

OWNER-CONTRACTOR FORM AGREEMENTS —AN OWNER'S PERSPECTIVE (WITH SAMPLE INSERTS)



ANDY JACOBSON is a partner in the Real Estate Group at Maslon LLP in Minneapolis, Minnesota. His practice covers a broad range of commercial real estate issues, with particular focus on commercial and retail leasing, land use and telecommunications, as well as design- and construction-related agreements. Andy is a frequent author and speaker on real estate subjects and teaches Real Estate Transactions at the University of St. Thomas School of Law. A graduate of Boalt Hall School of Law at the University of California, Berkeley, Andy is also a registered architect, having earned his Bachelors of Architecture from California Polytechnic State University, and practiced architecture prior to attending law school. Andy is a member of both the Minnesota and California bars and can be reached at andy.jacobson@maslon.com.

This is the second of two articles that address common owner concerns in form design and construction contracts. The first article (recently published in *Practical Real Estate Lawyer*) dealt with architectural services agreements. This companion article focuses on construction contracts. For those of you who have read my initial article, the next three paragraphs will be a déjà vu experience. However, I want to provide a similar introduction for both articles for the benefit of those who may end up reading only one of the two.

Representing an owner in connection with form design and construction agreements, particularly industry group produced forms (e.g., AIA, ConsensusDocs, EJCDC, etc.), raises certain challenges. This is especially true when the form agreements are voluminous (e.g., the combination of an AIA A101 and A201 is often close to 100 pages, not including exhibits), but the scope or nature of the project does not justify extensive and detailed modifications to the form agreements. Additionally, unlike many other types of contracts that we deal with in real estate, industry group produced form design and construction contracts often can only be amended using proprietary software. Unless one deals with the particular industry group's family of form agreements with some regularity, it is often not worth the expense or time to acquire that proprietary software. However, relying on the architect or contractor to make changes to the form agreements creates its own set of schedule and quality control issues. An owner's counsel may effectively address these challenges by preparing a stand-alone addendum that modifies and overrides the applicable form agreement, as needed. Because of the prevalent use of industry group produced form agreements in

the design and construction area over the years (the AIA form agreements have been around for over 100 years), modifying these form agreements through a stand-alone addendum has become a fairly accepted practice for owners' counsel. Having a good starting point for such an addendum provides value and quality of product for both attorneys and their clients. Using an addendum to modify industry form design and construction agreements does not eliminate the need for attorney review of the form agreements but should expedite that process. One must be cautious in reviewing the form documents, as architects and contractors will often modify initial drafts of those documents in ways which, not surprisingly, are not beneficial to the owner.

Currently, the two most common families of form design and construction agreements are the AIA (American Institute of Architects) forms and the ConsensusDocs (formerly known as AGC)(Association of General Contractors)) forms. The history of the AIA, ConsensusDocs and other industry group forms is the subject of a number of other available articles. While there are important distinctions between the AIA and ConsensusDocs forms, the most commonly used groups of forms, these two families of documents have much in common and address many issues in the design and construction process either in the same or in a very similar manner. I would caution owners' counsel to be particularly careful with any project that uses forms from more than one form family (e.g., an AIA owner-architect agreement is used in conjunction with a ConsensusDocs owner-constructor general contractor agreement). Each family of documents is meant to be compatible with other agreements in the same

family, so using documents from competing families can create problematic inconsistencies and gaps. For example, one noteworthy difference between the two main competing families of documents is that the AIA documents place significant responsibility on the architect to administer the owner-architect relationship, while the ConsensusDocs shift some of that responsibility to the owner.

This article is part of a long tradition of continuing legal education articles and seminars addressing issues with form design and construction agreements. As with any working attorney's personal form files, I have drawn from some of my "go to" cut-and-paste language from a broad range of sources, ranging from CLE materials to articles to provisions I picked up from other attorneys on past transactions. I have modified and customized most of the language over time and crafted my own individualized patchwork quilt of provisions. While I can claim original authorship of many of these provisions (although at this point I am not sure I could identify them all), many others are evolved versions collected from an array of sources over my 25 years of practice in California and Minnesota. As with any document of this type, these provisions are a constantly evolving work in progress. Just in the course of writing this article, I have added new provisions that were not previously in my form documents. My hope is that others can use some or all of the suggested provisions in this article as additional patches to their existing forms or as a starting point for their own evolving quilt of cut-and-paste provisions.

Below is a discussion of issues that owners' counsel often find are not adequately addressed in the form agreements for contractor services. For each issue, I provide one or more sample inserts that address some of a typical owner's concerns. Each provision can be used either as part of an addendum or inserted directly into the body of a form agreement. While fairly comprehensive, the list below is meant as a starting point only and is not intended to be exhaustive. Many projects may have additional and/or unique issues that the owner's counsel will need to address. The terminology in the discussion and sample inserts below (e.g., architect, owner, contractor, work, project) is generally consistent with the terminology used in the AIA family of form documents. When using other families of forms, make sure that the capitalized terms used in your addendum track with the defined terminology in the form agreement. For example, the contractor is

referred to as "Contractor" in AIA documents and as "Constructor" in ConsensusDocs forms. Some of the provisions below may overlap with provisions in a particular AIA or ConsensusDocs form document and thus may not always apply. However, the provisions that may overlap with the form documents will often be necessary when dealing with an architect's or contractor's custom form, as those custom forms are usually significantly less detailed than the AIA or ConsensusDocs forms and often omit provisions addressing some important owner concerns.

TERMINOLOGY AND PRIORITY

When using an addendum to modify a form construction agreement, it is generally a good idea to use the same defined terms as used in the form document. Because design and construction form agreements are filled with defined terms and terms of art, maintaining consistent terminology will help avoid potential confusion created by competing terms. Avoiding redefining terms can also cut down on the bulk of an addendum. Any addendum should also make clear that where there is a conflict between the provisions of the form agreement and the addendum, the addendum prevails.

SAMPLE INSERT:

Capitalized terms shall have the meanings set forth in the Form Agreement, unless otherwise defined in this Addendum. The Form Agreement, as modified by this Addendum, is collectively referred to as the "Agreement." To the extent that any provision of this Addendum should conflict with the Form Agreement, the provisions of this Addendum shall prevail.

COORDINATION OF DOCUMENTS

One must be cautious with coordination issues when a project involves use of form agreements from different sources. For example, it is not uncommon to see a project start with an agreement for architectural services based on AIA forms but then use a ConsensusDocs form for the construction contract. Most architects push to use AIA based forms for the architectural services agreement, and it is rare to find an architect that is interested in (or will agree to) use the owner-architect agreement included in the ConsensusDocs family. Typically, the architectural services agreement is in place before the construction contract. To avoid being in a position where the owner is caught between families of forms,

when applicable, it is prudent to include language in the construction contract addressing this issue.

SAMPLE INSERT:

Contractor acknowledges that Owner and Architect have used an amended _____ for the Owner-Architect agreement and that nothing in this Agreement shall create any liability by Architect to Contractor, beyond what is expressly provided for in the Owner-Architect agreement.

ROLE OF THE OWNER

Related to the issue of competing families of forms is the issue of the role the architect will play in construction administration. Most form construction agreements (particularly the AIA forms) envision a significant role for the architect in the construction administration process. One significant difference between the AIA and ConsensusDocs forms is the amount of authority and control the architect has during construction. In some instances an owner may elect to do all or a significant portion of the construction administration itself, often through a construction manager working for the owner. The sample insert below deals with this situation.

SAMPLE INSERT:

Notwithstanding the use of the term “Architect” in this Agreement, the Owner shall have the right upon written notice to Contractor to substitute itself or a designated third party into the role of the Architect for purposes of the construction administration authority and tasks related to the Work referenced in this Agreement. Contractor acknowledges that such substituted party may not be a licensed architect and that Owner is not holding itself or any such substituted party out as a licensed architect.

OWNER AS TENANT

Both the AIA and ConsensusDocs, as well as most contractors’ custom-drafted agreements, are set up with the contractor’s client designated as the “owner.” However, many businesses do not own the property they occupy and instead are tenants under commercial leases. The insert below can be used to address this situation by removing any type of implied representation that the client owns the property involved, notifying the contractor of the existence of the lease and incorporating by reference, as applicable, the provisions of

the lease pertaining to alterations, modifications and other construction.

Sample Insert: Notwithstanding the use of the term “Owner” in this Agreement, Contractor acknowledges that Owner does not own the Project Site. Instead, Owner leases the Project Site from _____ (“Landlord”) pursuant to a lease between Owner (as tenant) and Landlord (as landlord) dated _____ (the “Lease”). Contractor has been provided with a redacted copy of the Lease and Contractor acknowledges that all of the provisions within the Lease that pertain to the design of alterations and improvements shall apply to Contractor and be deemed to be incorporated into this Agreement by this reference. Wherever Contractor is required under this Agreement to indemnify Owner or to name Owner as an additional insured, in that context the word “Owner” shall be deemed to include Landlord, Landlord’s property manager, Landlord’s mortgagee and other parties reasonably designated by Landlord, as permitted under the Lease.

APPLICABLE RESTRICTIONS

Similar to the situation discussed above where the “owner” is a tenant, the project site (commercial or residential) may be part of a common development and subject to recorded covenants, conditions and restrictions that may include pertinent parameters applying to construction activities (e.g., restrictions on work during certain hours, rules as to storage and trash, etc.) that may affect the price and/or schedule of the work. In these situations, it is prudent to disclose these requirements to the contractor (and provide the contractor with copies of the relevant documents) so the contractor can properly account for those requirements in its logistics, scheduling and pricing for the work.

SAMPLE INSERT:

Contractor acknowledges that the Project Site is subject to certain recorded covenants, conditions and restrictions including _____ (the “Restrictions”). Contractor has been provided with a copy of the Restrictions and Contractor will take into account and abide by the requirements set forth in the Restrictions that pertain to the Work under this Agreement.

CONTRACTOR REPRESENTATIONS

An owner will typically assume that a contractor is qualified and able to perform the required work on the project. However, it still is prudent to include some basic express representations from the contractor in the addendum.

SAMPLE INSERT:

Contractor represents and warrants to Owner that: (a) Contractor is financially solvent, able to pay its debts as they mature and possesses sufficient working capital (subject to payments by Owner required under this Agreement) to complete the Work required to be performed of it under this Agreement; (b) Contractor is able to furnish (directly or by subcontract or through vendors) any plant, tools, materials, supplies, equipment and labor necessary to complete the services required of Contractor under this Agreement and Contractor has sufficient experience and competence to perform the Work under the Agreement; and (c) Contractor is authorized to do business in the State of _____ and properly licensed (to the extent required by law) by all necessary governmental authorities having jurisdiction over the Work.

NONDISCLOSURE REQUIREMENTS

In connection with some projects, the owner may have privacy issues and/or need to protect certain proprietary information. In those situations, it is prudent to include either a nondisclosure provision or a requirement that the contractor and certain subcontractors execute separate nondisclosure agreements satisfactory to the owner. Another approach, which should eliminate future discussions as to what constitutes a reasonable nondisclosure agreement, is to include a sample form nondisclosure agreement as an exhibit to the addendum and have the parties agree to use that form.

SAMPLE INSERT:

Where Contractor's services require Owner to disclose to Contractor or Contractor's subcontractors or consultants information of a proprietary or confidential nature, Owner shall have the right to require Contractor and/or such subcontractor(s) or consultant(s) to execute a commercially reasonable nondisclosure agreement for the benefit of

Owner, prior to Owner's release of such proprietary or confidential information.

RETROACTIVE COVERAGE

Construction projects are sometimes well under way before the parties complete and execute the formal construction contract. In those situations, the initial work is often performed under a work order or preliminary services agreement. Where this situation arises, it is important roll all of the work into the construction contract. One way to handle this issue is to retroactively date the construction contract to the date when the contractor first started to perform work on the project. The other approach is to date the construction contract as of the date it is executed but include a provision similar to the one below that retrospectively wraps into the agreement the work performed on the project prior to execution of the formal construction contract.

SAMPLE INSERT:

Any Work performed by Contractor on the Project prior to the date of this Agreement shall be deemed to have been performed by Contractor pursuant to this Agreement, and this Agreement shall supersede any preliminary services or similar agreements that may have been previously executed by the parties with respect to such portions of the Work.

PROJECT CONDITIONS

One of the common challenges to owners in construction contracts, particularly lump sum contracts, is when a contractor makes a claim for additional compensation due to unforeseen conditions. The sample insert below is meant to reduce the basis for such contractor claims.

SAMPLE INSERT:

Contractor acknowledges that it has visited and examined the Project Site, examined the physical, legal, and other conditions affecting the Work and is fully familiar with all of the conditions affecting the same. Contractor specifically represents and warrants to Owner that it has, by careful examination, satisfied itself as to: (a) the nature, location, and character of the Project and the Project Site, including, without limitation, the surface and sub-surface conditions of the site and all structures

and obstructions thereon and thereunder, both natural and man-made, and all surface and sub-surface water conditions of the site and the surrounding area; (b) the nature, location, and character of the general area in which the Project is located, including without limitation, its climatic conditions, available labor supply and labor costs, and available equipment supply and equipment costs; and (c) the quality and quantity of all materials, supplies, tools, equipment, labor, and professional services necessary to complete the Work in the manner and within the cost and time frame required by the Contract Documents. Contractor recognizes the extra degree of care required under the site construction circumstances with respect to safety, protection of pedestrians, cleanliness of the site, health and other laws, and protection of existing utilities, adjacent tenant spaces, common areas and property. In arriving at the Contract Sum and the Contract Time, Contractor has, as an experienced and prudent contractor, exercised its best judgment and expertise to include the impact of such circumstances upon the Contract Sum and the Contract Time.

ADJACENT PROPERTIES

Construction rarely occurs in isolation. When a project is adjacent to other improvements, it is prudent to expressly require the contractor to take adequate precautions to protect those adjacent improvements from damage caused by the contractor's work. This helps the owner be a good neighbor (or tenant) and reduces the risks of complaints and/or claims from adjacent property owners.

SAMPLE INSERT:

Contractor shall also be responsible for all reasonable measures necessary to protect any property and improvements adjacent to the Project Site. Any damage, to the extent caused by Contractor (including its subcontractors or material suppliers), to such property or improvements shall be promptly repaired by Contractor, at Contractor's expense and cost.

PROTECTION OF THE WORK

Occasionally, events will necessitate placing a construction project on hold. While such delays raise schedule and cost issues, the owner also wants to make sure that

the project site is secured during these periods and that completed construction and/or materials stored on site are adequately stored and protected.

SAMPLE INSERT:

When all or a portion of the Work is suspended for any reason, Contractor shall securely fasten down all coverings and other protections necessary to protect the Work and the Project Site from injury by the elements or otherwise.

SCOPE OF THE WORK

The design and construction process rarely has the precision of watchmaking, and it is common for there to be inconsistencies and ambiguities in the various components of the "contract documents" (i.e., plans, specifications, contracts, etc.). Issues can arise regarding the components of the work expressly set forth in the construction documents; however, it is more common for issues to arise regarding items that are implied or necessary to accomplish the items expressly set forth in the construction documents. The provisions below are meant to provide the contractor with guidance as to how to address inconsistencies, errors and omissions that it encounters in the contract documents.

SAMPLE INSERT:

In the event of inconsistencies within or between parts of the Contract Documents, or between the Contract Documents and applicable standards, codes and ordinances, Contractor shall: (a) provide the better quality or greater quantity of Work, and/or (b) comply with the more stringent requirements. If any errors, inconsistencies, or omissions in Contract Documents are recognized or reasonably should have been recognized by Contractor, Contractor shall be responsible for promptly notifying Owner and Architect in writing of such error, inconsistency, or omission before proceeding with the Work. If Contractor fails to give such notice and proceeds with such Work, it shall correct any such errors, inconsistencies, or omissions at no additional cost to Owner.

SAMPLE INSERT:

Contractor, as part of the Work, will provide all materials, fixtures and materials, whether specifically delineated in the Construction Documents, which are reasonably inferable and part of the

normal or customary construction for the project delineated in the Construction Documents.

DESIGN/BUILD COMPONENTS

Often, at least some components of the contractor's work on a project will be constructed on a design-build basis. Common examples of design-build components include the mechanical aspects of the work (e.g., HVAC) and other building systems. The provision below is meant to clarify the standard of care required for the design component of those design-build items.

SAMPLE INSERT:

The design portion of any design-build components of the Work performed by Contractor or its subcontractors will be performed pursuant to the standard of care exercised by other similarly situated, licensed (if required by law) designers. Owner shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications and/or approvals performed by any design professionals under Contractor's control.

SUBCONTRACTORS & MATERIAL SUPPLIERS

Except in the case of small scale projects and some types of specialty construction, the general contractor will likely have several subcontractors performing various portions of the work (e.g., plumbing, HVAC, excavation, electrical, etc.), and almost every project will involve at least some material suppliers. While most form construction contracts generally address the issue of material suppliers and subcontractors, below are several sample inserts to better clarify the general contractor's obligations with respect to any material suppliers and subcontractors.

SAMPLE INSERT:

Contractor has the responsibility to ensure that all material suppliers and subcontractors, as well as their respective agents and employees adhere to the Contract Documents, and that they order materials on time, taking into account the current market and delivery conditions and that they provide materials on time. Contractor shall coordinate its Work with that of all others on the Project including deliveries, storage, installations, and construction utilities. Contractor shall be responsible for the space requirements, locations, and routing of its equipment. In areas and

locations where the property and most effective space requirements, locations, and routing cannot be made as indicated, Contractors shall meet with all others involved, before installation, to plan the most effective and efficient method of overall installation. Contractor acknowledges that it is Contractor's responsibility to hire all personnel for the proper and diligent prosecution of the Work and Contractor shall use its best efforts to maintain labor peace for the duration of the Project. In the event of a labor dispute within or among its own labor force and/or that of Contractor's subcontractors, Contractor shall not be entitled to any increase in the Contract Sum or GMP, as applicable.

SAMPLE INSERT:

Contractor certifies that any part of the Work performed for Contractor by a Subcontractor shall be pursuant to a written subcontract between Contractor and such Subcontractor, which shall be prepared on a form of subcontract satisfactory to Owner. Each such Subcontract shall, where the context so requires, contain provisions that: (a) waive all Subcontractor's rights against Owner for damages caused by fire or other perils covered by the insurance described in the Contract Documents; (b) require the Subcontractor to carry and maintain insurance coverage in accordance with the Contract Documents or such lower coverage as Owner may approve, and to file certificates of such coverage with Contractor; (c) require the Subcontractor (to the extent required by this Agreement) to submit certificates and waivers of liens for work completed by it and by its sub-subcontractors, and material suppliers as a condition to the disbursement of the progress payment next due and owing; (d) require that each Subcontractor continue to perform under its subcontract in the event this Agreement is terminated and Owner shall take an assignment of said subcontract and request such Subcontractor to continue such performance consistent with this Agreement; and (e) provide that Owner and Owner's lender(s), if any, are express intended third-party beneficiary of such subcontract.

SUBSTITUTIONS

The larger and more complicated a project is, the more likely that at least some materials, fixtures or other items specified for the project will not be available

in a timely manner and a substitute will need to be selected. Because the contractor is the one maintaining the critical path schedule for project completion, the contractor is typically the one that first discovers the problem and proposes a solution (e.g., fixture A is on backorder, while fixture B is very similar and available now). Owners want to make sure that when substitutions occur, the owner is not surprised by aspects of the contractor's proposed substitute.

SAMPLE INSERT:

Owner and Architect will consider (but not be required to approve) a formal request for the substitution of products in place of those specified in the Contract Documents provided that by making requests for substitutions, Contractor: (a) represents that Contractor has personally investigated the proposed substitute product and determined that it is equal or superior in all respects to that specified; (b) represents that Contractor will provide the same warranty for the substitution that Contractor would have for that specified; and (c) will coordinate the installation of the accepted substitute, making such changes as may be required for the Work to be complete in all respects.

DESIGNATED PROJECT MANAGER

There is typically a personal element to the relationship between the owner and contractor. Sometimes this arises from how the contractor sells itself to get the project (e.g., introduces the owner to the potential project manager). Once the owner has met and approved a project manager, most owners want to minimize situations where the project manager will be changed, particularly where the contractor assigns a preferred project manager to a different project. While not all changes of project managers can be prevented or controlled, the provision below narrows the circumstances and procedures for the contractor to substitute the project manager.

SAMPLE INSERT:

Owner and Contractor agree that _____ shall be Contractor's project manager on the Project for the duration of the Work, and that Contractor shall not change such project manager without the prior written approval of Owner, which approval shall not be unreasonably withheld. If such project manager is no longer capable of

performing in their required capacity, Owner and Contractor shall agree on a mutually acceptable substitute project manager.

APPLICATIONS FOR PAYMENT

Many owners prefer to be more prescriptive than the basic form construction agreements with respect to the requirements for applications for payment. The inserts below cover some of the additional items often beneficial to the owner, including requiring a certification from the contractor (essentially, a type of estoppel certificate) with each application for payment. Note that a number of states (e.g., California) have statutes that specifically address the timing of progress payments and final payments, along with the permitted parameters for the owner to withhold (in whole or part) payments due to the contractor. As a result, it is always prudent to review those statutes in connection with use of the first insert below.

SAMPLE INSERT:

Each application for payment ("Application for Payment") by Contractor shall be accompanied by the following, all in form and substance satisfactory to Owner: (a) an updated sworn construction statement; (b) duly executed waivers of mechanic's and material supplier's lien rights, establishing payment or satisfaction of all such obligations through the date of the previous payment; (c) such other information or documentation as may be reasonably required by Owner; and (d) a Contractor's Certificate in the form of Exhibit A to this Addendum. Owner may refuse to make payment on any Application for Payment for any default by Contractor, provided that such withholding of payment does not unreasonably exceed Owner's estimate of the amount of potential damages to Owner as a result of any such default by Contractor, as reasonably determined by Owner. Owner shall not be deemed in default by reason of withholding payment while any of such defaults by Contractor remain uncured. If Contractor disputes Owner's determination with regard to the proper amount of such withholding, Contractor shall nevertheless expeditiously continue the prosecution of the Work.

SAMPLE LANGUAGE FOR CONTRACTOR'S CERTIFICATE:

Contractor represents and warrants to Owner, as of the date of this certificate, that : (a) the Agreement

is in full force and effect and free from default, and except for changes approved by Owner in writing, there have been no changes in the scope or time of performance of the Work or materials ordered or contracted for, nor any changes in the Contract Sum; (b) Contractor agrees to pay, out of funds to be received by it with respect to the subject advance, all sums due and payable to said subcontractors, laborers and material suppliers for labor, materials, and services in connection with the Project; (c) there are no mechanic's or material supplier's liens affecting the Project outstanding as of the date hereof, all due and payable bills with respect to the Work have been paid to date or are included in the amount requested for the subject advance, and, except for such bills not paid and so included, there is no basis for the filing of any mechanic's or material supplier's liens on the Project; (d) to the extent required under the Agreement, waivers of lien have been obtained from all subcontractors and material suppliers with respect to that portion of the Work under the Agreement for which the undersigned has previously received payment; (e) all construction to date has been performed in accordance with the Contract Documents, except as may have been expressly approved by Owner in writing; and (f) an up-to-date Construction Schedule has been provided to Owner and no notice has been given to Owner of a claim for an adjustment to the Contract Time other than claims, if any, made in conformity with the provisions of the Agreement.

RETAINAGE

Many form construction agreements address retention. However, a common approach is for the retention to only apply to the initial 50% of payments. Other retention provisions in form construction agreements provide for early release of portions of the retention as portions or phases of the project are completed. The provision below provides for a more traditional retainage approach. One should use caution with respect to retention, as a number of states have adopted statutes that limit the amount of retention from payments. For example, the maximum retention allowed by statute is five percent (Minn. Stat. § 337.10).

SAMPLE INSERT:

Owner shall have the right to hold back _____ percent (___%) of any amount otherwise payable

to Contractor on each Application for Payment as retainage. Such retainage shall be released to Contractor, net of any amounts that Owner is entitled to retain under this Agreement, in connection with the final payment from Owner to Contractor under this Agreement.

COST OF THE WORK

Where a contractor is getting compensated, in whole or part, based on the cost of its work, one of the key issues in the construction agreement is to clearly delineate what the contractor can properly include as components of the "cost of the work." The sample insert below includes some of the most common suggested express exclusions, but that list is not intended to be all-encompassing. I encourage anyone who uses this sample insert to expand and modify this list appropriately for their respective practice. In past construction contracts, I have seen exclusion lists that include five items and ones that list more than 30 exclusions.

SAMPLE INSERT:

In the event that Contractor is to be compensated on a cost plus basis for any component of the Work, the Cost of the Work, as defined in this Agreement, shall include only those costs scheduled, defined or stated in this Agreement, less all discounts, rebates and salvages that shall be taken by Contractor. Furthermore, notwithstanding the breakdown or categorization of costs to be reimbursed pursuant to this Agreement, there shall be no duplication in payment of any item in the event any particular item can be characterized in more than one category of permitted costs under this Agreement. Contractor shall promptly give notice to Owner of any available cash discounts so that Owner is able to make timely decisions on making payments therefore to Contractor or depositing funds with Contractor so that Owner may take advantage of such cash discounts. In addition, the Cost of the Work shall not include any of the following items: (a) salaries and other compensation of the Contractor's personnel stationed at the Contractor's principal office or offices other than the Project Site office; (b) expenses of the Contractor's principal office and offices other than the Project Site office, except for courier services, expressage, reproduction of Contract Documents, and customary petty cash items incurred in relation to the performance of the Work; (c) the Contractor's

overhead and general expenses; (d) Contractor's cost of capital expenses, including interest on the Contractor's funds employed for the Work; (e) rental costs of machinery and equipment, except as provided in the Form Agreement; (f) any cost not specifically and expressly described in the Form Agreement as a permissible component of the Cost of the Work; (g) taxes levied and assessed against the Contractor for property, materials or equipment belonging to the Contractor or any of the Subcontractors; (h) any deductibles paid as a result of an insurance claim under policies carried by Contractor or any of the Subcontractors or Suppliers; or (i) costs arising from or due to the negligence of Contractor, any Subcontractor or any Supplier.

FINANCIAL ACCOUNTABILITY

Even for construction projects that use a stipulated price contract, at least some aspects of the work may be accomplished on a time-and-materials basis. This is particularly true with certain types of change orders. As with any agreement where one is charged on a time and materials basis, it is good to recall Ronald Reagan's famous line from his Reykjavik summit with Mikhail Gorbachev – "Trust, but verify."

SAMPLE INSERT:

In the event that Contractor is to be compensated on a cost plus basis for any component of the Work, Owner (or its representative) shall have the right to inspect Contractor's books and records pertaining to such portion of the Work, and Contractor shall maintain such books in accordance with prudent industry practice and generally accepted accounting principles. If Owner's (or Owner's representative's) review of Contractor's books and records indicates that Contractor has requested total payment under this Agreement that is more than two percent (2%) greater than the amount properly permitted under this Agreement, in addition to refunding to Owner any overcharges, Contractor shall be responsible for the costs of such audit or inspection and Owner shall have the right to offset such costs as a credit against any amounts owing to Contractor. In addition, if such inspection or audit discloses that Owner has paid for any element of the Work that is not a Cost of the Work, an appropriate adjustment shall be made to rectify such overcharge.

SCHEDULE & DELAYS

Next to price and quality, issues pertaining to the construction schedule and timely completion are some of the most critical aspects of a construction contract from an owner's perspective. Most owners have a keen interest in being kept up-to-date with respect to the construction schedule and managing the impact of delays (both monetary and time). Delays in construction often result in claims by the contractor for additional compensation and disputes over both the cause and the actual impact of particular delays. Below are a couple of sample inserts that address some of the issues pertaining to the project schedule and delays.

SAMPLE INSERT:

The "Project Schedule" shall indicate the proposed starting and completion dates for the various subdivisions and components of the Work as well as the totality of the Work. The Project Schedule shall be updated by Contractor every month and such updated Project Schedule shall be submitted to Owner with Contractor's monthly Applications for Payment. Each version of the Project Schedule shall contain a comparison of actual progress with the estimated progress for such point in time stated in the original schedule. If any Project Schedule submitted by Contractor sets forth a date for Substantial Completion for the Work beyond the Date of Substantial Completion established in this Agreement (as the same may be extended as provided in this Agreement), then Contractor shall submit to Owner for its review and approval a narrative description of the means and methods which Contractor intends to employ to expedite the progress of the Work to ensure timely completion of the various phases of the Work as well as the totality of the Work. To ensure such timely completion, Contractor shall take all necessary action including, without limitation, increasing number of personnel and labor on the Project and implementing overtime and double shifts; provided, however, that Contractor shall not be entitled to an adjustment in the Contract Sum as a result of such actions.

SAMPLE INSERT:

Notwithstanding the provision of the Form Agreement, Contractor shall not be entitled to any extensions in the Contract Time or equitable adjustments to the Contract Price unless

the cumulative impact of delays exceed thirty (30) days. Normal adverse weather typical for the _____ area, including heavy rain and snow shall not be deemed as causing any delays for the Project.

LIQUIDATED DAMAGES & EARLY COMPLETION BONUSES

Issues of liquidated damages and early completion bonuses are tied directly into an owner's concerns regarding timely completion of a project. Most industry group form construction agreements will include at least the option to include a liquidated damages provision. Such provisions are less likely to appear in contractor-generated form agreements unless the parties have specifically agreed to liquidated damages prior to the contractor preparing the initial draft construction agreement. Liquidated damages provisions in construction contracts are enforceable, provided that they are set forth in the contract and the amount of the liquidated damages represents a reasonable estimate by the parties (at the time of contract) as to the owner's anticipated damages, rather than an amount set to punish the contractor for late completion. Liquidated damages can benefit and burden both the owner and the contractor. Most owners use liquidated damages to encourage timely completion of a project, but owners must be careful not to ratchet up the "encouragement" to the point of constituting an unenforceable penalty. From a contractor's perspective, liquidated damages define the contractor's risk exposure for late completion and are likely preferable to the risk of unknown damages (particularly consequential) from a late completion. Owners should note that when a contractor knows the owner will be looking for liquidated damages in the contract, the contractor is likely to add some extra padding to the schedule and/or contract price. Owners should not be tempted to try to include liquidated damages with an opt-out allowing the owner to seek actual damages instead. Such provisions generally render the liquidated damages provision unenforceable, as they undercut one of the predicates for liquidated damages (i.e., that actual damages in the event of a contractor delay would be very difficult to calculate). Related to the liquidated damages are early completion bonus provisions. While a liquidated damages provision provides for a reduction (typically on a per diem basis) in the contract price for delays beyond a specified date, early completion bonuses provide for additional compensation to the contractor for early completion. Early completion bonuses can also be on

a per diem basis or based on a certain key target date. While conceptually related, use of a liquidated damages provision does not imply nor legally require use of a counterpart bonus provision for early completion.

SAMPLE INSERT (LIQUIDATED DAMAGES):

Contractor acknowledges that completion of the Work in a timely manner is of critical importance to Owner and that Contractor's failure to complete the Work within _____ (__) days of the commencement of the Work [Alternatively: Specify a hard, required completion date] will cause Owner to suffer substantial damages, but it is impractical or extremely difficult to fix the amount of such damages. As a result, the parties agree that a reasonable measure of the damages to be sustained by Owner during the period of any delay beyond such ___-day period [Alternatively: List the hard, required completion date] (as such period may be modified by Change Order in accordance with this Agreement) shall be _____ Dollars (\$____.00) for each such day of delay. Any amounts calculated under this provision may be deducted from the amounts otherwise due to Contractor under this Agreement. In the event that the amount then owing to Contractor under this Agreement is insufficient to cover the full amount of such liquidated damages, then Contractor shall promptly pay such amounts to Owner upon demand.

SAMPLE INSERT (EARLY COMPLETION BONUS):

In the event Contractor is able to achieve Substantial Completion of the Work prior to _____ (__) days of the commencement of the Work [Alternatively: Specify a hard, target completion date] (the "Target Substantial Completion Date"), then Contractor shall be entitled to an increase in the Contract Sum equal to _____ Dollars (\$_____) for each day prior to such Target Substantial Completion Date and the actual date of Substantial Completion. The Target Substantial Completion Date shall not be subject to extension due to force majeure or any other reason, unless otherwise expressly agreed to by Owner and Contractor.

CONSEQUENTIAL DAMAGES

Most form construction agreements include a bilateral waiver of consequential damages. Of course, to the

extent that consequential damages should arise out of a construction contract, the owner is the one that will most likely incur significant consequential damages. These damages arise in two contexts: (a) the owner's lost productivity and profits arising from delayed completion, and (b) a forced closure of operations or a significant impairment in operations arising from a design or construction defect that is discovered after substantial completion. As a result, while appearing evenhanded, any waiver of consequential damages will almost always be of significantly more benefit to the contractor. On the other hand, contractors generally have an inherent fear that potential consequential damages could dwarf the profit the contractor will make from a project, thus adding substantial risk to the contractor's side of the equation. This fear has been engendered, in part, by several well-publicized cases over the years, including one involving the award of substantial consequential damages against a construction manager due to late completion of casino projects (see, e.g., *Perini Corporation v. Greate Bay Hotel & Casino*, 610 A.2d 364 (N.J. 1992)). The threshold issue for an owner with respect to consequential damages is whether to consent to a full waiver or negotiate for some other type of limitation on consequential damages. Below are proposed inserts that address several different approaches to this issue. Where a construction contract includes a full or partial waiver of consequential damages, there is still an issue as to what damages are properly categorized as consequential. Direct damages are often defined as damages that arise naturally or ordinarily out of a breach of contract. Consequential damages, on the other hand, are often defined as damages arising from special circumstances that are not ordinarily predictable. However, the line between what are considered direct versus consequential damages is not always clear and can vary from state to state. In the end, the distinction is a question of law that must be determined by a judge in the context of a specific case. As a result, to the extent an owner agrees to waive (in whole or part) consequential damages, it can make sense to insert language into the contract that better defines what the parties consider to constitute consequential damages for purposes of the waiver. When an owner is considering whether to push to delete a mutual waiver of consequential damages provision, it is important to keep in mind the interplay between liquidated damages and consequential damages. Liquidated damages are intended to compensate an owner for damages arising from a

delay and thus often will include a component of consequential damages. This raises two issues. First, if the owner is entitled to liquidated damages due to a delay in completion, then the owner will likely be deemed to have waived any consequential damages arising from delayed completion, except to the extent those potential consequential damages were a component of the estimated damages used to derive the liquidated damages amount. Finally, if the owner agrees to waive consequential damages, it is important to make sure that waiver does not apply to the liquidated damages.

SAMPLE INSERT:

Any provision in the Form Agreement pertaining to a general waiver of consequential damages shall not apply.

SAMPLE INSERT:

For purposes of this Agreement, any waiver of "consequential damages" shall only be deemed to apply to consequential damages that, in the aggregate, exceed _____ percent (____%) of Contract Sum.

SAMPLE INSERT:

For purposes of this Agreement, the term "consequential damages" shall be limited to _____.

SAMPLE INSERT:

Any waiver of consequential damages set forth in the Form Agreement shall not be deemed to negate or waive any liquidated damages provisions set forth in this Agreement.

SHARED SAVINGS

Related to an early completion bonus is the concept of shared savings. This type of provision can arise in connection with construction contracts that include allowances or a GMP. From an owner's perspective, this type of provision provides the contractor with incentive not to maximize the cost of a project. For example, imagine a cost plus contract with a \$5,000,000 GMP where the contractor's fee is 15%. If the project could be completed for \$4,500,000, the owner would save \$500,000, but the contractor would lose \$75,000 of the contractor's fee. While one would hope the contractor would do the right thing and achieve the savings, the contract does not provide incentive for the contractor to complete the work for less than the GMP. In these

circumstances, some owners will propose providing the contractor with a bonus that will essentially compensate the contractor for some percentage of any savings (often equal to or a bit more than the contractor's fees related to any savings). Of course, if a construction contract contains a savings provision, it creates an incentive for the contractor to be more liberal in determining the allowances or GMP to which the provision will apply. As a result, owners will sometimes wait to raise the issue of a shared savings provision until after the applicable allowances or GMP have been determined. Below is a sample shared savings provision that is set up to apply to a GMP scenario, which also could easily be adapted to apply to the context of allowance items.

SAMPLE INSERT:

In the event that the final Contract Sum for the Work is less than the GMP, Contractor shall be entitled to a shared savings bonus equal to _____ percent (___%) of the difference between the final Contract Sum (net of this shared savings provision) and the GMP.

MECHANIC'S LIENS

Most form construction agreements address the issue of mechanic's lien waivers. Mechanic's lien laws vary significantly from state to state, and many states have very prescriptive requirements that must be satisfied with respect to filing a valid lien and what constitutes a valid lien waiver. Owners' attorneys should always review this aspect of a construction contract and make sure that the requirements in the construction contract for mechanic's liens and lien waivers comply with applicable state law. For example, some states have statutorily prescribed forms of lien waiver. Liens filed by the general contractor are typically not an issue, but liens filed by one of the subcontractors or material suppliers can create a thorny problem for the owner, with the owner potentially getting caught up in payment disputes between the general contractor and its subcontractors and/or material suppliers. If such a lien is filed, it is prudent for an owner to include a provision that gives the owner the ability to address and defend against an improperly filed mechanic's lien.

SAMPLE INSERT:

If at any time during the progress of the Work, or before final payment is made, any lien or claim of lien is filed or threatened for a portion of the Work that Contractor has been paid for by Owner,

Owner shall have the right to withhold from any future payment due Contractor an amount sufficient to discharge any and all such liens or claims. Contractor must furnish releases in settlement of these liens or claims satisfactory to Owner in order to obtain the withheld amount. If Contractor has not settled or provided Owner with a bond against the liens or claims within a reasonable time, not to exceed fifteen (15) days from the date any such lien or claim made, Owner may, at its election, discharge such liens or claims out of the withheld amount. In the event that Contractor elects to bond against a lien, the amount of such bond shall equal 150% of the amount of the lien claim.

INDEMNITY

Indemnity provisions in construction contracts are always a hot button topic for contractors and, where a reciprocal indemnity is included in the form agreement (as in the ConsensusDocs form), for owners. The allowable scope and enforceability of an indemnity provision can vary significantly from state to state. As a result, with any indemnity provision, it is always prudent to include the qualifier "to the fullest extent permitted by law" so that the whole indemnity provision is not tossed aside if its scope exceeds what is permitted under applicable state law. Indemnity provisions raise a number of issues. There are also many different approaches and schools of thought as to indemnity provisions. As a result, I recommend that anyone using this article as a starting point for a menu of modifications to standard form construction agreements invest some time customizing the indemnity-related provisions.

SAMPLE INSERT:

In addition to (and not in lieu of) any other indemnity obligations of Contractor under this Agreement, to the fullest extent permitted by law, Contractor shall indemnify, protect, defend and hold Owner harmless from and against any and all damages, injuries, liabilities, costs (including reasonable attorney's fees), suits and/or claims alleging damages or injuries to persons or property, arising out of, or in any manner connected with the Work or arising out of the negligence or willful misconduct of Contractor (including parties for whom Contractor is responsible for under this Agreement), including all suits and claims for which Owner may be or may be claimed to be liable, and including all suits and claims that arise

either during construction or after completion of the Project, including claims for liens against the Project as a result of the Work. Contractor understands and agrees to undertake this obligation regardless of whether the injured party asserting a suit or claim is an employee of Contractor. Contractor's obligation pursuant to this paragraph shall not be limited by the operation of a workers' or workman's compensation act, any disability act, or any other employee benefit act. Contractor acknowledges and agrees that this provision obligates Contractor to pay any and all legal fees and expenses incurred by Owner in defending any covered suit or claim brought against it that arises out of or is in any manner connected with the Work, as well as any legal fees and expenses incurred in connection with the enforcement of this paragraph. Contractor further agrees to obtain, maintain and pay for commercial general liability insurance, to the fullest extent available, including completed operations coverages, to secure Contractor's obligations pursuant to the provisions of this paragraph.

SAMPLE INSERT:

To the extent, if any, that Owner is required to indemnify, protect, defend or hold Contractor harmless under the Form Agreement, such obligation shall not extend to the extent any claim by Contractor under such provision are attributable to the acts, neglect, misconduct, errors or omissions of Contractor (including Contractor's subcontractors, employees and suppliers) or the Architect or any engineer or consultant retained by Owner, or by any other third party.

CHANGE ORDERS

Even with the best planning and thorough construction documents, most construction projects require some changes between the start of construction and completion. Most form agreements provide procedures and mechanisms for change orders. However, the change order provisions in most form construction agreements rely on the owner and contractor agreeing in advance to the pricing for a change order. Given most owners' sensitivity to schedule, the contractor often has a lot of leverage in change order pricing discussions. The sample insert below provides an owner with the ability to get work on a change order started, even in the absence of agreed-upon pricing.

Sample Insert: In the event that the parties are unable to agree on pricing for a Change Order, Owner shall have the right to require Contractor to proceed with such Change Order and the adjustment to the Contract Sum or GMP, as applicable, for any such Change Order shall be equal to the net cost (or savings) to Contractor for the additional (or saved) materials and labor pertaining to such Change Order. Such adjustment shall include an additional _____ percent (___%) of such net amount to account for the additional (or saved) overhead and profit element pertaining to such Change Order. In connection with any Change Orders, the Contractor's Fee shall be adjusted on the basis of the net effect of all changes to the Work.

TERMINATION FOR CONVENIENCE

Maintaining flexibility where possible is important for most owners in the design and construction process. Though most form construction agreements address termination for cause, not all form agreements cover the issue of termination for convenience. Where an owner retains the right to terminate for convenience, the owner should anticipate that the contractor will require some type of termination fee and costs for demobilizing the work and securing the job site. The parties will also want to address ownership of any materials that are on the job site but not yet incorporated into the work, as well as termination fees related to subcontracts and supply agreements as a result of the termination of the general contract.

SAMPLE INSERT:

Owner shall have the right to terminate this Agreement at any time for convenience upon written notice to Contractor. Upon any such termination for convenience, Contractor shall promptly cease performance of the Work and coordinate with Owner to make provisions to secure the incomplete portions of the Work and as yet unused building materials. Following a termination for convenience, Contractor shall be entitled to payment for: (a) all portions of the Work properly completed by Contractor, (b) Contractor's costs for unincorporated building materials at the Project Site that are transferred to Owner, and (c) a termination fee equal to _____ percent (___%) of the difference between the amounts actually paid

to the Contactor under this Agreement and the Contract Sum or GMP, as applicable.

DISPUTE RESOLUTION

Form construction agreements (particularly the AIA and ConsensusDocs forms) often prescribe mediation and/or arbitration as the required mechanisms for dispute resolution. Choosing to agree to arbitration is a strategic decision each owner must make in the context of a specific project. In some instances the owner may not have the bargaining power to deviate from the dispute resolution mechanism set forth in the form agreement. In any situation, however, there are several issues that most owners will want to address. First, many owners will agree to arbitrate smaller dollar issues but want some threshold established above which the owner can elect to litigate the issue. Second, if the owner is required to arbitrate, it is critical that all parties necessary to the dispute can be brought into the same arbitration. This will help the owner avoid getting whipsawed between an arbitration with the contractor and a separate arbitration or litigation with other parties involved in that dispute (e.g., the architect). Third, because of the potential factual complexities of construction litigation from the owner's perspective (e.g., contractor's claims often relate to nonpayment while owner's claims often involve allegations of negligence or defective construction), if the parties arbitrate, most attorneys representing owners prefer to be able to conduct thorough enough discovery to ferret out the relevant facts.

SAMPLE INSERT:

Owner shall have the right to elect not to be bound by the mediation and/or arbitration provisions in this Agreement in connection with any dispute involving more than _____ Dollars (\$_____).

SAMPLE INSERT:

Owner shall not be bound to arbitrate any dispute with Contractor where all necessary parties to such dispute are also required (or otherwise agree) to be part of and bound by the results of such arbitration.

SAMPLE INSERT:

To the extent, if any, that arbitration of disputes is required in the Form Agreement, the parties shall be entitled to discover all documents

and information reasonably necessary for a full understanding of any legitimate issue raised in the arbitration. The parties may use all methods of discovery available under the Federal Rules of Civil Procedure, which shall apply to any arbitration under this Agreement. Prior to the deposition of any expert witness, the party proposing to call such witness shall provide a full and complete report by such expert, together with the expert's calculations and other data by which the expert reached any opinions concerning the subject matter of the arbitration. The Federal Rules of Evidence shall apply in any arbitration under this Contract, but the arbitrators shall liberally construe such rules to allow for admission of evidence that is helpful to resolving the controversy.

LENDER CONSIDERATIONS

Though some owners are cash customers, there is often financing involved in the construction of a project. Although the AIA and Consensus documents address some of the lender-related issues, the two inserts below provide an owner with more comprehensive coverage on the issue and will be appreciated by the owner's lender.

SAMPLE INSERT:

Contractor shall, upon request, consent to the collateral assignment of this Agreement by Owner to Owner's lender ("Lender") and agrees to cooperate with any such Lender in connection with completion of the Project after any event of default under Owner's loan agreement with the Lender; provided, however, if the Lender requires Contractor to perform any work for which Contractor has not already been paid, the Lender shall be obligated to pay the undersigned for such work, but shall have no obligation to pay for any work previously performed for which Owner has failed to pay. Contractor further agrees to provide Owner's Lender with such commercially customary certifications as Lender may from time to time reasonably request, including without limitation, a certification that the Work has been completed in accordance with the Contract Documents.

WARRANTIES & PROJECT CLOSEOUT

As is the case with indemnity provisions, it is worthwhile for an owner's attorney to spend time understanding

and customizing any warranty provisions that get added to a form construction contract. Most form construction agreements will include at least some basic warranty language, but many owners will want more robust warranty provisions. While construction contracts generally provide for one-year warranties, certain aspects of a particular project may warrant a longer warranty period. For example, I once worked on a project that had very precisely engineered footings (six feet deep) supporting some very heavy precision manufacturing equipment. The owner selected a specific contractor for the work because of its expertise in precision concrete work. In that instance, the contract provided that the footings were covered by a five-year warranty, while the rest of the work was covered by a one-year warranty. In addition to the contractor's warranty, it is important for owners to address the flow-through of any warranties that may exist for components of the work from third parties such as subcontractors and equipment suppliers.

SAMPLE INSERT:

Contractor warrants that the Work will be constructed in strict accordance with the Construction Documents, and that the Work installed will otherwise fulfill the requirements of this Agreement. Contractor agrees to repair or replace, or cause to be repaired or replaced, any or all of the Work that may prove to be defective in workmanship or materials, together with any adjacent improvements that may require repair or replacement because of defective portions of the Work, within a period of ____ year(s) from the date of the final completion of the Work, ordinary wear and tear and unusual abuse or neglect excepted. If Contractor fails to promptly commence compliance with such warranty within ten (10) days after receipt of written warranty claim from Owner, or if Contractor should shall fail to pursue such compliance with diligence, Owner shall have the right to correct the defective portion of the Work (along with any adjacent improvements needing repair because of such defective Work) and Contractor shall promptly reimburse Owner for all costs associated with such correction. The obligation of Contractor under any warranty or guaranty required of Contractor under this Agreement shall include all costs and expenses to repair and correct such defects, including additional testing and inspections and compensation for the Architect's

services and expenses made necessary by such warranty or guaranty work, plus damages, if any, to Owner caused by such defects. All materials furnished and labor performed to correct or repair any defects is warranted and guaranteed by Contractor in the same manner as the warranty and guaranty of the original labor and materials from the date of completion of such repair or correction. The period of any express warranty or guaranty under this Agreement relates only to the specific responsibility of Contractor under such warranty or guaranty to correct defective work or materials and has no relationship to the time within which proceedings may be commenced to establish Contractor's liability with respect to its any other obligation under this Agreement.

SAMPLE INSERT:

All manufacturers' or suppliers' warranties and guarantees, express or implied, respecting any material or equipment used in or as part of the Work shall be deemed obtained by Contractor on behalf of Owner, and shall inure to Owner's benefit without the necessity of separate transfer or assignment thereof; provided, that Contractor shall execute a separate transfer or assignment thereof in form and substance acceptable to Owner upon Owner's request. Contractor, within thirty (30) days after Substantial Completion, shall collect, assemble and deliver to Owner, in a neat and orderly manual, the original and two (2) copies of all written warranties, equipment manuals, shop drawings, design drawings, as-built drawings, maintenance manuals, equipment and spare part list and similar manufacturer's information.

ATTORNEYS' FEES

Some, but not all, form construction agreements will include a provision that entitles the prevailing party in a dispute to its attorneys' fees. Each owner must decide whether including an attorneys' fees provision is the best strategy from its perspective. If the owner does not want to provide for attorneys' fees, make sure that any attorneys' fees provisions in the form document are deleted. Below are two sample inserts; one is for unilateral attorneys' fees (i.e., only the owner gets the benefit), and the other is a bilateral provision. It is important to note that at least one state (California) has a code provision (Cal. Civ. Code § 1717) that automatically makes unilateral attorneys' fees provisions bilateral.

SAMPLE INSERT (UNILATERAL):

In the event that Contractor should default in its obligations to Owner under this Agreement, Owner shall be entitled to recover from Contractor, in addition to any other damages incurred by Owner, Owner's reasonable costs (including reasonable attorneys' and experts' fees and costs) incurred by Owner to enforce this Agreement.

SAMPLE INSERT (BILATERAL):

In the event of any action or dispute between Owner and Contractor arising out of this Agreement, the losing party shall pay the prevailing party a reasonable sum for attorneys' fees incurred in bringing or defending such action and/or enforcing any judgment granted in such action.

STATUTES OF LIMITATION / PERIODS OF REPOSE

In most states, design and construction claims are subject to both a statute of limitations and a statute of repose. Those two concepts are often conflated or confused, and I encourage anyone with questions as to the technical legal distinctions between the two to find an appropriate article on that subject. The significant substantive distinction between the two is that a statute of limitation may be tolled by the parties to a dispute, while a statute of repose is rarely subject to tolling. In general, a statute of repose is a period of time that runs from a specified event, such as completion of construction, while a statute of limitation is a time period that runs from the discovery of a claim. The application of both in the context of design and construction claims typically results in the following: any claims based on design and construction must be asserted, if at all, before the earlier to occur of a specified number of years after the completion of construction (statute of repose) or a specified number of years from the discovery of the claim (statute of limitation). In Minnesota, the applicable timeframes are ten years and two years, respectively (Minn. Stat. § 541.051(1)). In California, the applicable statute of repose timeframe is ten years for latent defects and four years for patent defects, while the statute of limitations timeframe is one year from discovery of the claim (Cal. Civ. Proc. Code §§ 337.1, 337.15). Both architects and contractors have a strong interest in getting the clock started on the statute of repose as quickly as possible to reduce their respective exposure to claims by an owner. Most form construction agreements are produced by

professional organizations consisting of design professionals and/or contractors (e.g., AIA and Consensus-Docs). As a result, many form construction contracts provide that statutes of repose commence upon substantial (as opposed to final) completion of the work. Other forms start the timeframes even sooner, as portions of the contractor's work are completed. In addition to the earlier start time, some form construction contracts provide for a shorter overall period for claims than what is provided by applicable state law. To receive the full benefit of the applicable statutes, owners have an interest in waiting to start the clock on the statute of repose until the work is fully completed. The sample insert below addresses these issues.

SAMPLE INSERT:

In the event that any time limitations on claims by Owner under the Form Agreement are shorter than the timeframes prescribed by applicable state law, the limitations set forth by statute shall prevail. All time limitations on claims shall run from final completion of the Work.

ELECTRONIC COUNTERPARTS

It is getting less common these days to see blue ink original signatures on contracts or for both parties to sign the same original document. Instead, parties often execute an agreement through an exchange of originals or electronic copies of counterpart signature pages. The sample provision below accommodates that approach to execution of the form agreement and addendum. Another issue to consider is whether the parties want the ability to execute subsequent documents related to the construction contract electronically (e.g., change orders, lien waivers, etc.). The second sample insert is intended to be used in addition to the first sample insert to expand the ability for the parties to transmit signed documents electronically.

SAMPLE INSERT:

The Form Agreement and this Addendum may each be executed in one or more counterparts, each of which shall be an original but all of which together shall be deemed to constitute a single document. Separate signature pages of either the Form Agreement or this Addendum may be attached to a copy of the Form Agreement or this Amendment, as applicable, in order to form a fully-executed document. Copies of signature pages delivered by one party to the other by

electronic communications (e.g., fax or email) shall be deemed to constitute original signatures.

SAMPLE INSERT:

The provisions of this paragraph shall apply to all documents generated in connection with this Agreement, including amendments, change orders, lien waivers and similar supplemental documents.

EMERGING TECHNOLOGIES

Emerging video technology is becoming more common on construction sites. This can include fixed cameras (on or off site) that produce time-lapse records of construction, as well as the emerging use of drones. Owners need to make sure that such emerging technologies are properly used and do not result in privacy violations or otherwise violate applicable laws. Below are several sample provisions that address fixed video feeds as well as the use of drones.

SAMPLE INSERT:

Contractor shall obtain Owner's written approval prior to using any unmanned aircraft systems ("Drones") above the Project Site or otherwise in connection with the Work. Contractor, at Contractor's sole cost and expense, shall be responsible for complying with all applicable laws and regulations (including but not limited to FAA requirements) pertaining to such drones. Any still or video data captured by such Drones shall be deemed to be Owner's property and shall not be used by Contractor for any purposes (other than for Contractor's internal use) without Owner's prior written consent. Upon Owner's request, Contractor shall provide Owner with complete and accurate

copies of all photos and videos of the Project and Project Site captured by such Drones.

SAMPLE INSERT:

Contractor shall obtain Owner's written approval prior to using any fixed cameras or video feeds (on or off the Project Site) to document the progress of the Work; provided that no such prior consent shall be required for the use of standard video surveillance of the Project Site for security reasons. Any still or video data captured by such camera or video systems shall be deemed to be Owner's property and shall not be used by Contractor for any purposes (other than for Contractor's internal use) without Owner's prior written consent. Upon Owner's request, Contractor shall provide Owner with complete and accurate copies of all photos and videos of the Project and Project Site captured by such systems.

WILD CARD ITEMS

When using an addendum to modify a form agreement, it is often nice to have the addendum stand-alone without the need to mark-up or modify the form agreement to which the addendum applies. Often the form agreement, whether it is an AIA, ConsensusDocs or other form, will have some provisions that an owner will want to delete, in whole or part. One effective way to accomplish this task is to consolidate and list those changes in the addendum, using a provision similar to the sample insert below.

SAMPLE INSERT:

The following provisions of the Form Agreement shall not apply to this Agreement: _____.

SPECIAL OFFER

FOR PERIODICAL READERS ONLY!

\$500 OFF*

The *in-person* course or
full video webcast.

Coupon code
below.



**16.25 CLE CREDIT HOURS,
INCLUDING
1.0 HOUR OF ETHICS
19.5 CPE CREDIT HOURS
IN BUSINESS**

REGISTER ONLINE

www.ali-cle.org/CZ004

Enter code:

CZ004TPL at checkout

1-800-CLE-NEWS [253-6397]

For Group Rates Please
Contact Customer Service

*Valid on new registrations only;
excludes all other discounts,
including group discounts and
webcast segments.

American Law Institute
CONTINUING LEGAL EDUCATION



**49TH ANNUAL ADVANCED COURSE
and LIVE VIDEO WEBCAST**

Modern Real Estate Transactions

WEDNESDAY - FRIDAY | AUGUST 9 - 11, 2017
REVERE HOTEL BOSTON COMMON | BOSTON

Come to THE seminal course for commercial real estate attorneys of all experience levels looking for real-world advice on structuring and negotiating commercial real estate transactions and advising clients on real estate ownership, management, and operation.

In addition to maintaining its traditional scope of modern commercial real estate practice — acquisition, due diligence, construction, financing, joint ventures, leases, title insurance, management, and disposition — this advanced course offers cutting-edge analysis of the most vexing issues in real estate transactions today. Each topic is addressed from multiple perspectives — an approach that registrants praise for providing nuance and greater understanding.

WHERE YOU GO *for* CLE MATTERS