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Proposed Revisions to the AIA Document A201™ – 2007 General Conditions of the Contract for Construction

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IMLA – Construction Contract Drafting Initiative (CCDI)
Revisions to the AIA Document A201TM – 2007
General Conditions of the Contract for Construction

REVISIONS - ARTICLE 1 GENERAL PROVISIONS

§ 1.1.2 THE CONTRACT

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Contractor and the Architect or the Architect's consultants, (2) between the Owner and a Subcontractor or a Sub-subcontractor, (3) between the Owner and the Architect or the Architect's consultants or (4) between any persons or entities other than the Owner and the Contractor. ~~The Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Architect's duties.~~

***Rationale*:** Never understood what this last sentence really means with respect to action by an architect. Look to eliminate the right of an architect to somehow independently enforce any part of the Contract.

§ 1.1.7 ~~INSTRUMENTS OF SERVICE~~ DESIGN DOCUMENTS

~~Instruments of Service~~ Design Documents are representations, in any medium of expression now known or later developed, of the tangible and intangible creative work performed by the ~~Architect and the Architect's consultants~~ designers under their respective employment or professional services agreements. ~~Instruments of Service~~ Design Documents may include, without limitation, studies, surveys, models, sketches, drawings, specifications, and other similar materials.

***Rationale*:** It is not always appropriate for the Architect to be the owner of the design documents. Many owners negotiate different agreements with their designers, and some have in-house design staff. Further, there is no reason why the owner-designer agreement with respect to copyright or ownership of the design needs to be in the construction contract. Inclusion of this language is not for the benefit of the Owner.

§ 1.1.8 INITIAL DECISION MAKER

The Initial Decision Maker is the person identified in the Contract ~~Agreement~~ to render initial decisions on Claims in accordance with Section 15.2~~. and certify termination of the Agreement under Section 14.2.2~~.

***Rationale*:** Eliminate the right of the architect to make the decision for termination of the Contract. While an Owner needs the architect's advice regarding the Contractor's compliance with the Contract, change the "Initial Decision Maker" from the Architect to the Owner in the A101 Agreement. The Owner makes the decision to terminate the Contract so the Owner does not need the Architect certification.

§ 1.1.9 SITE.

The term Site refers to that portion of the property on which the Work is to be performed or which has been otherwise set aside for use by the Contractor.

***Rationale*:** Need a definition for Site.

§ 1.1.10 PUNCH LIST

The term Punch List means, collectively, unfinished items of the construction of the Project, which unfinished items of construction are minor or insubstantial details of construction, mechanical adjustment or decoration remaining to be performed, the non-completion of which would not materially affect the use of the Project, and which are capable of being completed within thirty (30) days of Substantial Completion, subject to the availability of special order parts and materials.

***Rationale*:** Need a definition for Punch List because it is included in the work required to achieve Final Completion. Note that if the Contract has liquidated damages, most courts will not enforce them after the owner has beneficial occupancy of the work (the equivalent of Substantial Completion). It is suggested that the parties consider setting a separate, lower, rate for liquidated damages after Substantial Completion, but before Final Completion to account for the possible additional damages that the owner might still be incurring. Similarly, this same issue arises when an owner takes Partial Occupancy – See §9.9, below.

§ 1.4 INTERPRETATION

§ 1.4.1 In the interest of brevity the Contract Documents frequently omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

§ 1.4.2 In the event of conflict among the various provisions of the Contract Documents, the terms shall be interpreted in the following order of priority:

.1 Modifications to the Contract
.2 The Contract
.3 Special Conditions
.4 General Conditions

Drawings shall control over Specifications, and details in drawings shall control over large-scale drawings.

***Rationale*:** Because construction contracts (particularly ones big enough to use A201 General Conditions) have many documents drafted by different people, it is common for some of their terms to conflict. Inserting language that sets out how such conflicts are to be resolved can help avoid disputes.

§ 1.5 OWNERSHIP AND USE OF DRAWINGS, SPECIFICATIONS AND OTHER ~~INSTRUMENTS OF SERVICE~~ DESIGN DOCUMENTS

§ 1.5.1 Provided all payments have been made to Architect in accordance with its agreement with Owner, the Design Documents ~~Instruments of Service~~ are the Owner's exclusive property. The Owner owns all copyrights in and to the ~~Instruments of Service~~ Design Documents. ~~The Architect and the Architect's consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and will retain all common law, statutory and other reserved rights, including copyrights.~~ The Contractor, Subcontractors, Sub-subcontractors, and material or equipment suppliers shall not own or claim a copyright in the ~~Instruments of Service~~ Design Documents. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of the ~~Architect's or Architect's consultants~~ Owner's reserved rights.

***Rationale*:** Instruments of Service reference is changed to Design Documents consistent with changes made to § 1.1.7. Design Documents need to become the property of the Owner provided payment has been made to the Architect. Avoid letting the Architect retain copyrights to drawings/plans that are created with public money.

§ 1.5.2 The Contractor, Subcontractors, Sub-subcontractors and material or equipment suppliers are authorized to use and reproduce the Instruments of Service provided to them solely and exclusively for execution of the Work. All copies made under this authorization shall bear the copyright notice, if any, shown on the Instruments of Service. The Contractor, Subcontractors, Sub-subcontractors, and material or equipment suppliers may not use the Instruments of Service on other projects or for additions to this Project outside the scope of the Work without the specific written consent of the ~~Owner, Architect and the Architect's consultants.~~ Owner.

***Rationale*:** Clarify the required consent to use and reproduce the Instruments of Service.

§ 1.6 TRANSMISSION OF DATA IN DIGITAL FORM

If the parties intend to transmit ~~Instruments of Service~~ Design Documents or any other information or documentation in digital form, they shall endeavor to establish necessary protocols governing such transmissions, unless otherwise already provided in the Contract ~~Agreement~~ or the Contract Documents.

***Rationale*:** It is not always appropriate for the Architect to be the owner of the design documents. Many owners negotiate different agreements with their designers, and some have in-house design staff. Further, there is no reason why the owner-designer agreement with respect to copyright or ownership of the design needs to be in the construction contract. Inclusion of this language is not for the benefit of the Owner.

REVISIONS - ARTICLE 2 OWNER

§ 2.1.2 The Owner shall furnish to the Contractor within fifteen (15) days after receipt of a written request, information necessary and relevant for the Contractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, ~~usually referred to as the site,~~ and the Owner's interest therein.

***Rationale*:** Added numeral reference to days. Deleted weak reference to "site." Site is a defined term in Article 1.

§ 2.2.2 Except for trade permits and fees that are the responsibility of the Contractor under the Contract Documents, including those required under Section 3.7.1, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

***Rationale*:** Differentiate types of permits that are the responsibility of the Contractor from permits that are responsibility of the Owner.

§ 2.2.3 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the ~~site~~ Site. The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner, but shall exercise proper precautions for the safe performance of the Work.

***Rationale*:** Site is a defined term in Article 1.

§ 2.4 OWNER'S RIGHT TO CARRY OUT THE WORK

If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a ten-day period after receipt of written notice from the Owner, or such shorter time as may be reasonable under the circumstances, **[1]** to commence and continue correction of such default or neglect with diligence and promptness, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor the reasonable cost of correcting such deficiencies, including Owner's expenses and compensation for the Architect's additional services made necessary by such default, neglect or failure. ~~Such action by the Owner and amounts charged to the Contractor are both subject to prior approval of the Architect.~~ **[2]** If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner.

***Rationale*:**
[1] There are situations where it is appropriate for an Owner to be able to take action in less than ten days after a contractor's continued failure to perform. Since the A201 is intended to have no blanks to be filled in, unless language is added to the A101 or A102 and other "Agreement" giving the parties the option to choose a time frame other than ten days, the only way to deal with this is to be vague here.

[2] Further, there is no reason why the Owner's action to carry out the work always has to be subject to the architect's prior approval. If the Contractor chooses to dispute the Owner's action, the matter would come before the architect as the initial decision maker (unless someone else was chosen), but otherwise there is no reason that the Owner needs to go through this step.

REVISIONS - ARTICLE 3 CONTRACTOR

§ 3.1.3 The Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect in the Architect's administration of the Contract, or by tests, inspections or approvals required or performed by persons or entities other than the Contractor. The Contractor waives any rights, claims, or causes of action against Owner as a result of activities or duties of the Architect in the Architect's administration of the Contract or representations made by the Architect in the Instruments of Service. The Contractor acknowledges any such rights, claims, or causes of action accrue against the Architect and Contractor may see redress from Architect in the event that becomes necessary.

***Rationale*:** Protects the Owner from claims related to deficient design and construction. It contradicts the Spearin doctrine, but in freedom to contract states, the express language should be sufficient to overcome the common law doctrine's applicability. It has not been tested in court, to CCDI participants' collective knowledge, but Contractors have accepted it in contracts entered into with municipal owners.

§ 3.2 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR

~~**§ 3.2.1** Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.~~

~~**§ 3.2.2** Because the Contract Documents are complementary, the Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Section 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work, and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating coordination and construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, the Contractor shall promptly report to the Architect any errors, inconsistencies or omissions discovered by or made known to the Contractor as a request for information in such form as the Architect may require. It is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional, unless otherwise specifically provided in the Contract Documents.~~

~~**§ 3.2.3** The Contractor is not required to ascertain that the Contract Documents are in accordance with the applicable laws, statues, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Contractor shall promptly report to the Architect any nonconformity discovered by or made known to the Contractor as a request for information in such form as the Architect may require.~~

§ 3.2.1 By executing the Contract, the Contractor represents that the Contractor has reviewed and understands the Contract Documents, has visited the Site and is familiar with local conditions under which the Work is to be performed, has correlated personal observations with the requirements of the Contract Documents, and has notified the Architect of and obtained clarification of any discrepancies which have become apparent during the bidding or proposal period.

§ 3.2.2 The Contractor must carefully study and compare the Contract Documents among themselves and further compare the Contract Documents with any other information furnished by the Owner pursuant to Section 3.2 before commencing Work at the Site and at frequent intervals during its progress.

§ 3.2.3 The Contractor must take field measurements and verify Site conditions, and must carefully compare such field measurements and Site conditions and other information known to the Contractor with the Contract Documents, before ordering any material or doing any Work at the Site.

§ 3.2.4 The Contractor must make frequent inspections during the progress of the Work to confirm that Work previously performed by the Contractor is in compliance with the Contract Documents and applicable laws and regulations bearing on the performance of the Work and Referenced Standards and that portion of Work previously performed by the Contractor or by others are in proper condition to receive subsequent Work.

§ 3.2.5 If the Contractor believes that any portions of the Contract Documents do not comply with applicable laws, statutes, ordinances, building codes, and rules and regulations, or any orders by code enforcement officials or the Owner or its designees acting in the capacity of building code inspectors or Referenced Standards, the Contractor must promptly notify the Owner and the Architect of the non-compliance as provided in Section 3.2.6 and request direction before proceeding with the affected Work.

§ 3.2.6 The Contractor must promptly notify the Owner and the Architect in writing of any apparent errors, inconsistencies, omissions, ambiguities, construction impracticalities or code violations discovered as a result of the Contractor's review of the Contract Documents including any differences between actual and indicated dimensions, locations and descriptions, and must give the Owner and the Architect timely notice in writing of same and of any corrections, clarifications, additional Drawings or Specifications, or other information required to define the Work in greater detail or to permit the proper progress of the Work. The Contractor must provide similar notice with respect to any variance between its review of the Site and physical data and Site conditions observed.

§ 3.2.7 If the Contractor performs any Work involving an apparent error, inconsistency, ambiguity, construction impracticality, omission or code violation in the Contract Documents of which the Contractor is aware, or which could reasonably have been discovered by the review required by Section 3.2, without prompt written notice to the Owner and the Architect and request for correction, clarification or additional information, as appropriate, the Contractor does so at its own risk and expense and all claims relating thereafter are specifically waived. ~~The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Contractor shall promptly report to the Architect any nonconformity discovered by or made known to the Contractor as a request for information in such form as the Architect may require.~~

§ 3.2.8 4 If the Contractor believes that additional cost or time is involved because of clarifications or instructions the Architect issues in response to the Contractor's notices or requests for information pursuant to Section 3.2~~. 2 or 3.2.3~~, the Contractor shall make Claims as provided in Article 15. If the Contractor fails to perform the obligations of Section 3.2.~~2 or 3.2.3~~**,** the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations. If the Contractor performs those obligations, the Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents, for differences between field measurements or conditions and the Contract Documents, or for nonconformities of the Contract Documents to applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities.

***Rationale*:** Clarify the burden on the Contractor to review the Contract Documents before and during construction. A great deal of claims/litigation arises from the interpretation of the drawing/plans, specifications, and other Contract Documents.

§ 3.4.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Work. The Contractor shall not permit employment of unfit persons or persons not properly skilled in tasks assigned to them. Persons permitted to perform Work under Contractor or any Subcontractor or Sub-Subcontractor shall meet all employment eligibility, safety training, security or drug/alcohol testing requirements required by law or by Owner. Any person not complying with all such requirements shall be immediately removed from the Site.

***Rationale*:** There is no specific language in the A201 concerning some of the employee screening and verification requirements that are now very common. The Contractor should be put on notice that the Owner may have additional criteria that persons working on the Project may have to comply with.

§ 3.5 WARRANTY

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

§3.5.2 The Contractor's general warranty and any additional or special warranties are not limited by the Contractor's obligations to specifically correct defective or nonconforming Work as provided in Article 12, or are they limited by any other remedies provided in the Contract Documents. The Contractor shall also be liable for any damage to property or persons (including death) including consequential and direct damages relating to any breach of the Contractor's general warranty or any additional or special warranties required by the Contract Documents.

§3.5.3 The Contractor must furnish all special warranties required by the Contract Documents to the Owner no later than Substantial Completion. The Owner may require additional special warranties in connection with the approval of "Or-Equals" or Substitutions, Allowance items, Work that is defective or nonconforming, or the acceptance of nonconforming Work pursuant to Article 12.

***Rationale*:** Clarify and expand the warranty obligation on the Contractor.

§ 3.6 TAXES

The Contractor shall pay sales, consumer, use and similar taxes, including unemployment compensation taxes, for the Work provided by the Contractor that are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

***Rationale*:** Added unemployment compensation taxes.

Alternate 1:

§ 3.6 TAXES

§ 3.6.1 The Owner enjoys tax exempt status as a county. To enjoy the cost-savings benefits of its tax-exempt status, the Owner will provide a Tax Exemption Certificate to the Contractor for use on the Project. The Contractor shall use that certificate to exempt any purchases made for the Work from taxes. Contractor will pass on all savings for the tax-exempt status to the Owner. The Contractor agrees to bind all Subcontractors of any tier to the obligation to present and use the Tax Exemption Certificate and pass all savings to the Owner.

§3.6.2 The Contractor will require all Subcontractors and bidders to provide cost information for materials separate from other costs for labor, profit, overhead, etc. to allow the Owner to verify that no taxes are to be paid on material procurement and that such savings shall be passed on to the Owner.

§3.6.3 The Contractor will maintain all records, invoices, receipts, or other accounting data regarding material purchases and will allow, upon written request of the Owner and within a reasonable time frame after receipt of such request, the Owner to audit such records to verify tax savings. If an audit reveals taxes paid or savings not transferred to the Owner, the Contractor will be liable to the Owner for those amounts and the Owner may back-charge the Contractor for those amounts if a balance of funds due and payable remains at the time of such discovery.

.1 The Contractor will require all Subcontractors of any tier maintain all records, invoices, receipts, or other accounting data regarding material purchases. The Contractor will collect such records with each application for payment it receives from its Subcontractors and shall maintain such records in the same manner and location as the Contractor's records.

.2 The Contractor will ensure its Subcontractors and any lower-tier Subcontractors include these obligations in their contracts and bind themselves in the same manner as Contractor is bound to the Owner.

§3.6.4 The Contractor shall pay sales, consumer, use and similar taxes, including unemployment compensation taxes, for the Work provided by the Contractor that are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

***Rationale*:** Cost savings for tax-exempt status should be enjoyed by the Owner and required for all material and equipment purchases on the Project. Added unemployment compensation taxes.

Caveat: This may not be enforceable in all jurisdictions.

§ 3.7 PERMITS, FEES, NOTICES AND COMPLIANCE WITH LAWS

§ 3.7.1 Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for trade ~~the building~~ permits and fees as well as for other permits, fees, licenses, and inspections by government agencies necessary for proper execution and completion of the Work that are customarily secured after execution of the Contract and legally required at the time bids are received or negotiations concluded.

***Rationale*:** Clarify the permit obligations.

§ 3.7.4 ~~Concealed or Unknown Conditions.~~ If the Contractor encounters conditions at the S~~s~~ite that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, the Contractor shall promptly provide written notice to the Owner and the Architect before conditions are disturbed and in no event later than ~~21~~ seven (7) days after first observance of the conditions. The Architect will promptly investigate such conditions and, if the Architect determines that they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall promptly notify the Owner and Contractor in writing, stating the reasons. If either party disputes the Architect's determination or recommendation, that party may proceed as provided in Article 15.

***Rationale*:** Deleted header to subsection. Shorten time for notice of concealed or unknown conditions from 21 days to 7 days. Even shorten the notice to 3 days in some contracts.

§ 3.9 SUPERINTENDENT

§ 3.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor. The superintendent must provide his or her email address, cell phone number and pager number to Owner and Architect and must be available to be contacted during all business hours, and outside of business hours in the event of an emergency. The superintendent must be fluent in all languages necessary to effectively communicate with Contractor's staff assigned to the Project, and with all Subcontractors, in order to supervise and direct the Work and assist emergency responders.

***Rationale*:** It is not unusual for a crew of workers to be on a site who are not fluent in English. The Contractor must be responsible for seeing to it that someone is always on site who can communicate with them, not only to direct work, but also for emergency situations. How the Contractor accomplishes this is up to the Contractor. Additionally, the superintendent should give contact information so that he/she can be reached in case of an emergency.

Alternate 1:

§ 3.10 CONTRACTOR'S CONSTRUCTION SCHEDULES

Alternate 1:

§ 3.10.1 The Contractor, within twenty-one (21) days of the execution ~~promptly after being awarded~~ of the Contract, shall prepare and submit for the Owner's and Architect's approval~~, information~~ a Contractor's construction schedule for the Work. The schedule shall not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work. Thereafter, the Contractor shall prepare and update the construction schedule on a monthly basis ("Current Construction Schedule"), if not more frequently at the Contractor's discretion, to be submitted to the Owner with each Application for Payment.

***Rationale*:** (1) Added a deadline for schedules to be submitted to the Owner and Architect for approval rather than just for information. Approved schedule controls the completion date and the schedule and impact analysis going forward with the project. (2) Require the Contractor to prepare and update the construction schedule on a monthly basis and submit it to the Owner with each Application of Payment.

Alternate 2:

§ 3.10.1 The Contractor, promptly after being awarded the Contract, shall prepare and submit in its native electronic and graphic format, for the Owner's and Architect's ~~information~~ approval a Contractor's baseline construction schedule for the Work. The schedule shall not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work. The schedule at a minimum should demonstrate rate of work (ROW), availability dates, permits, submittals, working drawings, procurement, fabrication, delivery of materials, construction, and other activities necessary to complete the Work.

Float – Float is a measurement of time indicating how late any activity or group of activities in a schedule can be completed without impacting the critical path and the scheduled end date of the Project. Float belongs to the Project and is not for the exclusive use of the Contractor.

Thereafter, the Contractor shall prepare and update the construction schedule on a monthly basis ("Current Construction Schedule"), if not more frequently at the Contractor's discretion, to be submitted to the Owner in graphic and native electronic format with each Application for Payment. Each update shall include a narrative including:

1. A description of the status of the schedule
2. A discussion of current and anticipated delays
3. A discussion of progress of critical path activities
4. A discussion of the critical path for the remainder of the project
5. A listing and discussion of logic changes and duration changes

***Rationale*:** This is a much more specific and detailed scheduling requirement. It may not be appropriate for all projects.

Scheduling Specifications - Scheduling has greatly evolved over the past two decades. There are now many techniques that can be utilized to schedule a project from the most simple bar chart form to the most complex that incorporates resource and cost loading. No one scheduling specification should be considered as suitable for every project. The project complexity, owner sophistication and owner's appetite for risk should all be considered. The suggestions above are a starting point and should be considered as such.

Native Electronic Format - Construction schedules are typically created electronically with a software such as Primavera or Microsoft Project. The software package stores the data in a database. The user or operator is then able to print out the schedule in a visual format of their choosing. Any printed out schedule contains a picture or snapshot of what the operator wishes to demonstrate. While this is a useful function, a printout does not contain the entire dataset that was used to create the schedule. Therefore it is necessary to obtain the electronic copy of any schedule so that review and analysis can be completely and efficiently performed.
Rationale – Baseline Schedule Approval: The approval of a baseline schedule can often be delayed because of poor submissions by the contractor or a general apathy toward its accurate preparation. This can be countered by inserting language that ties the approval of the baseline schedule to early payments for mobilization or incorporating a significant payment for baseline schedule approval. Again, inclusion of such a provision should be considered on a case by case basis.

Narrative - Construction schedules can be difficult to analyze, especially for the project participant who does not have a background in scheduling. Narratives are effective tools in that the contractor explains in layman terms what the schedule is graphically demonstrating. The use of a narrative also reduces gamesmanship that often takes place.

§ 3.10.2 The Contractor shall prepare a submittal schedule, within twenty-one (21) days of the execution of ~~promptly after being awarded~~ the Contract and thereafter as necessary to maintain a current submittal schedule, and shall submit the schedule(s) for the Owner's and Architect's approval. The Owner's and Architect's approval shall not unreasonably be delayed or withheld. The submittal schedule shall (1) be coordinated with the Contractor's construction schedule, and (2) allow the Owner and Architect reasonable time to review submittals. If the Contractor fails to submit a submittal schedule, the Contractor shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of submittals.

***Rationale*:** Establish a deadline for submittals to be submitted to the Owner and Architect for approval.

§ 3.10.3 The Contractor shall perform the Work in general accordance with the most recent schedules ~~submitted to~~ approved by the Owner and Architect.

***Rationale*:** Changed "submitted" to "approved" to reflect that work must be done in accordance with approved schedules.

§ 3.11 DOCUMENTS AND SAMPLES AT THE SITE

The Contractor shall maintain at the site for the Owner one copy of the Drawings, Specifications, Addenda, Current Construction Schedule, Change Orders and other Modifications, in good order and marked currently to indicate field changes and selections made during construction, and one copy of approved Shop Drawings, Product Data, Samples and similar required submittals. The Contractor shall display a Current Construction Schedule at the site for reference and reliance by the Owner and Architect. These shall be available to the Architect and shall be delivered to the Architect for submittal to the Owner upon completion of the Work as a record of the Work as constructed.

***Rationale*:** Requires the Contractor to provide monthly updates to the schedule for Owner's use and information. Also requires posting of schedule so all parties can follow updated schedule and verify progress.

§ 3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES

§ 3.12.1 Shop Drawings are drawings, diagrams, schedules and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.

§ 3.12.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

§ 3.12.3 Samples are physical examples that illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

§ 3.12.4 Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents. Their purpose is to demonstrate the way by which the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents for those portions of the Work for which the Contract Documents require submittals. Review by the Architect is subject to the limitations of Section 4.2.7. Informational submittals upon which the Architect is not expected to take responsive action may be so identified in the Contract Documents. Submittals that are not required by the Contract Documents may be returned by the Architect without action.

§ 3.12.5 The Contractor shall review for compliance with the Contract Documents, approve and submit to the Architect, Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents in accordance with the submittal schedule approved by the Architect or, in the absence of an approved submittal schedule, with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of separate contractors. The Contractor must provide the Owner and the Architect with copies of all submittals made to regulatory agencies.

***Rationale*:** Added sentence requires the Contractor to provide copies of submittals made to regulatory agencies such as utilities, governmental or quasi-governmental authorities with jurisdiction or control over some part of the construction of the project. An example would be a submittal for an electrical duct bank in the public right of way adjacent to the project.

§ 3.12.6 By submitting Shop Drawings, Product Data, Samples and similar submittals, the Contractor represents to the Owner and Architect that the Contractor has (1) reviewed and approved them, (2) determined and verified materials, field measurements and field construction criteria related thereto, or will do so and (3) checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

§ 3.12.7 The Contractor shall perform no portion of the Work for which the Contract Documents require submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittal has been approved by the Architect. The Contractor must correct at its cost, and without any adjustment in Contract Time, any Work the correction of which is required due to the Contractor's failure to obtain approval of a submittal required to have been obtained prior to proceeding with the Work, including, but not limited to, correction of any conflicts in the Work resulting from such failure.

***Rationale*:** Added sentence for Contractor to incur all costs associated with work performed without the approval of a required submittal.

§ 3.13 USE OF SITE

§ 3.13.1 The Contractor shall confine operations at the site to areas permitted by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities and the Contract Documents and shall not unreasonably encumber the site with materials or equipment.

§ 3.13.2 Except as may be specifically provided in the Contract Documents, the Contractor shall provide all necessary temporary facilities, including power, water, sanitation, scaffolding, storage, and security. If Owner makes any such facilities available to Contractor, it is without representation or warranty as to their adequacy for Contractor's use, and Contractor shall indemnify, defend, and hold Owner harmless from and against any claims arising out of Contractor's use of such facilities.

***Rationale*:** Added subsection to address a subject not covered in the A201.

§ 3.15 CLEANING UP

§ 3.15.1 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract on a daily basis. At completion of the Work, the Contractor shall remove waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials from and about the Project.

***Rationale*:** Same rationale as § 3.13.2 dealing with temporary facilities.

§ 3.15 CLEANING UP, WORKING HOURS, NOISE ORDINANCE AND CLEANING UP

~~**§ 3.15.1** The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials from and about the Project.~~

§ 3.15.1 Work will be performed in accordance with the Contract Documents and the _____ City/County Code or other applicable law governing the Contractor's performance of the Work. No delays resulting from compliance with applicable laws or regulations may form the basis for any claim by the Contractor for delay damages or additional compensation or for any extensions of the Contract Time. The Contractor must not permit work outside of hours established in the Contract Documents on a Saturday, Sunday or other City/County, State or federal holiday without the written consent of the Owner, given after prior written notice to the Architect and any other applicable consultants; such consent, if given, may be conditioned upon payment by the Contractor of the Owner's, Architect's and any other applicable consultants' additional costs and fees, testing or regulatory agency costs incurred in monitoring such off-hours Work. The Contractor must notify the Owner as soon as possible if Work must be performed outside such times in the interest of the safety and protection of persons or property at the Site or adjacent thereto, or in the event of an emergency. In no event shall the Contractor permit Work to be performed at the Site without the presence of the Contractor's superintendent and person responsible for the protection of persons and property at the Site and compliance with all applicable laws and regulations, if different from the superintendent.

§ 3.15.2 The Contractor must comply with the _____ City/County Noise Ordinance (_____) of the _____ City/County Code and any successor or substitute provisions covering the regulation of noise levels. It is the duty of the Contractor to familiarize itself with those provisions and perform the Work in compliance with those provisions.

§ 3.15.3 The Contractor must keep the Site and adjacent areas free from accumulation of waste materials or rubbish caused by operations under the Contract, and must keep tools, construction equipment, machinery and surplus materials suitably stored when not in use. If the Contractor fails to do so in a manner reasonably satisfactory to the Owner or the Architect within forty-eight (48) hours after notice or as otherwise required by the Contract Documents, the Owner may clean the Site and back charge the Contractor for all costs associated with the cleaning. The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials from and about the Project.

~~**§ 3.15.2** If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and Owner shall be entitled to reimbursement from the Contractor.~~

***Rationale*:** Clarify Contractor's obligations for project work hours, cleanup, and noise ordinance compliance.

§3.18 INDEMNIFICATION

§ 3.18.1 To the fullest extent permitted by law the Contractor shall indemnify, defend, and hold harmless the Owner, Architect, Architect's consultants, and agents, employees, and members, officers and directors of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent or wrongful acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 3.18.

***Rationale*:** Add the word "defend" and impose on the Contractor to duty to defend the Owner. Check state and local laws to confirm the indemnification obligations that can be imposed on the Contractor.

REVISIONS - ARTICLE 4 ARCHITECT

§ 4.2 ADMINISTRATION OF THE CONTRACT

§ 4.2.1 The Architect will provide administration of the Contract as described in the Contract Documents and will be an Owner's representative during construction until the date the Architect issues the final Certificate for Payment. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents.

§ 4.2.2 The Architect will visit the ~~site~~Site at intervals appropriate to the stage of construction, or as otherwise agreed with the Owner, to become generally familiar with the progress and quality of the portion of the Work completed, and to determine in general if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. ~~However, the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work.~~ The Architect will not have control over, charge of, or responsibility for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents, except as provided in Section 3.3.1.

***Rationale*:** Strike limitation on Architect's responsibility to inspect quality and quantity of Work. Depends on what provisions there are in the agreement between the Architect and the Owner. An Owner may want the Architect to be regularly inspecting the Contractor's Work.

§ 4.2.4 COMMUNICATIONS FACILITATING CONTRACT ADMINISTRATION

~~Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized~~, T~~t~~he Owner and Contractor shall endeavor to include the Architect in communications ~~with each other through the Architect~~ about matters arising out of or relating to the aspects of the Contract which involve the Architect. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and material suppliers shall be through the Contractor. Communications by and with separate contractors shall be through the Owner.

***Rationale*:** There are often reasons why the Owner and Contractor might wish to confer directly without need of the Architect's involvement.

REVISIONS - ARTICLE 5 SUBCONTRACTORS

§ 5.2 AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK

§ 5.2.1 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Architect may reply within 14 days to the Contractor in writing stating (1) whether the Owner or the Architect has reasonable objection to any such proposed person or entity or (2) that the Architect requires additional time for review. Failure of the Owner or Architect to reply within the 14-day period shall constitute notice of no reasonable objection. The Contractor shall update this list throughout the Project and keep Owner and the Architect advised of any new Subcontractors employed.

***Rationale*:** The A201 as drafted did not require supplementation after submission of the initial list.

§ 5.2.3 If the Owner or Architect has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner or Architect has no reasonable objection. If the proposed but rejected Subcontractor met all criteria set forth in the Contract Documents and was reasonably capable of performing the Work, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute Subcontractor's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

***Rationale*:** There may be valid reasons to reject a subcontractor, even if it could perform the work, such as for past defaults, or inability to meet security requirements.

REVISIONS - ARTICLE 7 CHANGES IN WORK

§ 7.2 CHANGE ORDERS

§ 7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect stating their agreement upon all of the following:

.1 The change in the Work;
.2 The amount of the adjustment, if any, in the Contract Sum; and
.3 The extent of the adjustment, if any, in the Contract Time.

§ 7.2.2 Change Proposals. The Contractor must submit change proposals covering a contemplated Change Order within ten (10) days after request of the Owner, or the Architect or within ten (10) days of the event giving rise to the Contractor's claim for a change in the Contract Sum or Contract Time. No increase in the Contract Sum or extension of the Contract Time will be allowed the Contractor for the cost or time involved in making change proposals. Change proposals will define or confirm in detail the Work which is proposed to be added, deleted, or changed and must include any adjustment which the Contractor believes to be necessary in (i) the Contract Sum, or (ii) the Contract Time. Any proposed adjustment must include detailed documentation including but not limited to: cost, properly itemized and supported by sufficient substantiating data to permit evaluation including cost of labor, materials, supplies and equipment, rental cost of machinery and equipment, additional bond cost, plus a fixed fee for profit and overhead (which includes office overhead and site-specific overhead and general conditions) of ten percent (10%) if the Work is performed by the Contractor, or five percent (5%) if the Work is performed by a Subcontractor or Sub-subcontractor. The Subcontractors or Sub-subcontractors overhead and profit in turn must not exceed a total aggregate of ten percent (10%). Change proposals will be binding upon the Contractor and may be accepted or rejected by the Owner in its discretion. The Owner may, at its option, instruct the Contractor to proceed with the Work involved in the change proposal in accordance with this Section 7.2.2 without accepting the change proposal in its entirety.

§ 7.2.3 If the Owner determines that a change proposal is appropriate, the Architect will prepare and submit a request for a Change Order or Contract Amendment providing for an appropriate adjustment in the Contract Sum or Contract Time, or both, for further action by the Owner. No such change is effective until the Owner and Architect sign the Change Order.

***Rationale*:** The proposed addition calls for a change proposal to be submitted (before a Change Order issued) that provides the Owner with detailed documentation, including all of the costs. Also the language limits the overhead and profit (mark-up) on the Contractor's and Subcontractors' work to better control the costs of changed Work.

§ 7.3 CONSTRUCTION ~~CHANGE~~ DIRECTIVES

§ 7.3.1 A Construction ~~Change~~ Directive is a written order prepared by the Architect and signed by the Owner and Architect (after having been approved in writing by the Owner), directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction ~~Change~~ Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

§ 7.3.2 A Construction ~~Change~~ Directive shall be used in the absence of total agreement on the terms of a Change Order.

§ 7.3.3 If the Construction ~~Change~~ Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

.1 Mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
.2 Unit prices stated in the Contract Documents or subsequently agreed upon;
.3 Cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or
.4 As provided in Section 7.3.7.

§ 7.3.4 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed in a proposed Change Order or Construction ~~Change~~ Directive so that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

§ 7.3.5 Upon receipt of a Construction ~~Change~~ Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect of the Contractor's agreement or disagreement with the method, if any, provided in the Construction ~~Change~~ Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

§ 7.3.6 A Construction ~~Change~~ Directive signed by the Contractor indicates the Contractor's agreement therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

§ 7.3.7 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the Owner and the Architect shall determine the method and the adjustment on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, an amount for overhead and profit as set forth in the Agreement, or if no such amount is set forth in the Agreement, a reasonable amount. In such case, and also under Section 7.3.3.3, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Section 7.3.7 shall be limited to the following:

.1 Costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance;

.2 Costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;

.3 Rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;

.4 Costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work; and

.5 Additional costs of supervision and field office personnel directly attributable to the change.

§ 7.3.8 The amount of credit to be allowed by the Contractor to the Owner for a deletion or change that results in a net decrease in the Contract Sum shall be actual net cost as confirmed by the Architect. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

§ 7.3.9 Pending final determination of the total cost of a Construction ~~Change~~ Directive to the Owner, the Contractor may request payment for Work completed under the Construction ~~Change~~ Directive in Applications for Payment. The Architect will make an interim determination for purposes of monthly certification for payment for those costs and certify for payment the amount that the Architect determines, in the Architect's professional judgment, to be reasonably justified. The Architect's interim determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a Claim in accordance with Article 15.

§ 7.3.10 When the Owner and Contractor agree with a determination made by the Architect concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and the Architect ~~Contractor~~ will prepare a Change Order. Change Orders may be issued for all or any part of a Construction ~~Change~~ Directive.

***Rationale*:** Removes the word "Change" from the term "Construction Change Directive." There are instances when the Owner needs to issue a directive to the Contractor to do Work that is already covered by the Contract or Work that does not constitute a change. Add the Owner to the decision making and approval process for Construction Directives. Make the Architect responsible to prepare the Change Order.

***Note*:** That while this clause anticipates that the Architect will prepare Change Orders (and process payment applications), many Owners prefer to have their own staff perform these functions. Discussion should be held with the client to determine if it has the sophisticated staff to do this work.

REVISIONS - ARTICLE 8 DELAYS AND EXTENSIONS OF TIME

§ 8.2 PROGRESS AND COMPLETION

§ 8.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Contract ~~Agreement~~ the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

§ 8.2.2 The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence operations on the S~~s~~ite or elsewhere prior to the effective date of insurance required by Article 11 to be furnished by the Contractor and Owner, or prior to approval of Certificates of Insurance, and Additional Insured Endorsement and Notice of Cancellation Endorsement required to be submitted to Owner under the Contract. The date of commencement of the Work shall not be changed by the effective date of such insurance.

***Rationale*:** Proposed additions are made to be consistent with recommended insurance requirements. Without getting a physical copy of the Additional Insured Endorsement, the Owner has no assurance that it has received this coverage. Without getting a physical copy of the Notice of Cancellation Endorsement, the Owner has no assurance that it will actually get notice of cancellation (most certificates now say that they will give notice "as required by the policy" and many policies are silent on the subject).

§ 8.2.3 The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time. If Contractor's Work shall fall behind schedule for reasons that are not excused under the terms of the Contract, Contractor shall add additional workers or shifts, and/or work overtime as necessary to maintain the Construction Schedule.

***Rationale*:** The A201 does not otherwise give explicit direction to the Contractor to take steps to recover from delay.

§ 8.2.4 The Contractor must conform to the most recently approved Construction Schedule. The Contractor must complete the indicated Work or achieve the required percentage of completion, as applicable, within any interim completion dates established in the most recently approved Construction Schedule.

§ 8.2.5 The Contractor must maintain at the Site, available to the Owner and the Architect for their reference during the progress of the Work, a copy of the approved Construction Schedule and any approved revisions thereto. The Contractor must keep current records of and mark on a copy of the approved Construction Schedule the actual commencement date, progress, and completion date of each scheduled activity indicated on the Construction Schedule.

§ 8.2.6 The Contractor represents that its bid includes all costs, overhead and profit which may be incurred throughout the Contract Time and the period between Substantial and final Completion. Accordingly, the Contractor may not make any claim for delay damages based in whole or in part on the premise that the Contractor would have completed the Work prior to the expiration of the Contract Time but for any claimed delay.

§ 8.2.7 If the Contractor's progress is not maintained in accordance with the approved Construction Schedule, or the Owner determines that the Contractor is not diligently proceeding with the Work or has evidence reasonably indicating that the Contractor will not be able to conform to the most recently approved Construction Schedule, the Contractor must, promptly and at no additional cost to the Owner, take all measures necessary to accelerate its progress to overcome the delay and ensure that there will be no further delay in the progress of the Work and notify the Owner.

§ 8.2.8 The Owner reserves the right to issue a written directive to accelerate the Work that may be subject to an appropriate adjustment, if any, in the Contract Sum. If the Owner requires an acceleration of the Construction Schedule and no adjustment is made in the Contract Sum, or if the Contractor disagrees with any adjustment made, the Contractor must file a claim as provided in Article 15 or the same will be deemed to be conclusively waived.

§ 8.2.9 Float is a shared commodity for use of the Owner and the Contractor (and if applicable any Separate Contractors) and is not for the exclusive use or benefit of any one party. The parties have full use of the float until it is depleted.

***Rationale*:** Proposed additions better address Contract Time issues facing Owners. The additions address the fact that the Construction Schedule is approved by the Owner and that the Contractor has to adhere to the approved Construction Schedule. The additions also address acceleration and float.

§ 8.3 DELAYS TO CONTRACTOR AND EXTENSIONS OF TIME [1]

***Note*:** Weather delays can be addressed here, in 8.3, or in 15.1.5.2 as part of the Disputes Resolution discussion. If counsel chooses one of these suggestions, he or she should make sure that the language in the other sections does not conflict.

Alternate 1:

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner; or by changes ordered in the Work; or by labor disputes, fire, excusable weather delays as defined in §15.1.5.2, **[2]** unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control; or by delay authorized by the Owner pending mediation and arbitration; or by other causes that the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

***Rationale*:** [1] to clarify that this section applies to delays not the fault of the contractor.

***Rationale*:** [2] Excusable weather delays are clearly grounds for an extension of time (see §15.1.5.2), and there ought to be a reference to them here.

Alternate 2:

§ 8.3 DELAYS TO CONTRACTOR AND EXTENSIONS OF TIME

~~**§ 8.3.1** If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner; or by changes ordered in the Work; or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control; or by delay authorized by the Owner pending mediation and arbitration; or by other causes that the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.~~

~~**§ 8.3.2** Claims relating to time shall be made in accordance with applicable provisions of Article 15.~~

~~**§ 8.3.3** This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.~~

§ 8.3.1 Excusable delays are delays in the progress of the Work which at the time of the delays were critical path activities as shown on the most recently approved Construction Schedule and which prevent the Contractor from achieving Substantial Completion before the expiration of the Contract Time, caused by conditions which could not reasonably be anticipated by, are beyond the control of, and are without the fault or negligence of the Owner, as set forth in Section 8.3.2, the Contractor or anyone for whose acts the Contractor is responsible. Excusable delays do not include any delays caused in whole or in part by any Subcontractors, Sub-subcontractors or suppliers. There shall be no compensation whatsoever for excusable delays. Excusable delays may, but do not necessarily, include:

.1 weather delays as further defined in Section 8.3.6;

.2 acts of government and regulatory agencies and officials (other than the Owner in its capacity as Owner);

.3 catastrophic events such as fire, flood and unavoidable casualties; and

.4 strikes or labor disputes.

§ 8.3.2 Compensable delays are limited to delays in the progress of the Work which at the time of the delays were critical path activities as shown on the most recently approved Construction Schedule and which prevent the Contractor from achieving Substantial Completion before the expiration of the Contract Time, caused solely and exclusively by acts or omissions of the Owner (except actions taken by the Owner acting as a regulatory authority to protect the public health or safety or to conform to law).

§ 8.3.3 Unexcused delays are delays in Work which at the time of the delays were critical path activities as shown on the most recently approved Construction Schedule and which prevent the Contractor from achieving Substantial Completion before the expiration of the Contract Time, and which are not excusable delays or compensable delays. No increase in the Contract Sum or extension of the Contract Time will be made for an unexcused delay.

§ 8.3.4 The Contractor must provide written notice of any actual or prospective delay promptly, and in no event later than ten (10) days after the occurrence of the event giving rise to such delay. The notice must be given to the Owner and Architect within the specified time. In the case of a continuing delay, the Contractor must provide an initial notice and a further notice at each progress meeting throughout the duration of the delay. The notice must contain all of the specific information required in Section 8.3.5. The Contractor's failure to provide the written notice containing the information specified in Section 8.3.5 within the ten (10) days prescribed above will be conclusively deemed a waiver of any claim for delay arising from such occurrence.

§ 8.3.5 The Contractor's notice must identify those portions of the Construction Schedule affected by the delay and must include an estimate of the cost and probable effect of the delay, if any, on the progress of the Work. Supporting documentation must include, but is not limited to:

.1 A written detailed statement of the reasons and causes for the delay;

.2 inclusive dates of the delay;

.3 specific trades and portions of the Work affected by the delay;

.4 status of Work affected before commencement of the delay;

.5 effect of the delay on available "float" time;

.6 a critical path method (CPM) analysis demonstrating that the delay has affected an activity then on the critical path at the time of the occurrence of the delay as shown on the most recently approved Construction Schedule; and

.7 if the Contractor claims that the delay is an excusable delay or compensable delay, evidence that the delay was unforeseeable, beyond the Contractor's control, and without the fault or negligence of the Contractor or the negligence of anyone for whose acts the Contractor is responsible including any Subcontractor, Sub-subcontractor or supplier; and in the case of a compensable delay, was caused solely and exclusively by the acts or omissions of the Owner (excepting actions taken by the Owner to protect the public health or safety or to conform to law) or anyone for whose acts the Owner is responsible, and which are unreasonable under the circumstances involved and not reasonably within the contemplation of the parties.

§ 8.3.6 In order for the Contractor to be entitled to an extension of the Contract Time for unusually severe weather, the following conditions must be satisfied:

.1 The weather experienced at the Site during the Contract period must be found to be unusually severe, that is, more severe than the adverse weather anticipated for the Project location during any given month;

.2 The unusually severe weather must delay Work which at the time of the unusual severe weather was a critical path activity as shown on the most recently approved Construction Schedule and which prevents the Contractor from achieving Substantial Completion before expiration of the Contract Time. The delay must be beyond the control and without the fault or negligence of the Contractor. For example, the impacted critical activity must not have occurred during unusually severe weather due to previous unexcused delays; and

.3 The Contractor must have provided written notice of the weather-related delay complying with Sections 8.3.4 and 8.3.5 above.

The following schedule of monthly anticipated adverse weather delays constitute the base line for monthly weather time evaluations. The Contractor's Construction Schedule must reflect these anticipated adverse weather delays in all-weather dependent activities.

MONTHLY ANTICIPATED ADVERSE WEATHER DELAY.

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
3	3	2	2	1	2	2	1	2	2	2	3

Upon acknowledgement of the Notices to Proceed and continuing throughout the Contract, the Contractor must record on the daily superintendent report, the occurrence of adverse weather and resultant impact to normally scheduled Work. Actual adverse weather delay days must prevent Work on critical path activities for fifty (50) percent or more of the Contractor's scheduled workday. The number of actual adverse weather delays must include Contractor's scheduled workdays impacted by actual adverse weather (even if the adverse weather occurred in the previous month), be calculated chronologically from the first to the last day each month, and be recorded as full days. If the Contractor has complied with Sections 8.3.4 and 8.3.5 and the provisions of this Section 8.3.6 and the number of actual adverse weather delay workdays exceeds the number of days anticipated in the table above, and have adversely affected critical path weather-dependent activities, the Contractor is entitled to a Modification of the Contract Time but not the Contract Sum.

***Note*:** The chart above is for illustrative purposes only. A drafter should consult local data to formulate a chart that reflects recent weather patterns in the specific area.

§ 8.3.7 If strikes or labor disputes are to be considered as the basis for an excusable delay, they must be documented by data evidencing (i) the trades directly and indirectly involved in or affected by the strike or labor dispute, (ii) reasons for the strike or labor dispute, (iii) the onset and duration of the strike or labor dispute, and (iv) the measures taken by the Contractor to avoid or overcome the effects of any delay.

§ 8.3.8 Upon receipt of a notice from the Contractor of the occurrence of a delay complying with Sections 8.3.4 and 8.3.5 (and if applicable 8.3.6 and 8.3.7), the Owner will review the most recently approved Construction Schedule to determine (i) whether the delay is in fact an excusable or compensable delay, and (ii) whether any adverse effects of the delay can be overcome by an adjustment in the Construction Schedule, including the application of any unused "float" time available in the schedule. The Owner may require the Contractor to submit a more detailed Construction Schedule than previously required in order to permit the Owner to evaluate the delay. Based on such review, the Contractor must, if required by the Owner, submit for the Owner's approval a revised Construction Schedule which minimizes the adverse effects of the delay.

§ 8.3.9 No extension of the Contract Time or increase in the Contract Sum will be allowed for any delay or part thereof occurring more than ten (10) days before written notice of the delay is provided by the Contractor. No extension of the Contract Time or increase in the Contract Sum will be made to the extent that performance is, was or would have been suspended, delayed or interrupted by another cause for which the Contractor is responsible. No increase in the Contract Sum will be made to the extent performance was or would have been suspended, delayed or interrupted by another cause for which the Owner is not solely and exclusively responsible.

§ 8.3.10 The Contractor will not receive any compensation for profit, additional bond cost or overhead (which includes extended office overhead and site-specific overhead and general conditions) or any other cost or compensation or any other damages of any kind or nature whatsoever whether incurred by the Contractor, its Subcontractor or suppliers for delay, all of which are irrevocably waived by Contractor where the delay results from performance of additional Work (Change Order or Construction Directive) beyond the Work required by the Contract Documents and the Contractor is paid for the additional Work.

***Note*:** Using this clause eliminates issues which arise in the use of the Eichleay Formula, a common (but also a controversial) method of calculating the appropriate allocation of home-office overhead to a specific project.

§ 8.3.11 The Contractor acknowledges and agrees that the profit, additional bond cost and overhead (which includes extended office overhead and site-specific overhead and general conditions) if any, incurred by the Contractor in performing work beyond the Work required by the Contract Documents and any and all other costs, compensation or damages due Contractor (including any of its Subcontractors or suppliers), is included in, and payable to the Contractor as part of the Change Order or Construction Directive. Contractor waives any and all other damages and cost of any nature or kind whatsoever including claims for local and cumulative impacts as a result of such Change Order or Construction Directive Work and any and all other claims of any type or nature whatsoever including any claim for loss of productivity or loss of efficiency. The Contractor will be compensated for compensable delays

only for actual and direct damages resulting from such compensable delays. Actual direct damages are limited to site specific general conditions and do not include any indirect costs such as home office overhead. The Contractor will be compensated for such actual and direct damages for compensable delays not attributable to performance of Change Order. Work for which the Contractor is not otherwise compensated in an amount not to exceed the lesser of (i) a daily rate computed by dividing eight percent (8%) of the original Contract Sum by the original Contract Time or (ii) a daily rate computed by dividing the Contractor's profit, bond cost and site-specific overhead (but not home office overhead) for the original Contract Sum by the original Contract Time. The Contractor for itself and its Subcontractors and suppliers, irrevocably waives any and all other compensation and delay damages as a result of any compensable delays, including without limitations any claims for any indirect cost and any claims for loss of productivity or loss of efficiency.

§ 8.3.12 In the event the Owner denies the Contractor's request for a change in the Contract Time or, in the case of a compensable delay, a change in the Contract Sum, the Contractor may, within ten (10) days after such denial, submit a Claim as provided in Article 15. Submissions made prior to the denial must be resubmitted after the denial. Any Claim on account of denial of a change that is not made within such ten (10) days of the denial is deemed waived.

§ 8.3.13 Delay damages.

.1 By executing a Change Order or Contract Amendment, the Contractor represents that the Contractor is not entitled to an increase in the Contract Sum or an extension of the Contract Time beyond that specified in the Change Order or Contract Amendment for the Work performed or to be performed under the Change Order. The Contractor is not entitled to an increase in the Contract Sum or extension of the Contract Time as a result of the issuance by the Owner of Construction Change Directive unless the Contractor asserts a claim as required by this Article 8 and Article 15;

.2 No charges or claims for damages may be made by the Contractor or paid to the Contractor for any delay, disruption, inefficiency, interference or hindrance from any cause whatsoever, whether foreseeable or not, including (i) acts or omissions by the Owner, its agents, employees or consultants, (ii) Contract Documents that are negligently prepared or contain inaccurate statements, or (iii) force majeure and circumstances beyond the Contractor's control. The sole remedy for delays, disruptions or hindrances will be non-compensable time extensions for completion of the Work;

.3 The provisions of the Section 8.3.13.1 and Section 8.3.13.2 do not apply to claims that meet all of the following conditions: (i) the claim arises under the Contract; (ii) the claim is limited to actual and direct damages (i.e. profit, additional bond costs (if any) and overhead (only site-specific overhead and not including home office overhead)) incurred as a result of a delay in completing the Project which the Contractor acknowledges are fully compensated for by payment of the adjustment amount specified in Section 8.3.11; (iii) the Contract establishes a time limit for achieving Substantial Completion and the claim is for critical path delays that prevent achievement of Substantial Completion of the Contract within that time limit; (iv) the delay for which damages are claimed is caused solely and exclusively by the Owner and/or the County (except as the County acting as a regulatory authority) or anyone for whom they are responsible; (v) the delay is not caused by actions taken by the Owner to protect the public health or safety or to conform to law; and (vi) the Contractor has fully complied with Sections 8.3.4 and 8.3.5; and

.4 A time extension may be granted only for an excusable delay that is beyond the Contractor's control and occurs without the Contractor's fault or negligence. No time extension will be granted in the absence of a written claim for the time extension complying with Sections 8.3.4 and 8.3.5 (and if applicable, 8.3.6 and 8.3.7).

***Rationale*:** Proposed additions address delays, extension of time and resulting damages. Also, the drafter should confirm local procurement code and regulations concerning how damages for delay are best calculated.

***** No Damages for Delay Clause** – Several CCDI participants recommended that the Contract contain a "No Damages for Delay" clause. An example of such a clause is as follows:

> "In the event that the Contractor is delayed in the performance of the Project for any reason whatsoever, including but not limited to action or inaction of the Owner, another contractor, or subcontractor, the Contractor shall not be entitled to any damages from the Owner for such delay, but the Contractor's sole remedy shall be an extension of time."

Since many construction disputes revolve around damages for delays, such a clause can be a huge defense for the Owner.

***Caveat*:** Some jurisdictions prohibit the use of a "No Damages for Delay" clause" in construction contracts. Therefore, carefully check your jurisdiction's laws.

REVISIONS - ARTICLE 9 PAYMENTS AND COMPLETION

§ 9.3 APPLICATIONS FOR PAYMENT

~~**§ 9.3.1** At least ten days before the date established for each progress payment, the Contractor shall submit to the Architect an itemized Application for Payment prepared in accordance with the schedule of values, if required under Section 9.2, for completed portions of the Work. Such application shall be notarized, if required, and supported by such data substantiating the Contractor's right to payment as the Owner or Architect may require, such as copies of requisitions from Subcontractors and material suppliers, and shall reflect retainage if provided for in the Contract Documents.~~

~~**§ 9.3.1.1** As provided in Section 7.3.9, such applications may include requests for payment on account of changes in the Work that have been properly authorized by Construction Change Directives, or by interim determinations of the Architect, but not yet included in Change Orders.~~

~~**§ 9.3.1.2** Applications for Payment shall not include requests for payment for portions of the Work for which the Contractor does not intend to pay a Subcontractor or material supplier, unless such Work has been performed by others whom the Contractor intends to pay.~~

~~**§ 9.3.2** Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include the costs of applicable insurance, storage and transportation to the site for such materials and equipment stored off the site.~~

~~**§ 9.3.3** The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work.~~

§ 9.3.1 The Contractor must submit to the Architect itemized Applications for Payment for Work completed on a monthly basis in accordance with a schedule approved by the Owner. Each Application for Payment must be consistent with the approved Schedule of Values. In order to expedite the review and approval of Applications for Payment, the Contractor may submit to and review with the Architect and Owner a draft Application for Payment at a progress meeting prior to submitting a formal Application for Payment.

§ 9.3.2 The form of Application for Payment must be AIA Document G702, Application and Certificate for Payment, supported by AIA Document G703, Continuation Sheet (latest edition), or such other form as may be prescribed by the Owner. The application must be notarized and supported by sufficient data to demonstrate the Contractor's right to payment and compliance with the payment provisions of the Contract to the satisfaction of the Owner and Architect, such as copies of requisitions from Subcontractors and material suppliers, partial lien waivers, releases and other documents. Each Application for Payment must reflect approved Contract Modifications and the Contract retainage provided for in the Contract Documents.

§ 9.3.3 Applications for Payment may include materials and equipment delivered and suitably stored at the Site for subsequent incorporation in the Work. The Owner has no obligation or responsibility to pay for materials stored off the Site. If specifically approved in writing in advance by the Owner, an Application for Payment may include materials and equipment stored off the Site at a location agreed upon in writing. Payment for materials and equipment stored on or off the Site is conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to protect the Owner's interests. Payment for materials and equipment stored off the Site will, in addition, be conditioned upon the Contractor's provision of applicable insurance, storage and transportation to the Site.

§ 9.3.4 Under applicable provisions of _____ law, payments received by the Contractor are held in trust for Subcontractors and suppliers who have furnished labor and materials covered by an Application for Payment. Accordingly, Applications for Payment may not include requests for payment of amounts for Work performed by a Subcontractor or Supplier that the Contractor does not intend to pay for said work.

***Rationale*:** Confirm compliance with Prompt Payment laws.

§ 9.3.5 Until the conditions set forth in this Section have been satisfied by Contractor, the amount of each monthly Application for Payment must include the value of each line item as indicated on the approved Schedule of Values, to the extent completed, less Contract retainage of five percent (5%). The retainage will not be paid to the Contractor until thirty (30) days after all of the following conditions have been satisfied: (A) the Contractor has fully performed the Contract; (B) the Contractor has completed all Punch List items to the satisfaction of the Owner and the Architect; (C) the Contractor has delivered to the Owner all Project close-out documents in duplicate, including (1) all maintenance and operating manuals; (2) marked sets of as-built drawings; (3) all guarantees and warranties required under the Contract Documents; (4) a list of names, addresses, and telephone numbers for all subcontractors and others providing guarantees and warranties; and (D) the applicable governmental authorities have issued to the Owner the final use and occupancy permit for the Project.

§ 9.3.6 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner, no later than the time of payment. By submitting an Application for Payment, the Contractor further warrants that all Work for which payments have previously been received from the Owner are free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities having provided labor, materials and equipment relating to the Work.

§ 9.3.7 Before the Contractor receives a progress payment, the Contractor must certify in writing that, in accordance with contractual arrangements, Subcontractors and suppliers:

.1 have been paid from the proceeds of previous progress payments; and
.2 will be paid in a timely manner from the proceeds of the progress payment currently due.

In the event the Contractor has not paid or does not pay as certified, such failure constitutes a ground for termination under Section 14.2 of the Contract. Contractor shall submit Applications for Payment to Architect on a monthly basis or as otherwise specified in the Contract Documents. Once the Architect submits a completed Application for Payment with its Certificate of Payment to the Owner, the Owner within twenty-one (21) days after its receipt of a Request for Payment from the Architect, shall pay the approved amount contained in the Request for Payment to the Contractor.

***Rationale*:** Proposed additions better address applications for payment.

§ 9.4 CERTIFICATES FOR PAYMENT

§ 9.4.1 The Architect will, within seven (7) days after receipt of the Contractor's Application for Payment, either issue to the Owner a Certificate for Payment, with a copy to the Contractor, for such amount as the Architect determines is properly due, or notify the Contractor and Owner in writing of the Architect's reasons for withholding certification in whole or in part as provided in Section 9.5.1.

§ 9.4.2 The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on the Architect's evaluation of the Work and the data comprising the Application for Payment, that, to the best of the Architect's knowledge, information and belief, the Work has progressed to the point indicated and that the quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to correction of minor deviations from the Contract Documents prior to completion and to specific qualifications expressed by the Architect. The issuance of a Certificate for Payment will further constitute a representation that the Contractor is entitled to payment in the amount certified. However, the issuance

of a Certificate for Payment will not be a representation that the Architect has ~~(1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner and County to substantiate the Contractor's right to payment, or (4)~~ made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

***Rationale*:** Proposed deletions bring Section 9.4.2 into line with the duties the Owner should impose on the Architect to inspect the quality and quantity of Work, to review the construction means and methods, and to review subcontractor's requisitions.

§ 9.6.7 ~~Unless the Contractor provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor for Work properly performed by Subcontractors and suppliers shall be held by the Contractor for those Subcontractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor for which payment was made by the Owner. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor, shall create any fiduciary liability or tort liability on the part of the Contractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the Contractor for breach of the requirements of this provision.~~

***Rationale*:** Section 9.6.7 is unnecessary. Public entities require a payment bond. Section 9.7 revisions are necessary to eliminate the Contractor's right to stop Work and to extend the time for payment on an Application for Payment.

§ 9.7 FAILURE OF PAYMENT

~~If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or i~~If the Owner does not pay the Contractor within sixty (60) days after the Contractor submits an Application for Payment to the Architect, the Contractor may file a claim in accordance with Article 15 of this Contract. ~~seven days after the date established in the Contract Documents the amount certified by the Architect or awarded by binding dispute resolution, then the Contractor may, upon seven additional days' written notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, plus interest as provided for in the Contract Documents.~~

***Rationale*:** Remove the Contractor's ability to stop work for non-payment.

§ 9.8. SUBSTANTIAL COMPLETION

Alternate 1:

§ 9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.

§ 9.8.2 When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected prior to final payment ("Punch List"). Failure to include an item on the Punch List does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.

§ 9.8.3 Upon receipt of the Contractor's Punch List, the Architect will make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Architect's inspection discloses any item, whether or not included on the Contractor's Punch List, which is not sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work or designated portion thereof for its intended

use, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Architect. In such case, the Contractor shall then submit a request for another inspection by the Architect to determine Substantial Completion.

***Rationale*:** This is the terminology used in construction, and adding the definition allows all parties to understand that they are talking about the same list.

§ 9.8. SUBSTANTIAL COMPLETION

Alternate 2:

~~**§ 9.8.1** Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.~~

~~**§ 9.8.2** When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected prior to final payment. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.~~

~~**§ 9.8.3** Upon receipt of the Contractor's list, the Architect will make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Architect's inspection discloses any item, whether or not included on the Contractor's list, which is not sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work or designated portion thereof for its intended use, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Architect. In such case, the Contractor shall then submit a request for another inspection by the Architect to determine Substantial Completion.~~

~~**§ 9.8.4** When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion that shall establish the date of Substantial Completion, shall establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.~~

~~**§ 9.8.5** The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate. Upon such acceptance and consent of surety, if any, the Owner shall make payment of retainage applying to such Work or designated portion thereof. Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents.~~

§ 9.8.1 When the Contractor considers that the Work is substantially complete and that items remaining to be completed or corrected can be accomplished within another thirty (30) days, subject to the availability of special order parts and materials, the Contractor must give written notice to the Owner and the Architect and request an inspection of the Work as provided in Section 9.8.3. The Contractor's notice and request for an inspection must be accompanied by a comprehensive Punch List describing all items to be completed or corrected before final Completion and the submittals required by Section 9.8.2. The Contractor must proceed promptly to complete and correct items on the list. Failure to include an item on such list does not alter the Contractor's responsibility to complete all Work in accordance with the Contract Documents.

§ 9.8.2 In addition to the Punch List, the Contractor must submit the following with its request for a determination of Substantial Completion:

.1 a use and occupancy permit;

.2 final test reports as required by the Contract and certificates of inspection and approval required for use and occupancy;

.3 Fire Marshal's report;

.4 approvals from, and transfer documents for, all utilities;

.5 Warranties and Guarantees as provided in this Contract;

.6 final, approved operating and maintenance manuals;

.7 all documents and verification of training required in accordance with any Commissioning Plan; and

.8 Schedule to complete the Punch List and value of Work not yet complete.

§ 9.8.3 Upon receipt of the Punch List, the Architect will make an inspection to determine whether the Work or designated portion thereof is substantially complete and whether remaining items can be completed or corrected within thirty (30) days subject to the availability of special order parts and materials The Owner may make a similar inspection. If such inspection discloses any item, whether or not included on the Punch List, which, in the opinion of the Owner or the Architect, (i) must be completed or corrected before the Work can be occupied or used for its intended purpose, or (ii) cannot be completed or corrected within thirty (30) days, subject to the availability of special order parts and materials the Architect will so advise the Contractor, and the Contractor must promptly complete or correct such item.

§ 9.8.4 Following the inspection and completion or correction of Work required by the Owner or the Architect before issuance of a Certificate of Substantial Completion, the Contractor must notify the Owner and Architect and request another inspection by the Owner and the Architect to determine Substantial Completion. The Contractor must submit a revised Punch List with such notice. The Architect will promptly notify the Contractor if the Owner or the Architect do not concur that the Work is substantially complete. In such case, the Contractor must bear the cost of any additional services of the Owner or the Architect until the Work is determined to be Substantially Complete.

§ 9.8.5 When the Owner and the Architect concur that the Work is Substantially Complete and that Work remaining to be completed or corrected can be accomplished within a period of thirty (30) days, subject to the availability of special order parts and materials, the Architect will prepare a Certificate of Substantial Completion and a revised Punch List. The Certificate of Substantial Completion will fix the Date of Substantial Completion and the time periods within which the Contractor must finish all items on the Punch List accompanying the Certificate.

§ 9.8.6 The Certificate of Substantial Completion and accompanying Punch List must be submitted to the Owner and Contractor for execution, which will constitute their written acceptance of responsibilities assigned to them in such Certificate.

§ 9.8.7 To the extent provided in the Contract Documents or in the Certificate of Substantial Completion, the Owner, upon execution of the Certificate, will assume responsibility for security, operation, safety, maintenance, heat, utilities, damage to the Work (other than damage caused by the Contractor) and insurance.

§ 9.8.8 Warranties required by the Contract Documents will commence on the Date of Substantial Completion of the Work unless otherwise provided in the Certificate of Substantial Completion or the Contract Documents.

§ 9.8.9 Upon execution of the Certificate of Substantial Completion, the Contractor will deliver custody and control of such Work to the Owner. The Owner will thereafter provide the Contractor reasonable access to such Work to permit the Contractor to fulfill the correction, completion and other responsibilities remaining under the Contract and the Certificate of Substantial Completion.

§ 9.8.10 Unless otherwise provided in the Certificate of Substantial Completion, the Contractor must complete or correct all items included in the final Punch List within thirty (30) days, subject to the availability of special order parts and materials, after the Date of Substantial Completion.

§ 9.8.11 At the time of Substantial Completion, in addition to removing rubbish and leaving the building "broom clean," the Contractor must replace any broken or damaged materials, remove stains, spots, marks and dirt from decorated Work, clean all fixtures, vacuum all carpets and wet mop all other floors, replace HVAC filters, clean HVAC coils, and comply with such additional requirements, if any, which may be specified in the Contract Documents.

***Rationale*:** Revisions provide a more comprehensive set of requirements for the Contractor to achieve Substantial Completion.

§ 9.9 PARTIAL OCCUPANCY OR USE

§ 9.9.1 The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer as required under Section 11.3.1.5 and authorized by public authorities having jurisdiction over the Project. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, or reduction in liquidated damages, if appropriate, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Architect as provided under Section 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, by decision of the Architect.

***Rationale*:** In some states, a daily (or hourly) rate for late delivery of all of the work will not be enforced if some or most of the work had already been delivered to the Owner. In these states, no liquidated damages would remain after partial occupancy. To deal with this situation, the parties could agree to reduce the LDs to reflect the fact that some of the Project is now being used for its intended purpose.

§ 9.10 FINAL COMPLETION AND FINAL PAYMENT

~~**§ 9.10.1** Upon receipt of the Contractor's written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make such inspection and, when the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's on-site visits and inspections, the Work has been completed in accordance with terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions listed in Section 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled.~~

~~**§ 9.10.2** Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner, (3) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment and (5), if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a~~

~~bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.~~

~~**§ 9.10.3** If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, and the Architect so confirms, the Owner shall, upon application by the Contractor and certification by the Architect, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the Architect prior to certification of such payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of claims.~~

~~**§ 9.10.4** The making of final payment shall constitute a waiver of Claims by the Owner except those arising from~~

~~.1 liens, Claims, security interests or encumbrances arising out of the Contract and unsettled;~~
~~.2 failure of the Work to comply with the requirements of the Contract Documents; or~~
~~.3 terms of special warranties required by the Contract Documents.~~

~~**§ 9.10.5** Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.~~

§9.10.1 When the Contractor has completed or corrected all items on the final Punch List and considers that the Work is complete and ready for final acceptance, the Contractor must give written notice to the Owner and the Architect and request a final inspection of the Work as provided in Section 9.10.2. The Contractor's notice and request for a final inspection must be accompanied by a final Application for Payment and the Submittals required by Section 9.10.3.

§9.10.2 Upon receipt of the Contractor's notice and request for final inspection, the Owner and the Architect will promptly make such inspection and, when the Owner and the Architect concur that the Work has been fully completed and is acceptable under the Contract Documents, the Architect will issue a Certificate of Final Completion to the Owner. The Contractor's notice and request for final inspection constitutes a representation by the Contractor to the Owner that the Work has been completed in full and strict accordance with terms and conditions of the Contract Documents. The Architect will promptly notify the Contractor if the Owner or the Architect do not concur that the Work is finally complete. In such case, the Contractor must bear the cost of any additional services of the Owner or the Architect until the Work is determined to be finally complete.

§ 9.10.3 Neither final payment nor any remaining retained percentage will become due until the Contractor submits the following documents to the Architect:

.1 an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner), have been paid or otherwise satisfied, submitted on AIA Document G706, Affidavit of Payment of Debts and Claims (latest edition) or such other form as may be prescribed by the Owner;

.2 a release or waiver of liens on behalf of the Contractor and a similar release or waiver on behalf of each Subcontractor and supplier, accompanied by AIA Document G706A, Affidavit of Release of Liens (latest edition) or such other form as may be prescribed by the Owner;

.3 a certificate evidencing that the Contractor's liability insurance and Performance Bond remain in effect during the one-year correction period following Substantial Completion as set forth in Section 12.2.2.1 and 12.2.2.2;

.4 a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents;

.5 consent of surety to final payment, submitted on AIA Document G707 (latest edition) or other form prescribed by the Owner;

.6 other data required by the Owner establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be prescribed by the Owner;

.7 a certified building location survey and as-built site plan in the form and number required by the Contract Documents;

.8 all warranties and bonds required by the Contract Documents;

.9 Record Documents as provided in Section 3.11and return of Contract Documents as provided therein; and

.10 Attic stock items as required by the Contract Documents; and

.11 As applicable, documentation of approval by the [name of permitting services authority] of all Storm Water Management (SWM) work as to allow closeout of the SWM Permit. [_____] approval will be based on satisfying all [_____] Permit requirements including the submission of acceptable as-built SWM drawings and other required SWM documents.

***Note*:** Insert the name of the appropriate permitting authorities.

§ 9.10.4 If the Contractor is unable to secure from any Subcontractor or supplier a release or waiver required under the Contract, the Contractor must furnish a bond satisfactory to the Owner to indemnify the Owner and any co-obligees under the bond against any lien or claim from such Subcontractor or supplier. The Contractor must also indemnify the Owner for all costs incurred by the Owner in removing, discharging or otherwise settling all Subcontractor or supplier liens or claims, including all personnel and consultant costs and reasonable attorneys' fees.

***Rationale*:** Revisions provide a more comprehensive set of requirements for the Contractor to achieve Final Completion.

REVISIONS - ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY

§ 10.2 SAFETY OF PERSONS AND PROPERTY

~~**§ 10.2.1** The~~ Contractor ~~shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to~~

~~.1 employees on the Work and other persons who may be affected thereby;~~

~~.2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors; and~~

~~.3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.~~

~~**§ 10.2.2** The Contractor shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.~~

~~**§ 10.2.3** The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.~~

~~**§ 10.2.4** When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, the Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.~~

~~**§ 10.2.5** The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Sections 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Sections 10.2.1.2 and 10.2.1.3, except damage or loss attributable to acts or omissions of the Owner or Architect or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Section 3.18.~~

§ 10.2.1 The Contractor must take reasonable precautions for the safety of, and must provide reasonable protection to prevent damage, injury or loss to:

.1 All persons at the Site and other persons who may be affected by the Work or other operations of the Contractor;

.2 the Work and materials and equipment to be incorporated therein or otherwise utilized in the performance of the Contract, whether in storage on or off the Site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors; and

.3 other property at the Site or adjacent thereto and not designated for removal, relocation or replacement in the course of construction.

§ 10.2.2 The Contractor must implement and maintain, as required by the Contract Documents, applicable laws and regulations and orders of public authorities having jurisdiction (without limitation OSHA and (Insert - State OSH authority), manufacturers' instructions or recommendations, existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including issuing appropriate notices, distributing material safety data sheets and other hazard communication information, providing protective clothing and equipment, posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

***Rationale*:** Confirm compliance with state and local occupational, safety, and hazard laws.

§ 10.2.3 The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

§ 10.2.4 The Contractor must not load nor permit any part of any structure at the Site to be loaded or subjected to stresses or pressures so as to endanger its safety or that of adjacent structures or property.

§ 10.2.5 When explosives or other hazardous materials or equipment are stored or used or unusual methods are employed in the performance of the Work, the Contractor must exercise utmost care and conduct such activities under supervision of properly qualified personnel.

§ 10.2.6 If the Contractor suffers injury or damage to person or property because of an act or omission of the Owner, or of any of the Owner's employees or agents, or of others for whose acts it is contended that the Owner is liable, written notice of such injury or damage, whether or not insured, must be given to the Owner within a reasonable time not exceeding ten (10) days after the onset or occurrence of such damage or injury or such shorter time as may be required by the Occupational Safety Hazards Administration (OSHA). The notice must provide sufficient detail to enable the Owner to investigate the matter. If notice is not received by the Owner within the time specified, any claim arising from the occurrence will be deemed to be conclusively waived, except to the extent of any applicable insurance (excluding self-insurance) coverage covering such occurrence. The provisions of this Section may not be used by the Contractor in lieu of the requirements of Article 7 when the Contractor is seeking an adjustment in the Contract Sum and are in addition to the requirements of Article 8 when the Contractor is seeking an adjustment in the Contract Time.

§ 10.2.7 The Contractor must promptly remedy, at its sole cost and expense, damage and loss to property referred to in Sections 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable, unless otherwise instructed in writing by the Owner. This obligation is in addition to, and not in limitation of, the Contractor's obligations for indemnification under Section 3.18 and the Contractor's responsibility to repair and or replace that portion of the Work and any materials and equipment to be incorporated therein which are damaged as a result of criminal mischief as specified in Section 10.2.10.

§ 10.2.8 The Contractor is responsible for taking all reasonable and necessary precautions to secure and protect the Site, the Work, materials and equipment to be incorporated therein, and any tools or equipment of the Contractor necessary or beneficial to the performance of the Work from damage due to vandalism, theft, or other criminal mischief. The Contractor must repair and/or replace that portion of the work and any materials or equipment to be incorporated therein and any tools or equipment of the Contractor necessary or beneficial to performance of the Work which are damaged or stolen due to vandalism, theft or any other criminal mischief at its expense whether or not covered by insurance. No extension of the Contract Time or increase in the Contract Sum will be granted to the Contractor as a consequence of any delay, impacts or inefficiencies resulting from any act of vandalism, theft or other criminal mischief whether or not caused or contributed to by the Contractor's negligence.

§ 10.2.96 The Contractor shall designate a responsible member of the Contractor's organization at the Site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner and Architect.

~~**§ 10.2.7** The Contractor shall not permit any part of the construction or site to be loaded so as to cause damage or create an unsafe condition.~~

§ 10.2.10~~8 Injury or Damage to Person or Property~~ If either party suffers injury or damage to person or property because of an act or omission of the other party, or of others for whose acts such party is legally responsible, written notice of such injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

***Rationale*:** Revised sections better set forth the Contractor's responsibilities for safety of persons and property.

Alternate to § 10.2.10:

§ 10.2.10 If either party suffers injury or damage to person or property because of an act or omission of the other party, or of others for whose acts such party is legally responsible, written notice of such injury or damage, whether or not insured, shall be given to the other party as soon as possible ~~within a reasonable time not exceeding 21 days after discovery~~. The notice shall provide sufficient detail to enable the other party to investigate the matter.

***Rationale*:** If the damage or injury is one for which the other party is being blamed, that party should get notice of it immediately, so that it can investigate.

§ 10.3 HAZARDOUS MATERIALS

~~§ 10.3.1 The Contractor is responsible for compliance with any requirements included in the Contract Documents regarding hazardous materials. If the Contractor encounters a hazardous material or substance not addressed in the Contract Documents and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Owner and Architect in writing.~~

~~§ 10.3.2 Upon receipt of the Contractor's written notice, the Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Contractor and, in the event such material or substance is found to be present, to cause it to be rendered harmless. Unless otherwise required by the Contract Documents, the Owner shall furnish in writing to the Contractor and Architect the names and qualifications of persons or entities who are to perform tests verifying the presence or absence of such material or substance or who are to perform the task of removal or safe containment of such material or substance. The Contractor and the Architect will promptly reply to the Owner in writing stating whether or not either has reasonable objection to the persons or entities proposed by the Owner. If either the Contractor or Architect has an objection to a person or entity proposed by the Owner, the Owner shall propose another to whom the Contractor and the Architect have no reasonable objection. When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Contractor. By Change Order, the Contract Time shall be extended appropriately and the Contract Sum shall be increased in the amount of the Contractor's reasonable additional costs of shut-down, delay and start-up.~~

~~§ 10.3.3 To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Subcontractors, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Section 10.3.1 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), except to the extent that such damage, loss or expense is due to the fault or negligence of the party seeking indemnity.~~

§ 10.3.1 The Contractor is responsible for compliance with any requirements included in the Contract Documents regarding hazardous materials. In the event the Contractor encounters on the Site material reasonably believed to be a Hazardous Material (other than those for which the Contractor may have specific responsibility for remediation under the Contract), and the Contractor's reasonable precautions will be inadequate to prevent foreseeable damage or injury and the Contractor cannot proceed with the Work in the absence of the removal, containment or remediation of the Hazardous Material, the Contractor must immediately stop Work in the area affected and report the condition to the Owner and the Architect, in writing, within 24 hours of discovery.

§ 10.3.2 Upon receipt of notice of suspected Hazardous Materials, Owner will cause an investigation to be made to verify the presence and extent of such materials, to determine whether such materials are in fact hazardous, and the steps necessary for their removal, containment or remediation.

§ 10.3.3 If the Owner's investigation confirms the presence of Hazardous Materials which present a risk of injury or damage which will not be adequately protected against by the Contractor's reasonable precautions, then the Work in the affected area must not thereafter be resumed except at the written direction of the Owner. The Work in the affected area will be resumed promptly (i) in the absence of a finding of Hazardous Material by the Owner, (ii) upon the removal, containment or remediation of the Hazardous Materials, or (iii) upon the establishment of appropriate safety precautions.

§ 10.3.4 The Contractor may request a change in the Contract Sum or Contract Time if the Contractor incurs additional costs on account of or is delayed by the need to remove, contain or remediate Hazardous Materials which has not been rendered harmless at the Site unless the Contractor is responsible for same under the Contract. Any such requested change in the Contract Sum or Contract Time must be made in writing within ten (10) days of discovery of any Hazardous Materials, which has not been rendered harmless giving rise to the request for the change and must fully comply with Articles 7, 8, and 15 or any claim will be deemed conclusively waived by the Contractor.

§ 10.3.45 The Owner shall not be responsible under this Section 10.3 for materials or substances the Contractor brings to the Site unless such materials or substances are required by the Contract Documents. The Owner shall be responsible for materials or substances required by the Contract Documents, except to the extent of the Contractor's fault or negligence in the use and handling of such materials or substances.

§ 10.3.56 The Contractor shall indemnify the Owner for the cost and expense the Owner incurs (1) for remediation of a material or substance the Contractor brings to the ~~s~~Site and negligently handles, or (2) where the Contractor fails to perform its obligations under Section 10.3.1, except to the extent that the cost and expense are due to the Owner's fault or negligence.

§ 10.3.67 If, without negligence on the part of the Contractor, the Contractor is held liable by a government agency for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, the Owner shall indemnify the Contractor for all cost and expense thereby incurred.

***Rationale*:** Revised sections better set forth responsibilities of the Contractor with respect to hazardous materials. Also puts the Owner in control of investigation and choosing the laboratory that will examine hazardous materials. Eliminates Owner indemnification language from the Contract. Establishes ten days for the Contractor to assert a request a change in the Contract Sum or Contract Time if the Contractor incurs additional costs on account of or is delayed by the need to remove, contain or remediate hazardous materials.

§ 10.4 EMERGENCIES

~~In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Article 15 and Article 7.~~

In an emergency affecting safety of persons or property, the Contractor must take all necessary action, without the necessity for any special instruction or authorization from the Owner or Architect, to prevent threatened damage, injury or loss. The Contractor must promptly, but in all events within twenty-four (24) hours of the emergency, report such action in writing to the Owner and Architect. If the Contractor incurs additional costs on account of or is delayed by such emergency, the Contractor may request a change in the Contract Sum or Contract Time to account

for such additional costs or delay in accord with Articles 7, 8 and 15. The Contractor must file any such request within ten (10) days of the emergency or it is deemed waived. Any adjustment in the Contract Sum or Contract Time shall be limited to the extent that the emergency work is not attributable to the fault or neglect of the Contractor or otherwise the responsibility of the Contractor under the Contract Documents.

***Rationale*:** Revised section better sets forth responsibilities of the Contractor with respect to emergencies. Requires notice to the Owner and Architect within 24 hours of an emergency. Establishes that any request for additional cost or time extension on account of the emergency must be filed with the Owner and Architect within 10 days of the emergency or else it is waived.

REVISIONS - ARTICLE 11 INSURANCE AND BONDS

ARTICLE 11 INSURANCE AND BONDS
§ 11.1 CONTRACTOR'S LIABILITY INSURANCE
§ 11.1.1 The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations and completed operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

.1 Claims under workers' compensation, disability benefit and other similar employee benefit acts that are applicable to the Work to be performed;
.2 Claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;
.3 Claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;
.4 Claims for damages insured by usual personal injury liability coverage;
.5 Claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;
.6 Claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle;
.7 Claims for bodily injury or property damage arising out of completed operations; and
.8 Claims involving contractual liability insurance applicable to the Contractor's obligations under Section 3.18.

***Note*:** Care should be taken to ensure that you have named the appropriate coverages. Recommend dictating certain policy forms and endorsements. For instance, the CG 22 94, CG 22 95 (removing broad form property damage); CG 21 39 and CG 24 26 (removing indemnity coverage); and CG 21 49 (removing minimal pollution coverage) can significantly impair coverage. Consider dictating the types of coverages that are appropriate and those that are inappropriate. Work closely with your client's insurance advisor to select wording. The insurance market is changing, so this is an area that should be updated frequently.

§ 11.1.2 The insurance required by Section 11.1.1 shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from the date of commencement of the Work until the date of final payment and termination of any coverage required to be maintained after final payment, and, with respect to the Contractor's completed operations coverage, until the expiration of the period for correction of Work or for such other period for maintenance of completed operations coverage as specified in the Contract Documents.

***Note*:** Make sure that limits are clearly defined here. Should list the occurrence/claim and aggregate limits. Make sure to also include caps on deductibles or self-insured retentions.

§ 11.1.3 Certificates of insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work and thereafter upon renewal or replacement of each required policy of insurance. These certificates and the insurance policies required by this Section 11.1 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner. An additional certificate evidencing continuation of liability coverage, including coverage for completed operations, shall be submitted with the final Application for Payment as required by Section 9.10.2 and thereafter upon renewal or replacement of such coverage until the expiration of the time required by Section 11.1.2. Information concerning

reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the Contractor with reasonable promptness.
***Note*:** Certificates of Insurance are nice, but they rarely tell the whole story. You may want to consider reviewing the entire policies to ensure that the contractor has maintained the appropriate coverages and has not sought improper endorsements. It is often not possible to obtain a complete copy of the policy before work commences, but you should at least be able to review the Additional Insured Endorsement and the Notice of Cancellation Endorsements – both of which ISO (or alternative) forms you should specify to avoid surprises.

§ 11.2 OWNER'S LIABILITY INSURANCE
The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance.

§ 11.3 PROPERTY INSURANCE
§ 11.3.1 Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract Modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Section 9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Section 11.3 to be covered, whichever is later. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Project.

***Note*:** There is some dispute in the industry concerning whether an Owner should include Subcontractors and Sub-subcontractors on the Builders' Risk policy (if the Owner purchases Builder's Risk). Recommend removing Subcontractors and Sub-subcontractors and naming only the Contractor. This still protects their rights (derivative through the Contractor, without complicating resolution of claims through many more claimants.

§ 11.3.1.1 Property insurance shall be on an "all-risk" or equivalent policy form and shall include, without limitation, insurance against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Architect's and Contractor's services and expenses required as a result of such insured loss.

***Note*:** Many of these coverages are not actually commercially available. Very few locales will write policies with earthquake and flood coverage without significant sub-limits. Consider revising the language here to ensure that the coverages are commercially available and that you purchase the appropriate coverage. Again, work with your client's insurance advisor and take into account the nature and size and location of the project.

§ 11.3.1.2 If the Owner does not intend to purchase such property insurance required by the Contract and with all of the coverages in the amount described above, the Owner shall so inform the Contractor in writing prior to commencement of the Work. The Contractor may then effect insurance that will protect the interests of the Contractor, Subcontractors and Sub-subcontractors in the Work, and by appropriate Change Order the cost thereof shall be charged to the Owner. If the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain insurance as described above, without so notifying the Contractor in writing, then the Owner shall bear all reasonable costs properly attributable thereto.

§ 11.3.1.3 If the property insurance requires deductibles, the Owner shall pay costs not covered because of such deductibles.

***Note*:** If Contractor is to provide Builder's Risk, be sure you know what the deductible is, and what the cost would be to lower/raise it. Consider allowing Owner to recover the cost of the deductible from the Contractor, and how this would affect a cost-reimbursement contract or waiver of subrogation.

§ 11.3.1.5 Partial occupancy or use in accordance with Section 9.9 shall not commence until the insurance company or companies providing property insurance have consented to such partial occupancy or use by endorsement or otherwise. The Owner and the Contractor shall take reasonable steps to obtain consent of the insurance company or companies and shall, without mutual written consent, take no action with respect to partial occupancy or use that would cause cancellation, lapse or reduction of insurance.

***Note*:** Confirm revising when termination concludes to match with the Builder's Risk policy. Very few, if any, builders risk policies go this far.

§ 11.3.7 WAIVERS OF SUBROGATION

The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Section 11.3 or other property insurance applicable to the Work, ~~except such rights as they have to proceeds of such insurance held by Owner as fiduciary~~. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

***Rationale*:** The Owner should not agree to be a fiduciary for the insurance proceeds. A fiduciary has to put everyone else's interests before its own.

§ 11.3.8 A loss insured under the Owner's property insurance shall be adjusted by the Owner ~~as fiduciary~~ and made payable to the Owner ~~as fiduciary for the insureds, as their interests may appear~~, subject to requirements of any applicable mortgagee clause and of Section 11.3.10. The Contractor shall pay Subcontractors their just shares of insurance proceeds received by the Contractor, and by appropriate agreements, written where legally required for validity, shall require Subcontractors to make payments to their Sub-subcontractors in similar manner.

~~**11.3.9** If required by a party in interest, the Owner as fiduciary shall, upon occurrence of an insured loss, give bond for proper performance of the Owner's duties. The cost of required bonds shall be charged against the proceeds received as fiduciary. The Owner shall deposit in a separate account proceeds so received, which the Owner shall distribute in accordance with such agreements as the parties in interest may reach, or as determined in accordance with the methods of binding dispute resolution selected in the Agreement between the Owner and the Contractor. If after such loss no other special agreement is made and unless the Owner terminates the Contract for convenience, replacement of damaged property shall be performed by the Contractor after notification of a Change in the Work in accordance with Article 7.~~

~~**11.3.10** The Owner as fiduciary shall have the power to adjust and settle a loss with insurers unless one of the parties in interest shall object in writing within five (5) days after occurrence of loss to the Owner's exercise of this power; if such objection is made, the dispute shall be resolved in the manner selected by the Owner and Contractor of binding dispute resolution in the Agreement. If the Owner and Contractor have selected arbitration as the method of binding dispute resolution, the Owner as fiduciary shall make settlement with insurers, or in the case of a dispute over distribution of insurance proceeds, in accordance with the direction of the arbitrators.~~

***Rationale*:** The Owner should not agree to be a fiduciary for the insurance proceeds. A fiduciary has to put everyone else's interests before its own.

§ 11.4 PERFORMANCE BOND AND PAYMENT BOND

§ 11.4.1 The Owner shall have the right to require the Contractor to furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder as stipulated in bidding requirements or specifically required in the Contract Documents on the date of execution of the Contract. The bonds shall be issued by a United States Department of Treasury listed corporate surety, accompanied by current powers of attorney, on a form acceptable to Owner.

***Rationale*:** There are many different forms of surety bonds, and some are more cumbersome to ever make a claim against. Counsel should consider proposing a bond form, which would then be attached as an exhibit to the contract. Also, to avoid receiving a fraudulent bond, or one from a surety without sufficient assets, that only sureties which are qualified to issue bonds for Federal projects be accepted, and that they be accompanied by valid documentation attesting to the authority of the agent who issues them.

REVISIONS - ARTICLE 12 UNCOVERING AND CORRECTION OF WORK

ARTICLE 12 UNCOVERING AND CORRECTION OF WORK
§ 12.1 UNCOVERING OF WORK
§ 12.1.1 If a portion of the Work is covered contrary to the Architect's request or to requirements specifically expressed in the Contract Documents, it must, if requested in writing by the Architect, upon written authorization from the Owner, be uncovered for the Architect's examination and be replaced at the Contractor's expense without change in the Contract Time.

Rationale: Require Owner to authorize uncovering Work.

§ 12.1.2 If a portion of the Work has been covered that the Architect has not specifically requested to examine prior to its being covered, the Architect may request, upon written authorization from the Owner, to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement shall, by appropriate Change Order, be at the Owner's expense. If such Work is not in accordance with the Contract Documents, such costs and the cost of correction shall be at the Contractor's expense unless the condition was caused by the Owner or a separate contractor in which event the Owner shall be responsible for payment of such costs.

***Rationale*:** Require Owner to authorize uncovering Work.

REVISIONS - ARTICLE 13 MISCELLANEOUS PROVISIONS

§ 13.1 GOVERNING LAW

~~The Contract shall be governed by the law of the place where the Project is located except that, if the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern Section 15.4.~~

The Contract shall be governed by, and construed in accordance with, the laws of the State of _____ without regard to its conflict of laws provisions.

***Rationale*:** Owner should have all disputes revolved under its state law.

§ 13.2 SUCCESSORS AND ASSIGNS

~~**§ 13.2.2** The Owner may, without consent of the Contractor, assign the Contract to a lender providing construction financing for the Project, if the lender assumes the Owner's rights and obligations under the Contract Documents. The Contractor shall execute all consents reasonably required to facilitate such assignment.~~

***Rationale*:** Delete § 13.2.2 if the Project is not lender financed. Retain the subsection if lender financed.

§ 13.3 WRITTEN NOTICE

Written notices are to be provided to the representatives of the parties designated in this Contract. Written notices are deemed to have been duly served if delivered in person to the addressee for whom it was intended, or if delivered by overnight courier. The date of any notice is deemed to be the earlier of the date of personal delivery or the delivery by overnight courier. ~~Written notice shall be deemed to have been duly served if delivered in person to the individual, to a member of the firm or entity, or to an officer of the corporation for which it was intended; or if delivered at, or sent by registered or certified mail or by courier service providing proof of delivery to, the last business address known to the party giving notice.~~

***Rationale*:** Clarify notice delivery methods and provide for hand delivery and overnight courier services. Registered or certified mail takes longer for delivery and generates unintelligible signatures on return receipt cards.

§ 13.5 TESTS AND INSPECTIONS

§ 13.5.1 Tests, inspections and approvals of portions of the Work shall be made as required by the Contract Documents and by applicable laws, statutes, ordinances, codes, rules and regulations or lawful orders of public authorities. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections and approvals. The Contractor must schedule all tests, inspections or specific approvals required by law or the Contract Documents so as to avoid any delay in the Work. The Contractor shall give the Architect timely notice of when and where tests and inspections are to be made so that the Architect may be present for such procedures. ~~The Owner shall bear costs of (1) tests, inspections or approvals that do not become requirements until after bids are received or negotiations concluded, and (2) tests, inspections or approvals where building codes or applicable laws or regulations prohibit the Owner from delegating their cost to the Contractor.~~

§ 13.5.7 In addition to the tests required by this Section 13.5, the Owner may at any time arrange for other tests, inspections and specific approvals to be performed by others selected by the Owner, at the Owner's expense. The Contractor must cooperate with the Owner and provide access to the Work for such tests, inspections and approvals.

***Rationale*:** Gives the Owner the ability to conduct additional testing at Owner's expense. These other tests and inspections are in addition to the tests and inspections that are required by the Contract and that are the Contractor's responsibility and expense.

§ 13.6 INTEREST

Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at such rate as the parties may agree upon in writing or, in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

***Rationale*:** Need to check local and state laws to determine is the payment of interest is mandatory, prohibited or optional. If interest is permitted, and the law does not specify how it is determined, then the practitioner still needs specific language addressing when and how interest will accrue under the Contract. For example, when would interest accrue if there were a dispute between the Owner and Contractor? If local law allows, could the parties negotiate a rate?

§ 13.7 TIME LIMITS ON CLAIMS

The Owner and Contractor shall commence all claims and causes of action, whether in contract, tort, breach of warranty or otherwise, against the other arising out of or related to the Contract in accordance with ~~the requirements of the final dispute resolution method selected in the Agreement within the time period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work~~ the time period specified by applicable law. ~~The Owner and the Contractor waive all claims and causes of action not commenced in accordance with 13.7.~~

***Rationale*:** The statute of limitations/statute of repose for construction related causes of action in many jurisdictions are for a period of time longer than 10 years. Do not inadvertently limit the time periods for the Owner to pursue its claims.

§ 13.8 DOCUMENT RETENTION AND AUDIT PROVISIONS

Contractor shall account for all materials, equipment and labor entering into the Work and must keep such full and detailed records as may be necessary for proper financial management pursuant to the Contract Documents for a period of _____ (__) years after final payment. Furthermore, the Owner has the right to examine the Contractor's and its Subcontractors' and suppliers' records directly or indirectly pertaining or relating to the Work or the Contract and the Contractor must grant the Owner access to and an opportunity to copy such records at all reasonable times during the Contract period and for _____ (__) years after final payment.

***Rationale*:** Owner must have the ability to audit the Contract with access to the Contractor's books and records. Some jurisdictions have the specific statutory authority to conduct an audit in their municipal or city code. Need to specify the duration for the Contractor's records retention. The question arises as to how to audit the subcontractors' and suppliers' books and records related to the Project. Need the Contractor to place a flow down provision for audits, in its contracts, with subcontractors and suppliers, authorizing the Owner to audit their books and records related to the Project.

REVISIONS - ARTICLE 14 TERMINATION OR SUSPENSION OF CONTRACT

ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

~~§ 14.1 TERMINATION BY THE CONTRACTOR~~

~~§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, for any of the following reasons:~~

~~.1 Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;~~

~~.2 An act of government, such as a declaration of national emergency that requires all Work to be stopped;~~

~~.3 Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time slated in the Contract Documents; or~~

~~.4 The Owner has failed to furnish to the Contractor promptly, upon the Contractor's request, reasonable evidence as required by Section 2.2.1.~~

§14.1.1 NO RIGHT TO STOP WORK FOR NON-PAYMENT

The Contractor has no right to stop Work as a consequence of non-payment. In the event of any disagreement between the Contractor and Owner involving the Contractor's entitlement to payment, the Contractor's only remedy is to file a Claim in accordance with Article 15. The Contractor must diligently proceed with the Work pending resolution of the Claim. If, however, an Application for Payment has been approved for payment by the Owner, and the Owner fails to make payment within sixty (60) days of the approval for payment by the Owner, the Contractor may upon ten (10) days written notice to the Owner, stop work if payment is not made by the Owner within ten (10) days following the notice.

***Rationale*:** Contractor should not have a right to stop work for non-payment by the Owner during the Project. Contractor must be compelled to keep working pending the resolution of claims.

~~**§ 14.1.2** The Contractor may terminate the Contract if, through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, repeated suspensions, delays or interruptions of the entire Work by the Owner as described in Section 14.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.~~

~~**§ 14.1.3** If one of the reasons described i n Section 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed, including reasonable overhead and profit, costs incurred by reason of such termination, and damages.~~

~~**§ 14.1.4** If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has repeatedly failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Section 14.1.3.~~

§ 14.2 TERMINATION BY THE OWNER FOR CAUSE

~~**§ 14.2.1** The Owner may terminate the Contract if the Contractor~~

~~.1 repeatedly refuses or fails to supply enough properly skilled workers or proper materials;~~

~~.2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;~~

~~.3 repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or~~

~~.4 otherwise is guilty of substantial breach of a provision of the Contract Documents.~~

~~**§ 14.2.2** When any of the above reasons exist, the Owner, upon certification by the Initial Decision Maker that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:~~

~~.1 Exclude the Contractor from the site and take possession of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;~~

~~.2 Accept assignment of subcontracts pursuant to Section 5.4; and~~

~~.3 Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.~~

~~**§ 14.2.3** When the Owner terminates the Contract for one of the reasons staled in Section 14.2.1 the Contractor shall not be entitled to receive further payment until the Work is finished.~~

~~**§ 14.2.4** If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Initial Decision Maker, upon application, and this obligation for payment shall survive termination of the Contract.~~

14.2.1 The Owner may terminate the Contract for cause if the Contractor:

.1 Fails to supply adequate properly skilled workers or proper materials;

.2 Fails to make payment to Subcontractors or Suppliers for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors or Suppliers;

.3 Fails to comply with any laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction;

.4 Fails to perform the Work in accordance with the Contract Documents or otherwise breaches any provision of the Contract Documents;

.5 Anticipatorily breaches or repudiates the Contract;

.6 Fails to make satisfactory progress in the prosecution of the Work required by the Contract; or

.7 Endangers the performance of this Contract.

14.2.2 The Owner may terminate the Contract, in whole or in part, whenever the Owner determines that sufficient grounds for termination exist as provided in Subsection 14.2.1. The Owner will provide the Contractor with a written notice to cure the default. If the default is not cured, the termination for default is effective on the date specified in the Owner's written notice. However, if the Owner determines that default contributes to the curtailment of an essential service or poses an immediate threat to life, health, or property, the Owner may terminate the Contract immediately upon issuing oral or written notice to the Contractor without any prior notice or opportunity to cure. In addition to any other remedies provided by law or the Contract, the Contractor must compensate the Owner for additional costs that foreseeably would be incurred by the Owner, whether the costs are actually incurred or not, to obtain substitute performance. A termination for default is a termination for convenience if the termination for default is later found to be without justification.

***Rationale*:** The revised section makes grounds for termination more definite. The revised section eliminates the word "repeatedly" which is an unknown number and eliminates the Initial Decision Maker's certification that sufficient cause exists to justify the termination. The Architect should not control the decision to declare a default. The Owner should make the decision to terminate the Contract and if the Contractor disagrees with that decision then the Contractor can exercise its rights under Article 15. The last sentence of Subsection 14.2.2 is consistent with certain jurisdictions that specifically provide that "a termination of default is a termination for convenience if the termination for default is later found to be without justification." Not all jurisdictions have a similar provision in their procurement code and regulations. Query - would such a provision be legally enforceable if not otherwise permitted by statute?

§ 14.2.3 Upon receipt of written notice from the Owner of termination, the Contractor must:

- **.1** cease operations as directed by the Owner in the notice and, if required by the Owner and County, participate in an inspection of the Work with the Owner, County and the Architect to record the extent of completion thereof, to identify the Work remaining to be completed or corrected, and to determine what temporary facilities, tools, equipment and construction machinery are to remain at the Site pending completion of the Work;
- **.2** complete or correct the items directed by the Owner, and take actions necessary, or that the Owner may direct, for the protection and preservation of any stored materials and equipment and completed Work;
- **.3** unless otherwise directed by the Owner, remove its tools, equipment and construction machinery from the Site, and
- **.4** except as directed by the Owner, terminate all existing subcontracts and purchase orders and enter into no further subcontracts or purchase orders.

§ 14.2.4 Following written notice from the Owner of termination, the Owner may:

- **.1** take possession of the Site and of all materials and equipment thereon, and at the Owner's option, such temporary facilities, tools, construction equipment and machinery thereon owned or rented by the Contractor that the Owner elects to utilize in completing the Work;
- **.2** accept assignment of subcontracts and purchase orders, and
- **.3** complete the Work by whatever reasonable method the Owner may deem expedient.

§ 14.2.5 Upon termination for cause, the Contractor must take those actions described in Section 14.2.3, and the Owner may take those actions described in Section 14.2.4, subject to the prior rights of the Contractor's Surety.

§ 14.2.6 When the Owner terminates the Contract for cause, the Contractor is not entitled to receive further payment until the Work is completed and the costs of completion have been established.

§ 14.2.7 If the unpaid balance of the Contract Sum less amounts which the Owner is entitled to offset from the unpaid Contract balance including actual or Liquidated Damages, exceeds the costs of completing the Work, including compensation for the Owner's and the Architect's services made necessary thereby, such excess will be paid to the Contractor or Surety, as directed by the Surety. If such costs exceed the unpaid Contract balance, the Contractor must pay the difference to the Owner upon written demand. This obligation for payment survives termination of the Contract.

§ 14.2.8 In completing the Work following termination for cause, the Owner is not required to solicit competitive bids or to award completion work to the lowest bidder, but may obtain such completion work and related services on the basis of sole source procurement and negotiated compensation.

***Rationale*:** The additional subsections describe the duties of the Contractor following receipt of a notice of termination. The subsections address the Owner's rights to secure the Project Site following the notice of termination and the use of the remaining Contract balance to offset costs of completing the Work.

ALTERNATE - § 14.2 TERMINATION BY THE OWNER FOR CAUSE
Add additional subsection to A201-14.2:

§14.2.5 If the Contractor files for protection, or a petition is filed against it, under the Bankruptcy laws, and Contractor wishes to affirm the Contract, Contractor shall immediately file with the Bankruptcy Court a motion to affirm the Contract and shall provide satisfactory evidence to Owner and to the Court of its ability to cure all present defaults and its ability to timely and successfully complete the Work. If Contractor does not make such an immediate filing, Contractor accepts that Owner shall petition the Bankruptcy Court to lift the Automatic Stay and permit Owner to terminate the Contract.

***Rationale*:** Many laypeople (and some lawyers) do not understand how the Automatic Stay in bankruptcy works, and will run afoul of it by terminating a contractor for default even though a contractor has filed for bankruptcy protection. Having this language gives a template to counsel for the Owner for making a demand and moving forward. Further, although every Bankruptcy Court and Judge is different, many will give weight to an agreement of the parties as to what action the Contractor has agreed to take in the event of a filing in Bankruptcy.

§ 14.3 SUSPENSION BY THE OWNER FOR CONVENIENCE

§ 14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

§ 14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption as described in Section 14.3.1. Adjustment of the Contract Sum shall not include profit. No adjustment shall be made to the extent

.1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or

.2 that an equitable adjustment is made or denied under another provision of the Contract.

***Rationale*:** Add the word "not" to the subsection to reflect that adjustments to Contract Sum resulting from a suspension of the Contract will not include the Contractor's profit. While the Contractor may be entitled to an increase in the Contract Sum for additional direct costs and general conditions, those costs and general conditions should not include profit.

§ 14.4 TERMINATION BY THE OWNER FOR CONVENIENCE

~~**§ 14.4.1** The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.~~

~~**§ 14.4.2** Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Contractor shall~~

~~.1 cease operations as directed by the Owner in the notice;~~

~~.2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and~~

~~.3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.~~

~~**§ 14.4.3** In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.~~

14.4.1 The Owner may, at any time, terminate the Contract or any portion thereof or of the Work for the Owner's convenience and without cause.

14.4.2 Upon receipt of written notice from the Owner of termination, the Contractor must:

.1 Cease operations as directed by the Owner in the notice and, if required by the Owner, participate in an inspection of the Work with the Owner and the Architect/Engineer to record the extent of completion thereof, to identify the Work remaining to be completed or corrected, and to determine what temporary facilities, tools, equipment and construction machinery are to remain at the Site pending completion of the Work;

.2 Complete or correct the items directed by the Owner, and take actions necessary, or that the Owner may direct, for the protection and preservation of any stored materials and equipment and completed Work;

.3 Unless otherwise directed by the Owner, remove its tools, equipment and construction machinery from the Site, and

.4 Except as directed by the Owner, terminate all existing subcontracts and purchase orders related to the Work and enter into no further subcontracts or purchase orders therefor.

14.4.3 Following written notice from the Owner of termination, the Owner may:

.1 Take possession of the Site and of all materials and equipment thereon, and at the Owner's option, such temporary facilities, tools, construction equipment and machinery thereon owned or rented by the Contractor that the Owner elects to utilize in completing the Work;

.2 Accept assignment of subcontracts and purchase orders; and

.3 Complete the Work by whatever reasonable method the Owner may deem expedient.

14.4.4 In case of termination for the Owner's convenience, the Contractor will be entitled to compensation only for the following items:

.1 Payment for acceptable Work performed up to the date of termination;

.2 The costs of preservation and protection of the Work if requested to do so by the Owner;

.3 The cost of terminating the following contracts including:

(i.) Purchased materials but only if not returnable and provided to the Owner, or the restocking or return charge, if any, if returnable at the Owner's written election;

(ii.) Equipment rental contracts if not terminable at no cost but not to exceed an amount equal to thirty (30) days rental;

.4 Documented transportation costs associated with removing Contractor-owned equipment;

.5 Documented demobilization and close-out costs; and

.6 Overhead and profit on the foregoing not to exceed ten (10%) percent.

The Contractor will not be compensated for the cost of terminating subcontracts, which must be terminable at no cost to the Owner if the Contract is terminated. The Contractor will not be compensated for the cost of any idled employees unless the employee is under a written employment contract entitling the employee to continued employment after termination of the Contract and the employee cannot be assigned to other work provided that in all events the Contractor's costs must be limited to thirty (30) days of employment costs from the date of the notice of termination. The Contractor is not entitled to any other costs or compensation (including lost or expected profit, uncompensated overhead or related expenses, or the cost of preparing and documenting its compensable expenses under this Subsection 14.4.4 as a consequence of the Owner's termination of the Contract for convenience. The Contractor conclusively and irrevocably waives its right to any other compensation or damages (compensatory or punitive) arising from termination of the Contract. If the Owner and the Contractor are unable to agree upon the amounts specified in this subsection, the Contractor may submit a Claim as provided in Article 15. The Claim must be limited to resolution of the amounts specified in Subsections 14.4.4.1, 14.4.4.2, 14.4.4.3 and 14.4.4.4 of this Subsection 14.4.4. No other cost, damages or expenses may be claimed or paid to the Contractor or considered as part of the Claim, the same being hereby conclusively and irrevocably waived by the Contractor. Any such Claim

must be delivered to the Owner within thirty (30) days of the termination of the Contract and must contain a written statement setting forth the specific reasons and supporting calculations and documentation as to the amounts the Contractor claims to be entitled to under this Subsection as a result of the termination of the Contract.

14.4.5 The Contractor's obligations surviving final payment under the Contract, including without limitation those with respect to insurance, indemnification, and correction of Work that has been completed at the time of termination, remains effective notwithstanding termination for convenience of the Owner.

***Rationale*:** Revised subsections for termination of the Contract for convenience to better address the obligations of the Contractor, the rights of the Owner, and the limits on the compensation to be paid to the Contractor. Practitioners need ensure that the revised subsections comply with the procurement laws in their jurisdictions.

REVISIONS - ARTICLE 15 CLAIMS AND DISPUTES

ARTICLE 15 CLAIMS AND DISPUTES
§ 15.1 CLAIMS
§ 15.1.1 DEFINITION
A Claim is a written demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim.

***Rationale*:** Require that demands and assertions be in writing.

§ 15.1.2 NOTICE OF CLAIMS
Claims by either the Owner or Contractor must be initiated by written notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party must be initiated within ten (~~21~~ 10) days after occurrence of the event giving rise to such Claim or within ten (~~21~~ 10) days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

Alternate 1:

§ 15.1.2 NOTICE OF CLAIMS
Notice of circumstances that could give rise to a Claim must be given to the other party as soon as possible, to enable that party to take action as appropriate to lessen the impact of the potential Claim. The party recognizing a potential claim shall also explore all options and generate suggestions for how to avoid or overcome the impact of the circumstances. If damage cannot be avoided, Claims by either the Owner or Contractor must be initiated by written notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

***Rationale*:** There are many situations in which, had the Owner known that something it was doing or not doing might result in a claim, it could take action to avoid a delay or extra cost (such as directing the use of tarps, blankets, heaters, gravel or other materials to overcome the effects of weather; intervening with utilities or other third-parties to resolve disputes; permit alternate materials or construction techniques if material or equipment is not available; alter working hours). There is otherwise no provision in the A201 requiring the Contractor to give the Owner the opportunity to proactively avoid claims.

Alternates to § 15.1.1 and § 15.1.2:

§ 15.1.1 DEFINITION
A Claim is a demand or assertion by the Contractor, one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract. ~~The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract.~~ The responsibility to substantiate Claims shall rest with the Contractor ~~party making the Claim~~. Nothing contained in this subsection 15.1.1 is intended to apply to or in any way limit the Owner's right to make claims related to or arising out of the Contract.

§ 15.1.2 NOTICE OF CLAIMS

Claims by ~~either the Owner or~~ Contractor must be initiated by written notice to the ~~other party~~ Owner and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by ~~either party~~ the Contractor must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant Contractor first recognizes the condition giving rise to the Claim, whichever is later. As a condition to making a claim for additional costs, the Contractor shall maintain and produce accurate records to substantiate all additional costs actually incurred. If a Claim for actual costs is approved, the Owner shall pay the Contractor actual costs incurred, plus either (a) ten-percent (10%) for overhead and profit for work performed by the Contractor, or (b) five percent (5%) overhead and profit for work performed by a subcontractor, as applicable.

***Rationale*:** These changes exempt the owner from the Claims process, which includes the broad catch-all "or other relief with respect to the terms of the Contract." A reciprocal 21-day limit on notice forces quick response and could be raised as a bar to important owner Claims involving the work or materials that the owner does not raise within that short period. The construction phase Claims typically are brought by the contractor and are legitimately time sensitive to allow the owner to make decisions affecting work progress. With these changes, the owner then retains the limitations periods allowed by law for its claims, unless provided elsewhere in the contract. The change to 15.1.2 also places requirements on the contractor to substantiate its Claims.

§ 15.1.3 CONTINUING CONTRACT PERFORMANCE

Pending final resolution of a Claim, except as otherwise agreed in writing or as provided in Section 9.7 and Article 14, the Contractor shall proceed diligently with performance of the Contract ~~and the Owner shall continue to make payments~~ in accordance with the Contract Documents. ~~The Architect will prepare Change Orders and issue Certificates for Payment in accordance with the decisions of the Initial Decision Maker~~.

§ 15.1.4 CLAIMS FOR ADDITIONAL COST

If the Contractor wishes to make a Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4.

§ 15.1.5 CLAIMS FOR ADDITIONAL TIME

§ 15.1.5.1 If the Contractor wishes to make a Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.

§ 15.1.5.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated and had an adverse effect on the critical path of ~~the scheduled~~ construction.

***Rationale*:** Weather delays must affect the critical path to be considered and are frequently addressed in other contract provisions.

Alternate: Weather Claims

~~**§15.1.5.2** If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated and had an adverse effect on the scheduled construction~~.

§15.1.5.2 Contractor may request an extension of time to the Contract Schedule based on adverse weather conditions only if the following criteria are met:

.1 The weather conditions are recorded on a daily basis at the Site, using properly calibrated measurement devices, photographs, video and such other media as necessary to properly document actual conditions.

.2 The weather conditions encountered exceed the previous [10-year historical records] for the general locality of the Project based on records of the [Office of Environmental Data Service of the National Oceanic and Atmospheric Administration of the U.S. Department of Commerce nearest the site of the Project.]

.3 The weather conditions adversely impact the Contractor's performance of Work on the critical path of construction.

.4 The adverse impact of the weather conditions cannot not be overcome by reasonable steps undertaken by Contractor, such as rescheduling Work or implementing measures to protect Work without additional expense to Contractor.

.5 Contractor has notified Owner in writing whenever it reasonably anticipates future adverse weather conditions, or immediately upon encountering unanticipated adverse weather conditions. Contractor shall not only advise Owner of the anticipated impact of the adverse weather conditions, but shall also suggest to Owner steps which might be undertaken to avoid or lessen the impact of such conditions, so that Owner has sufficient information upon which to base a decision as to whether to employ such steps.

.6 Owner shall promptly advise Contractor in writing if Owner wishes for Contractor to take any steps to avoid or lessen the impact of adverse weather conditions. If such steps require Contractor to incur additional costs, the Contract Sum shall be equitably adjusted as otherwise provided in this Contract.

***Rationale*:** The more specific the contract can be in describing what is expected of a contractor encountering unusual weather conditions, the better, as this gives the Contractor a road map to follow. Most of these items are not identified in the standard AIA language: (1) requiring contemporaneous documentation of actual site conditions; (2) identifying the criteria against which "adverse" weather is to be judged (in this example, a ten-year history, and the records of the closest NOAA office) *but NOTE that this may not always be available, or the most appropriate criterion;* (3) limiting the conditions that might give rise to relief to those affecting the critical path of work; (4) requiring the Contractor to use reasonable steps to avoid impact, such as re-scheduling work that might be affected; and (5) giving notice VERY promptly, so that the Owner has the opportunity to decide if it wants to incur additional expense to avoid or lessen impact, such as bringing in rock to muddy sites, or temporary heat in winter.

Another alternative to the use of local NOAA or other historical data would be to specify in the contract the number of days that the parties agree are to be expected (and therefore, included in the contract time already) for adverse weather. This can be done in gross (one total number of days) or by month. If this latter, monthly approach is used, the clause should deal with what happens if that number of days is not lost to weather: does each month stand alone, or can the owner require unused days in one month to be carried forward to a future month, preventing an extension of time in a later month? If this approach is used, the Owner should be able to articulate where the number of days came from. Some lists are copied from other contracts that may or may not have any relationship to the weather to be anticipated at a specific contract site.

§ 15.1.6 CLAIMS FOR CONSEQUENTIAL DAMAGES

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

.1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

.2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

***** *Delete or Retain 15.1.6 Claims for Consequential Damages?*** Although this section is framed as a "mutual" waiver of consequential damages, in almost every case it is the Contractor that is benefitted by this clause and not the Owner. The purpose of the clause is to eliminate claims for loss of income from late completion of work, or the inability of work (a water pump, a swimming pool) to perform as promised. The only way a Contractor can recover for consequential damages would be to prove that the Owner's breach prevented the Contractor from earning profit on another job, which is nearly impossible to prove. But an Owner is frequently damaged by its inability to sell admissions to a park or pool, or to generate revenue from a water or sewer system. The A201, instead, places the burden on the Owner to purchase Loss of Use insurance, which puts the risk of loss on the Owner for the Contractor's fault. Discussion should be conducted with the client to determine if it wants to give this waiver.

§ 15.2 INITIAL DECISION

§ 15.2.1 Claims, excluding those arising under Sections 10.3 and~~,~~ 10.4, ~~11.3.9, and 11.3.10~~, shall be referred to the Initial Decision Maker for initial decision. The Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Contract ~~Agreement~~. Except for those Claims excluded by this Section 15.2.1, an initial decision shall be required as a condition precedent to mediation of any Claim arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Initial Decision Maker with no decision having been rendered. Unless the Initial Decision Maker and all affected parties agree, the Initial Decision Maker will not decide disputes between the Contractor and persons or entities other than the Owner.

***Rationale*:** Make the Owner the Initial Decision Maker in the A101. Note that Sections 11.3.9 and 11.3.10 are suggested deletions from the A201 which is why those sections are shown as redlined-strikeout above.

§ 15.2.2 The Initial Decision Maker will review Claims and within ten days of the receipt of a Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Initial Decision Maker is unable to resolve the Claim if the Initial Decision Maker lacks sufficient information to evaluate the merits of the Claim or if the Initial Decision Maker concludes that, in the Initial Decision Maker's sole discretion, it would be inappropriate for the Initial Decision Maker to resolve the Claim.

§ 15.2.3 In evaluating Claims, the Initial Decision Maker may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the Initial Decision Maker in rendering a decision. The Initial Decision Maker may request the Owner to authorize retention of such persons at the Owner's expense.

§ 15.2.4 If the Initial Decision Maker requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within ten days after receipt of such request, and shall either (1) provide a response on the requested supporting data, (2) advise the Initial Decision Maker when the response or supporting data will be furnished or (3) advise the Initial Decision Maker that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Initial Decision Maker will either reject or approve the Claim in whole or in part.

§ 15.2.5 The Initial Decision Maker will render an initial decision approving or rejecting the Claim, or indicating that the Initial Decision Maker is unable to resolve the Claim. This initial decision shall (1) be in writing; (2) state the reasons therefore; and (3) notify the parties and the Architect, if the Architect is not serving as the Initial Decision Maker, of any change in the Contract Sum or Contract Time or both. The initial decision shall be final and binding on the parties but subject to mediation and, if the parties fail to resolve their dispute through mediation, to binding dispute resolution.

§ 15.2.6 Either party may file for mediation of an initial decision at any time, subject to the terms of Section 15.2.6.1.

§ 15.2.6.1 Either party may, within 30 days from the date of an initial decision, demand in writing that the other party

file for mediation within 60 days of the initial decision. If such a demand is made and the party receiving the demand fails to file for mediation within the time required, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision.

§ 15.2.7 In the event of a Claim against the Contractor, the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor's default, the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

§ 15.3 MEDIATION

§ 15.3.1 Claims, disputes, or other matters in controversy arising out of or related to the Contract except those waived as provided for in Sections 9.10.4, 9.10.5, and 15.1.6 shall be subject to mediation as a condition precedent to binding dispute resolution.

~~**§ 15.3.2** The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the dale of the Agreement. A request for mediation shall be made in writing, delivered to the other party to the Contract, and tiled with the person or entity administering the mediation. The request may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section 15.3.2 the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.~~

§ 15.3.2 All controversies, claims, or disputes arising out of this Contract shall initially be subject to non-binding mediation as condition precedent to the commencement of binding arbitration pursuant to Section 15.4 below. The request for mediation may be made concurrently with the filing of an arbitration complaint, but such mediation shall proceed in advance of the binding arbitration, which shall be stayed pending mediation for a period of sixty (60) days from the date of filing, unless stayed for a longer period by agreement of the parties. The Chief Judge of _____ Court for _____ shall appoint the mediator, and such mediation shall be held at a mutually agreeable time and place in _____, _____. A request for mediation shall be made in writing, delivered to the other party to the Contract. If arbitration is stayed pursuant to this Section 15.3.2, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.

§ 15.3.3 The parties shall share the mediator's fee and any filing fees equally. The parties will bear their own attorneys' fees, expert witnesses' fees, costs and expenses in the mediation. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

Alternate § 15.3 MEDIATION

§ 15.3.1 ~~Claims, disputes, or other matters in~~ controversy Any claim, dispute or other matter in question or arising out of or related to the Contract ~~except those waived as provided for in Sections 9.10.4, 9.10.5, and 15.1.6~~ shall be subject to mediation ~~as a condition precedent to binding dispute resolution~~. Mediation is not a condition precedent to commencing litigation, but if litigation is commenced before mediation is held, the Parties agree to mediate before any dispositive motions or trial.

§ 15.3.2 The parties shall ~~endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section 15.3.2, the parties may nonetheless proceed to the selection~~

~~of the arbitrator(s) and agree upon a schedule for later proceedings~~ share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreement reached in mediation and ratified by the Owner's Council shall be enforceable as settlement agreements in any court having jurisdiction thereof.

***Rationale*:** Mediation - These changes slightly modify this important settlement tool in construction cases. Mediation as a condition precedent sometimes forces the parties to mediate before sufficient discovery is completed and the parties are still locked into their "best case" positions. Not only is mediation likely to be unsuccessful in that case, but it also may sour the client's attitude for a later pretrial mediation. The provision gives the parties more flexibility to choose a later time for mediation, well into or after discovery, when parties are more aware of the weaknesses in their positions.

§ 15.4 ARBITRATION

~~**§ 15.4.1** If the panics have selected arbitration as the method for binding dispute resolution in the Agreement, any Claim subject to, but not resolved by mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. A demand for arbitration shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.~~

§ 15.4.1 Claims, disputes, or other matters in controversy arising out of or related to the Contract that are not resolved by mediation pursuant to Section 15.3, shall be resolved in accordance with the terms of this Contract by _____ *[select - American Arbitration Association ("AAA"), Judicial Arbitration & Mediation Services ("JAMS"), some other arbitration organization]* or its successor or one otherwise agreed to by the parties by final and binding arbitration. The arbitration hearing shall be conducted at a location determined by the arbitrator in the _____ *[select jurisdiction – City, County, State]*, and shall be administered by and in accordance with the then-existing Rules of Practice and Procedure of _____, and judgment upon any award rendered by the arbitrator may be entered by any state or federal court of competent jurisdiction. The parties agree to select an arbitrator that is an attorney with at least twenty (20) years of experience in the practice of construction law. No attorneys' fees may be assessed by the arbitrator against any other party. All parties to the arbitration bear their own attorneys' fees, expert witnesses' fees, expenses and costs incurred in the arbitration. The arbitrating parties each shall pay an equal share of the arbitrator's fees and expenses promptly upon receipt of any invoice in connection therewith. A demand for arbitration shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

§ 15.4.1.1 A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation, but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the Claim would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the Claim.

§ 15.4.1.2 Pending resolution of any controversy, claim or dispute arising out of this Contract ~~Agreement~~, the Contractor must proceed diligently with the performance of the Work under this Contract ~~Agreement~~.

§ 15.4.2 The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

§ 15.4.3 The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Contract ~~Agreement~~ shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

§ 15.4.4 CONSOLIDATION OR JOINDER

§ 15.4.4.1 Either party, at its sole discretion, may consolidate an arbitration conducted under this Contract ~~Agreement~~ with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) the arbitrations to be consolidated substantially involve common questions of law or fact, and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

§ 15.4.4.2 Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.

§ 15.4.4.3 The Owner and Contractor grant to any person or entity made a party to an arbitration conducted under this Section 15.4, whether by joinder or consolidation, the same rights of joinder and consolidation as the Owner and Contractor under this Contract ~~Agreement~~.

***Rationale*:** Revised subsections better address the dispute resolution process and the allocation of fees and expenses incurred in mediation and arbitration.

***Alternate*: ARBITRATION**

~~**§ 15.4.1.1** A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation, but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the Claim would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the Claim.~~

~~**§ 15.4.1.2** Pending resolution of any controversy, claim or dispute arising out of this Agreement, the Contractor must proceed diligently with the performance of the Work under this Agreement.~~

~~**§ 15.4.2** The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.~~

~~**§ 15.4.3** The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.~~

~~**§ 15.4.4 CONSOLIDATION OR JOINDER**~~

~~**§ 15.4.4.1** Either party, at its sole discretion, may consolidate an arbitration conducted under this Contract Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) the arbitrations to be consolidated substantially involve common questions of law or fact, and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).~~

~~**§ 15.4.4.2** Either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.~~

~~**§ 15.4.4.3** The Owner and Contractor grant to any person or entity made a party to an arbitration conducted under this Section 15.4, whether by joinder or consolidation, the same rights of joinder and consolidation as the Owner and Contractor under this Agreement.~~

***Rationale*:** The alternate deletes the section for arbitration (and consolidation or joinder) as the required dispute resolution method, in its entirety. For many of the CCDI participants, a court is usually the preferable venue for a construction dispute involving a public owner. For public owners, AAA arbitration, and arbitration in general, can have significant negatives. While consolidation and joinder is an available Section 15.4.4 process to bring the contractor(s), design professionals and construction manager into single arbitration proceeding, it becomes an additional owner expense to effectuate and may be foiled if one of the several contracts includes a right to the party's own proceeding. Design professionals often try to include such a clause in their contracts. Separate arbitration proceedings for a design-construction dispute can be devastating for the owner by raising the possibility of inconsistent, disappointing awards. Also, arbitration does not necessarily save cost, given the significant administrative fees that attach, and the high hourly rate paid to one or more arbitrators. No party is more of a "visiting team" than the public owner when pleading its case to the likely arbitrator(s): an architect, engineer, general contractor, construction manager, or attorney who represents them in private practice. Rarely are city or county attorneys represented on arbitrator pools and if they are, the other parties will strike them. A court's ability to schedule and decide construction cases will of course vary by state, but it allows all parties in one proceeding, is less costly in added fees, will probably be in the owner's city or county and will typically allow for mediation by a competent, party-selected mediator at the appropriate time in the proceeding. Further, if the dispute goes to trial, the judge is far more likely to have an understanding of the unique working aspects of a city, township or county in a construction case. As we know, the bench often includes former public sector attorneys. Litigation has the additional benefit of broad discovery of parties, experts, and third parties that is generally very limited or nonexistent in arbitration.