

CONSTRUCTION CONTRACT DOCUMENTS

CONSTRUCTION MGT TRAINING CORVALLIS, SEPT. 28, 2006

I. OVERVIEW

- A. What constitutes “contract documents”?
- contract (A101), General Conditions (A201), Supplementary Conditions, plans, specs (Project Manual), bid docs, engineer reports (e.g., soils report, Phase I Environmental, ALTA survey),
 - don’t confuse with “construction documents” which are the drawings used for construction, that architect prepares
- B. Other Contracts relevant to Construction Phase
- Architect Agreement
 - Contracts with other Consultants
 - Civil Engineer (inspections, as-built survey)
 - Soils Testing, Concrete Testing
 - Lenders—Construction Lender, Permanent Lender (draw process, change orders)
 - Other Funders—Tax Credit Investor, Green Building, Weatherization/BETC, HCS/HUD/RD (ADA, Fair Housing, Visitability, Section 3, MBE/WBE, etc.—see para. ___ below)
- C. Construction Procurement—How is Contractor Chosen? Negotiated contract, “pure” competitive bid, RFQ/bid
- D. Who prepares Construction Contract?
- Owner or owner’s representative, with help from architect (see AIA B141 §2.4.4.2);
 - to avoid copyright infringement, ask architect to provide forms (A101, A201) or purchase blank forms from AIA (office in Portland)
 - RD, HUD have form contracts and/or attachments that you’re required to use
- E. Timing
- When to Prepare? Before start of contractor selection process, since architect usually includes the contract in the Project Manual
 - When to sign? Normally, just before construction loan closing
- F. Consistency is Key:
- Make sure versions of contract documents are same (A101, A201, B141)— AIA revises agreements every 10 yrs, most recent version is 1997; 2007—new set, but lots of people will still use ’97 set
 - make sure provisions are consistent
 - accepted practice is to show all changes, with underlines and strikethroughs
- G. Resources
- AIA has explanatory materials
 - Lawyer websites: CDLC, Miller Nash, Holland & Knight,
- I. What we’re not talking about:
- Public contracting (ORS 279A-279C);
 - single family, owner occupied (CCB)

II. OWNER/ARCHITECT DOCUMENTS

AIA “B” SERIES,

most common is AIA B141: 2 parts

Term: make sure agreement is for at least 3 years, not including services performed during 1-yr warranty period; otherwise architect gets to renegotiate fee

Consultants: best to have architect hire civil engineer, other consultants; even if hired by owner, architect has responsibility to coordinate (§ __)

Visits/inspections (§2.6.2.1): preferably weekly, at least every other week; architect to provide written minutes

Project Parameters (§1.1.2): Project Description, Physical Parameters (surveys, environmental assessment), Legal Parameters, Financial Parameters (Total Development Cost, Hard Costs), Time Parameters, Contractor Procurement Method, ,

- Other Parameters (list here funder requirements; eg “comply with all OHCS, FHLB requirements”);
- see also §1.2.3.6, stating Architect to respond to laws, codes, regs, etc.; list here any regs you know will apply (e.g., compliance with Fair Housing Act, ADA, HCS Visitability)

Make sure to include required certifications assignment to lender

Ownership of Plans (§1.3.2): Architect owns “instruments of service”, owner has nonexclusive license to use for construction & maintenance

Contract administration:

- architect is owner’s rep (A201 §4.2.1)
- communication between owner and contractor should be through architect (A201 §4.2.4)
- where disputes arise, architect switches from pro-owner to impartial initial decision-maker—will interpret and decide matters concerning performance under and requirements of the Contract Docs (A201 §4.2.11)

III. AIA A-101 1997 STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR

Art. 1. Parties:

- Owner, Builder
- Make sure you have legal names; if LIHTC, owner should be the LP, not the sponsor
- For easy reference, list name, address, contact person, phone, fax, email

Art. 2. Contract Documents: provide complete list in Article 8 (get help from architect)

Art. 3. Date of Commencement & Substantial Completion

- Date of commencement—as set forth in Notice to Proceed
- Substantial Completion—usually stated in calendar days; occurs when Certificate of Occupancy issued by city & only minor punch list items remain; then architect issues *Certificate of Substantial Completion*, owner or contractor posts and records *Notice of Completion*; this starts 75 day lien period; (see also A201, §9.8)
- Final Completion—add this to contract (“30 days after S/C”) (see also A201 § 9.10—conditions under which architect issues *Final Certificate of Payment*)
- Liquidated Damages—add this (\$500 per day), specify that it applies to both S/C and F/C

Art. 4. Contract Sum— could be fixed price (A101 is fixed price), “cost plus a fee with guaranteed maximum price” (A111); also space in this Article for “Alternates” and “Unit Prices”

- Contract sum includes profit, overhead and general requirements (not usually stated in A101 Contract Sum, but found in Schedule of Values): note limits
 - HCS LIHTC: profit, O/H and GR ≤14% of const. cost, net of profit, O/H, GR
 - RD: 10% profit, 4% overhead, 7% general requirements;

Art. 5.1 Progress Payments (see also A201 §§9.3-9.6)

- Normally monthly
- Contractor submits pay app by 25th, gets paid by 10th of following month
- Payment based on % complete for each line item in Schedule of Values (see A201 §9.2)
- Less “Retainage”— 5-10% of each payment held back, paid at “Final Payment”
- Lien Releases—condition payment on providing lien releases for contractor, subs, major suppliers; 3 varieties: conditional, unconditional, final

Art. 5.2 Final Payment (see also A201 §9.10; Supp p. 7)

- Final Payment includes release of retainage, so condition Final Payment on providing lien releases, warranties, manuals, as-built plans, consent of surety, AND *expiration of 75 day lien period* with no liens filed (could release part of retainage before 75 days, with lien releases; could release retainage even if liens filed, if contractor posts bond)

Art. 6 Termination or Suspension (see A201 §14)

Art. 7 Miscellaneous

Art. 8 Contract Documents: provide complete list here; includes plans and specs; also should specify that bid docs, engineer reports (e.g., soils report, Phase I Environmental, ALTA survey), Schedule of Values and Construction Schedule are included; don't forget to include last-minute changes for *Value Engineering*

Signatures: Get 3 signed originals (one each for owner, contractor and architect); OK to sign separate pages; for RD projects, signed at preconstruction conference

IV. AIA A201 1997 GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION

A. INTRODUCTION

- If you have a question during construction, look here first (and in Supplement, for changes)
- Document is 43 pages long, in small type; in other words, there's a lot of info here
- Good Table of Contents and Index at beginning of document

B. CRITICAL PROVISIONS

- **Order of Priority** of Contract Documents—put this in supplement (see Supp, §1.2.2)
- **Owner Responsibilities** (Art. 2)
 - Get necessary easements
 - Provide survey, plans & specs (specify number in supplement)
 - On request of Contractor, provide evidence that financing for project is in place (§2.2.1)
- **Contractor Responsibilities** (Art. 3, pp 12-18):
 - Contractor assumed to be familiar with site & local conditions, & must take field measurements of existing conditions related to the Work;
 - must report to architect any errors, inconsistencies or omissions in Contract Docs of which contractor becomes aware (including violations of code), otherwise is liable for knowingly failing to do so; may be entitled to change order to address errors, omissions; see also §3.7.3, §3.7.4 (contractor liable if knowingly does work that violates code, even if called for in plans & specs)
- **Permits and Fees** (§3.7): A201 says contractor responsible for payment of permits; but since contractor adds 10-20% for profit, overhead & general requirements to all costs it incurs, it's best if owner agrees to pay for building permits and system development charges ("SDCs", for water, parks, streets, etc.), builder to pay for electrical, plumbing and mechanical fees, builder to pick up all permits
- **Waiver of Consequential Damages** (§4.3.10)—normally not good for owner to do if LIHTC project, so consider deleting this provision
- **Change Orders**: A201 §7.3.6 says contractor entitled to overhead and profit on change orders that *increase* contract price, but owner not entitled to deduct overhead and profit on change orders that *decrease* contract sum; change this to apply same percentage to increases and decreases
- **Bonds**: not necessarily required; owner has right to require bonds (§11.5)
 - Payment Bond (assures that subcontractors and suppliers are paid),
 - Performance Bond (assures that Contractor completes construction);
 - If project bonded, surety has certain rights to notice; don't release retainage until get consent of surety
 - alternatives to bonds (letter of credit, lien releases, title co. writedowns, retainage)
- **Insurance** (A201 Art. 11)
 - Contractor's General Liability
 - Owner's and Contractors Protective Liability
 - Builder's Risk Property Insurance ("Course of Construction"): A201 says owner to get this, but could be either owner or builder, depending on cost; if there is a claim, who pays deductible? (under §11.4.1.3, Owner pays)
 - Owner's General Liability

- Make sure to incorporate funder insurance limits into this section
- **Warranties**
 - Art. 3.5.1—General warranty
 - Art. 12.2, One Year “Warranty”—owner to notify contractor promptly after discovery of defective work, contractor to correct defective work promptly after receipt of notice
 - Manufacturers’ warranties
- **Termination** (Article 14)
 - Either party can terminate for cause, normally on 7 days’ written notice
 - Owner can terminate for convenience on written notice (no minimum number of days), but under §14.4.3, contractor entitled to overhead and profit *even on work not yet done*; change this to overhead and profit on work *completed*.
- **Attorney Fees:** Under Oregon law, can’t get unless specified in contract; none specified in A101 or A201, so if you want ‘em, add a provision for attorney fees
- **Funder Requirements:** Usually included as attachment(s) to Supplementary Conditions; Typical federal requirements include:
 - Section 3 (contracts of \$100,000 or more): hire low-income persons to greatest extent possible
 - MBE/WBE (all contracts): take affirmative steps to assure that MBE/WBE are used when possible,
 - EEO/Affirmative Action (contracts of \$10,000 or more): take affirmative action to ensure equal employment opportunity without regard to race, color, religion, sex or national origin
 - State Prevailing Wage Rates (PWR) / Federal Davis Bacon Wage Rates
 - State PWR required if public agency (including housing authority) is party to, carries out or controls the project
 - Davis Bacon required for HOME project with 12+ HOME units, CDBG projects with 8+ units, RD projects with LH grant; others?
 - Contractor must have written contracts with subs (subcontracts of \$10,000 or more)
 - Misc: No lobbying with federal funds (contracts of \$100,000 or more); no kickbacks (Copeland Anti-Kickback clause); no lead paint; environmental, cultural and historic preservation protections
- **Replacement and Major Maintenance Schedule:** Have contractor provide cost and number of units for major systems (appliances, roof, exterior paint, carpet, vinyl, siding etc.) see Attachment A

C. **Disputes**—See A201 Article 4, Architect’s Administration of the Contract

1. Request for Interpretation (§4.2.11-4.2.13)
 - owner or contractor makes written request for interpretation/decision
 - architect to decide in writing w/ reasonable promptness, must be w/in 15 days; A will not show partiality to either O or C
2. Disputes (§4.3, 4.4) (pp 20-23)
 - Definition of “**Claim**”: written demand for interpretation of contract terms, adjustment in pay or time, or any other dispute related to Contract
 - Either party has **21 days** from date of occurrence giving rise to claim to make written claim to other party and architect
 - Pending resolution of claim, Contractor to continue work, Owner to continue paying (§4.3.3)
 - If Contractor’s claim includes claim for additional money, contractor must give written notice before doing work, except in case of emergency endangering life or property (§4.3.5); prior written notice rarely happens in real life
 - Architect has 10 days to either
 - Request either party to provide additional information, which must be provided within 10 days; Architect will then approve or reject claim in writing
 - Reject or approve claim in writing, with reasons for decision and notice to appeal (file claim for arbitration) within 30 days
 - Suggest compromise
 - Tell parties architect is unable to resolve claim
 - After 30 days from making claim, either party can proceed to mediation, arbitration or litigation
 - Mediation and arbitration are mandatory, unless changed by supplement (RD says mediation and arbitration are voluntary)
 - Within 30 days of architect’s decision, file request for mediation and claim for arbitration simultaneously
 - Arbitration will be stayed for 60 days pending mediation
 - Per §4.6.4, architect not a party to arbitration. Change this to say that all parties with interest in dispute shall be parties to arbitration; *need to also change Architect Agreement, §1.3.5.4*
 - Decision of arbitrator final, can be enforced through court judgment
 - **Exceptions** to normal 21 day notice period
 - Owner’s Right to Stop Work if Contractor fails to correct non-conforming work (§2.3); no notice required
 - Owner’s Right to “Correct and Deduct” (§2.4.1)
 - If Contractor defaults or fails to carry out the Work per contract documents, Owner should give Contractor 7 days’ written notice to begin to correct work;
 - if Contractor still fails to begin correction, Owner gives 3 days’ written notice to correct;
 - If Contractor still fails to correct, then, with prior approval of architect, Owner can correct and be entitled to Change Order deducting from contract sum the costs of correction , including additional architect expenses
 - Nonpayment (§9.7) If contractor doesn’t get timely paid within 7 days after due date, contractor can give 7 days notice and then stop work until paid
 - Concealed Conditions (§4.3.4): Contractor to provide 21 days notice, architect to investigate and make decision. Architect’s decision *starts* the 21 day claim period