between Owner and Contractor for a Residential or Small Commercial Project, provides for a stipulated sum contract only. Using A107–2007, Standard Form of Agreement Between Owner and Contractor for a Project of Limited Scope, allows for the selection of a Stipulated Sum or Cost of the Work plus the Contractor’s fee with or without a Guaranteed Maximum Price. A107 is coordinated for use with owner-architect agreement B104-2007.

Q14: Is it possible to use the B106 pro bono agreement as the basis for tax losses?

We recommend that you discuss any tax implications of providing pro bono services with your legal or accounting advisors. You may also wish to review the AIA’s “Institute Guidelines to Assist AIA Members, Firms and Components in Undertaking Pro Bono Service Activities,” which discusses issues associated with providing Pro Bono Services and includes recommendations relating to seeking the advice of your attorney, accountant, and insurance advisors prior to undertaking a pro bono project. The Guidelines can be downloaded free of charge at www.aia.org/probonoguidelines.

Q15: Can the B107 developer-builder/architect agreement be modified easily to apply to a one-of-a-kind developer project?

We recommend that you review B107-2010 and its instructions to determine whether it can be used in the project you are contemplating. As discussed in the webinar, the architect’s scope of services in B107 is limited to development of Permit Set documents and very limited construction phase services. The developer-builder performs the construction and is envisioned to be a sophisticated entity capable of completing the project based on the Permit Set documents. You may review a sample of B107 at www.aia.org/smallprojects.

Q16: Can B107 be used as an owner-builder/architect agreement rather than a developer-builder/architect agreement?

The term “Developer-Builder” was used in B107, rather than “Owner” as in other AIA owner-architect agreements, because the entity that is contemplated to be the Developer-Builder is defined differently than “Owner.” The Developer-Builder is expected to have a higher level of construction expertise than does a typical owner. We suggest that you review B107 and its instructions to determine whether the entity that you are describing as an Owner/Builder would have the qualifications that are set forth for the Developer-Builder entity in B107. You may review a sample of B107 at www.aia.org/smallprojects.

Q17: Where can you download these documents for review in order to compare with the documents that we have? I did not find them on the AIA site except for purchase and then you needed to enter project info.

Samples of the documents discussed in the webinar may be reviewed at www.aia.org/smallprojects and, for the Sustainable Projects documents, at www.aia.org/greendocs.

Q18: What document would you recommend for small commercial projects where the owner is also the builder, similar to B107 but for a small commercial project?

B107-2010 is the only agreement that we publish in which the developer is performing the construction. The other AIA owner-architect agreements contemplate that the owner will hire a contractor to perform construction. We recommend that you confer with legal counsel if you wish to modify B107 or one of the other agreements for the use that you have described.

Q19: Are post occupancy services for Living Building Challenge addressed in the SP documents? What are the provisions for compensation for this time?

The Sustainable Projects (SP) documents are not drafted for a particular Sustainability Certification; rather, the SP documents establish a new scope of services (Sustainability Services) to aid in the development of a Sustainability Plan that outlines the services and work necessary to achieve the Owner's Sustainable Objective, which may include obtaining a Sustainability Certification. Under B101™-2007 SP, the architect's Sustainability Services are included as part of the architect's Basic Services, but there are new payment provisions in Article 11 that provide for separate compensation for the Sustainability Services. Additional time spent providing post occupancy services on a Living Building Challenge Project can be included in separate compensation for Sustainability Services in Article 11.

Q20: Do you have any provisions for integrating the IPD process for a small business?

All of our Integrated Project Delivery (IPD) agreements provide examples of how the IPD process works in a contractual setting. For more guidance on the IPD process in practice, and how it can be applied to traditional delivery models, we suggest you read the IPD Guide, which can be downloaded at <http://www.aia.org/contractdocs/AIAS077630>.

Q21: Most often I use the B105 owner-architect agreement for my single family residential projects. Many times the owner hires a contractor who uses its own owner-/ contractor agreement. As a result, there are no coordinated agreements and the construction phase services are limited. Any suggestions?

You have identified two key issues faced when providing architectural services on a project where the owner-contractor agreement is not an AIA Contract Document coordinated with an AIA owner-architect agreement. You should consider discussing these issues with the project owner at the outset of the project, and perhaps before you enter into the owner-architect agreement. You might also wish to consult an attorney and discuss options for contract language that might require that the owner use a coordinated AIA owner-contractor agreement and/or requires construction phase services.

Q22: Why are the "A" documents for Builders and the "B" documents for Architects?

The first document published by the AIA in 1888 was not an Owner-Architect Agreement. The first document was the Uniform Contract for use between Owner and Contractor. As the AIA Contract Document Program expanded, it became necessary to come up with a short form way of designating documents. In 1925, the Owner-Contractor Agreement, due to its history as the AIA's first Contract Document, became document A-1 and its General Conditions became document A-2. In the late 1950s the AIA undertook the development of a comprehensive and logical numbering system broken down by series. Because of the history of the Owner-Contractor Agreement and the General Conditions as document A-1 and A-2, respectively, Owner-Contractor Agreements became the A series.

Q23: For those of us who have few projects per year and use AIA Documents in small quantities, will we have access to all AIA contract documents on the Documents on Demand service, including the Interiors family documents?

At this time, the entire library of documents is available on Documents on Demand (DoD), with a few exceptions for documents that are not suited to the DoD format, such as the complex Integrated Project Delivery Family agreements. All of the Interiors Family documents are available on DoD.

Q24: The documents are excellent but my needs on an annual basis don't justify the cost of a subscription. Are there other options for obtaining digital format documents?

You may obtain almost all of the documents from our Documents on Demand service, with a few exceptions for documents that are not suited to the DoD format, such as the complex Integrated Project Delivery Family agreements. For more information on Documents on Demand, please refer to <http://documentsondemand.aia.org>. In addition, you might consider one of our limited subscription options, Docs 100 or Docs 300. You can find out more about these limited subscriptions at www.aia.org/contractdocs under the section for purchasing.

Q25: I sometimes would like to review the various documents to determine which is appropriate for use for a particular project. How will the AIA permit this under terms of the Documents on Demand program?

We do not currently provide online samples of all of the documents. Samples of the documents discussed in the webinar may be reviewed at www.aia.org/smallprojects and, for the Sustainable Projects documents, at www.aia.org/greendocs. In addition, you may review document synopses, comparatives, comparisons, commentaries and other reference materials at www.aia.org/contractdocs/reference. The Architect's Handbook of Professional Practice also includes a compact disc with samples of the documents current as of the Handbook publication date.

Q26: I was involved in a situation in which an owner's attorney significantly revised the section in the A107 owner-contractor agreement related to the architect's performance of site inspections to require that the architect inspect and test the work, and certify the work as being in conformance with the requirements applicable to the state rehabilitative construction law. When I objected to this revision, the attorney said the document is between the owner and the contractor, and has little bearing on the architect. What are your thoughts on this type of situation?

The language you indicate was stricken by the attorney is clearly intended to set and limit expectations with respect to the architect's construction phase services and responsibilities, which, as set forth in A107 are incorporated by reference in the B104 owner-architect agreement. The text added by the attorney also seems designed to create a much higher burden and level of responsibility for the architect. Beyond that, we cannot comment on the impact of these revisions on your particular firm. You might consider reviewing this situation with your insurance carrier and/or with competent legal counsel.

Q27: Does the AIA publish a document for releasing copyright, including release of future liability?

Under AIA Contract Documents, the architect retains the copyright in its Instruments of Service (IOS). In the AIA owner-architect agreements, the architect grants a limited license to the owner for use of the architect's IOS so that the owner may complete and maintain the Project. This license is granted so long as the owner makes payment when due the architect and requires indemnity in the event the owner uses the IOS without retaining the architect. This license is incorporated directly in the text of AIA owner-architect agreements and is not available as a stand-alone document. The AIA does publish a license agreement specifically associated with digital data, AIA Document C106™-2007, Digital Data Licensing Agreement. However, C106 does not need to be executed by parties who are already using an AIA owner-architect agreement. You may also wish to review Section 8 of AIA Document B503-2007 at <http://www.aia.org/contractdocs/aiab081440> and/or consult your insurance or legal counsel.