

MINUTES OF THE SENATE COMMITTEE ON TRANSPORTATION AND TOURISM

The meeting was called to order by Chairman Ben Vidricksen at 9:05 a.m. on February 12, 1998 in Room 254-E of the Capitol.

All members were present except: Senator Harrington

Committee staff present: Hank Avila, Legislative Research Department
Bruce Kinzie, Revisor of Statutes
Marian Holeman, Committee Secretary

Conferees appearing before the committee:

Others attending: See attached list

SB 489: Re construction contracts - procedure for partial payment.

This bill was heard February 3, 1998. Members were provided copies of written material in support of the bill (Attachment 1), as well as in opposition to the bill (Attachment 2). The Chair advised the committee would listen to anyone who wished to speak on the issue. Nancy Bogina, Kansas Department of Transportation advised KDOT had no objection to the 5% retainage, but objected to the escrow section of the bill. John Peterson, Associated General Contractors of Kansas, Inc., explained a proposed amendment to the escrow section of the bill; including the word "may" in applicable sections. The purpose of the amendment is to make it crystal clear that this is not something a public entity has to do. It also includes language to clarify that a contractor "upon request and upon approval by the public contracting entity may," substitute securities, etc. This has been discussed with other interested parties.

Chris McKenzie, League of Kansas Municipalities, expressed concern regarding the less than 10% retainage, especially for small cities. Norm Willis, School Board Association, affirmed their concern with the 5% retainage; adding that schools needed more flexibility in determining how to deal with contractors. Mr. Peterson suggested that perhaps a dollar threshold should be considered for the retainage limit. Trudy Aron, American Institute of Architects, reminder members of Mr. Hoffman's testimony and their belief that owners need to determine how much retainage is best, based on many variables in individual circumstances. Judy Moler, Kansas Association of Counties, advised small counties have all of the above problems. Tom Slattery, AGC, there is a very small percentage of jobs where there is conflict between owner and contractor. He also pointed out some positive possibilities with the escrow provision. Michelle Miller, Johnson County Government, suggested setting the retainage minimum at 5% and leave flexibility for the involved entities to decide on each project. Mr. Peterson said that existing law is better than changing it to force everyone to impose a minimum even if they wanted none.

Will Larson, legal counsel for AGC, had a hand in drafting some of this bill. He reviewed retainage statutes in some 20 states and explained why they feel retainage gives entities unfair power over contractors. Chris McKenzie advised that legal proceeding against performance bonds and statutory bonds are expensive and time consuming, but without retainage that's the only choice. Buildings and highways are different entities; and Tom Slattery advised that many in both fields would support "pre-qualification" for contractors on all public contracts. Discussion also stressed that any retainage figure would be arbitrary and respect for local options in deciding contractual obligations should be available. Tom Slattery stated that the problem is the inability to earn any money on what is retained. The proposed amendments would respond to that problem to a certain degree. The Chair recommended that interested parties meet again to determine some middle ground which would allow the committee to move on the bill. It will be taken up again next week.

Approval of minutes.

Senator Nick Jordan moved to approve minutes of January 27, 1998. Senator Tyson seconded the motion. Motion carried.

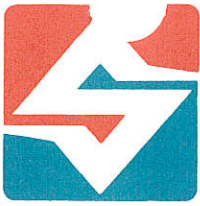
The meeting adjourned at 10:05 a.m.

The next meeting is scheduled for February 16, 1998.

SENATE TRANSPORTATION AND TOURISM
COMMITTEE GUEST LIST

DATE: FEBRUARY 12, 1998

NAME	REPRESENTING
Judy Melu	Ks. Assn of Counties
Kelly Kuitala	City of Overland Park
Sandra Peterson	Marion County
Steve Woolington	K. D. O. T.
JIM GARDNER	DEPT OF ADMINISTRATION
Chris Browner	Leadership Sumner County
Tudy ARON	Am Institute of Architects
NORM WILK	KASB
Tom Slattery	AGC of Ks
John Peterson	AGC
Will Larson	AGC
Bob Totten	Ks Contractors Association
E. R. "Woody" Moses	Ks. App. Procl. Assn
Don Seifert	City of Olathe
Mike Taylor	City of Wichita
Jarvis Stramberg	JO Co Westminister
Michelle Miller	Johnson County



Shelley Electric, Inc.

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Fax: (316) 945-2604

February 03, 1998

**Senator Ben Vidricksen--Chairman
C/O Statehouse
Topeka, KS 66612**

Dear Senator

Please support the Retainage Bill introduced S.B. 489. This would help reduce costs for construction projects. It would also reduce the burden to the contractor and sub-contractors to pay interest on monies borrowed to carry retainage. The following are the four major provisions of this bill.

- I Retainage withheld from payments to contractors could not exceed 5% of the payment or 5% of the contract.**
- II On contracts over one million dollars (1,000,000.00), contractors may request that retained funds be placed in an interest-bearing escrow account. The contractor would be responsible for establishing and paying any fees associated with the account.**
- III On contracts over one million dollars (1,000,000.00), after retainage has been withheld the contractor may request that approved securities, i.e. U.S. Treasury Bonds, Notes or Certificates of Deposit, be substituted for the retained monies. Substituted securities would have to equal or exceed the amount of the retained funds.**
- IV If during the course of the project the contractor would default the retained funds would revert to the public contracting entity.**

Please support this bill there should be no risk to the taxpayers these projects require bonds.

Thank You

**Douglas L. Hague
President Shelley Electric {Employing 125+ Kansans}**

**CC: Gary Anderson
NECA Kansas**

98-046

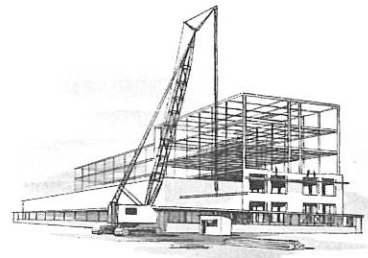
*Senate Group + Tourism
2-12-98
Attachment #1*

DONDLINGER & SONS CONSTRUCTION CO., INC.

General Contractors

TOM DONDLINGER
NICK DONDLINGER
PAUL DONDLINGER
MARTIN DONDLINGER JR.

FOUNDED IN 1898 BY N. L. DONDLINGER



P.O. BOX 398 WICHITA, KANSAS 67201-0398
PHONE (316) 945-0555
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January 29, 1998

Senator Ben Vidricksen--Chairman
c/o Statehouse
Topeka, KS 66612

Dear Senator Vidricksen:

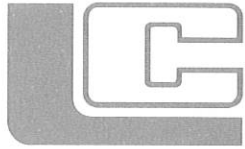
This letter is to express my support of Senate Bill 489 which would make changes in the retainage procedures on Public Works Projects for state, county, city and school districts.

I believe the changes make good business sense and are fair and reasonable.

Your support of S.B. 489 would be most appreciated.

Sincerely,


Tom Dondlinger
President



The Law Company, Inc.

Contractors • Construction Managers

January 29, 1998

Senator Ben Vidricksen, Chairman
c/o Statehouse
Topeka, KS 66612

Re: Retainage legislation

Dear Senator Vidricksen:

The purpose of this letter is to express my support for Senate Bill #489 concerning contract retainage. I sincerely believe that the adoption of legislation permitting the substitution of securities in lieu of retainage on State projects would be equitable to both contractors and State entities. The retainage substitution concept is already utilized in many other states; in fact, thirty-one states currently permit retainage substitution and several other states are considering adoption of the practice.

The basis for my endorsement of this legislation is:

- Retainage represents money earned by the contractor, but unpaid until final completion of the project. Retainage substitution would permit retained funds to be either:
 - (1) paid directly to a contractor who has deposited approved securities into escrow as collateral for continued performance, or
 - (2) deposited into an interest bearing account with the contractor receiving the retainage, with interest, upon completion of the project.
- State entities currently retain a percentage (generally 10%) from monthly payments to contractors. This procedure forces contractors to carry long-term, non-interest bearing receivables. Retainage causes contractors to incur additional cost in the form of loan interest or the opportunity cost of foregone investment earnings. It is likely that the adoption of retainage substitution would result in lower bids to the State as a result of the elimination of this financial cost.

CORPORATE OFFICES:
345 Riverview
Wichita, Kansas 67203
(316) 268-0200



P.O. Box 1139, 67201-1139
Fax (316) 268-0210

1-3

Senator Vidricksen
January 29, 1998
Page 2

- States which currently permit retainage substitution typically encourage contractors to use state issued tax-exempt bonds which create a new market and increased demand for their bonds.
- The process would not need to be burdensome or expensive. With the use of a standard form of escrow agreement, most of the paperwork would be the responsibility of the contractor. Furthermore, the contractor would bear any expense imposed by the financial institution for holding the retention securities. A threshold could be established to restrict the use of retainage substitution to larger-sized contracts.
- The substitution of securities for retainage does not diminish the State's security for the completion of a project. The State would continue to have the security provided by surety bonds, as well as, the right to the securities held in trust for the benefit of the State entity.

If you have any questions, or need additional information, please don't hesitate to give me a call.

Very truly yours,

THE LAW COMPANY, INC.



Marc Porter
Vice President-Finance &
Administration

\\MP\retain-s.ltr



City Hall • 8500 Santa Fe Drive
Overland Park, Kansas 66212
913/895-6040 • FAX 913/895-5055

TO: Members of the Senate Transportation and Tourism Committee
FROM: Bob Lowry, Director of Public Works, Overland Park, Kansas
DATE: February 9, 1998
SUBJECT: Senate Bill 489, a bill repealing existing statutes providing procedures for partial payment of construction contracts.

The City of Overland Park is opposed to Senate Bill 489 for the following reasons:

- The present system of allowing for a retainage of 10% protects municipalities and its residents from assuming bad work or incomplete construction projects and does not appear to be broken. In fact, during more than 30 years of administering government construction projects I have not encountered a single instance in which a contractor objected to the method or amounts of retainage.
- Retainage is the only non-litigation related mechanism that local units of government have to ensure that contractors complete their work in a timely and quality manner. This is particularly true for contracts of a relative small dollar amount since many problems tend to occur with smaller contractors.
- Proposed legislation as it relates to establishing escrow accounts will impose administrative burdens on local units of governments which far outweigh any possible benefits.

As a practical matter, contractors are paid for the work they accomplish as they complete it. Retainage is reduced appropriately (generally to 2% or less) when work is substantially complete and the risk of not completing the job is minimized. While there may be a few contractors in the State who are dissatisfied with the current statutes governing retainage, the majority of them have no complaints with the present system. At this time there is no need fixing something that isn't broken.

Thank you for considering this input.

*Senate Transportation + Tourism
2-12-98
Attachment # 2*

From: Sen Ben Vidricksen (2/10/98)
To: Marian Holeman

[1]SB 489 Construction Contracts
Forwarded mail...

2/10/98 10:42 AM

Date: 2/10/98 10:42 AM
From: Michelle.Mille
Dear Senator Jordan;

I apologize for the lateness of this information, but our departments have been working diligently to collect the data regarding the impact of SB 489 to Johnson County, and I have just received this information. Please excuse the email transmission to you, but it was the most efficient method I had available to get this information to you quickly.

In a nutshell, we are concerned that counties have not had adequate input regarding the significant impact the SB 489 will have upon our operations. Listed below are the concerns of Johnson County's Public Works, Wastewater, Purchasing and County Treasurer departments:

1) The reduction of the retainage fee to 5% will weaken the county's position with contractors. Currently, departments have the option to negotiate to retain any amount, depending on the cost of the total project and its complexity, especially since, many contractors use sub-contractors for certain portions of the contract. We have experienced situations where we have asked for and received a 40% retainage fee and the contractor still has not adequately performed.

RECOMMENDATION: THE 5% SHOULD BE INSERTED AS A MINIMUM ALLOWING EACH ENTITY TO ESTABLISH and NEGOTIATE Their OWN RETAINAGE AMOUNT.

2) Regarding the language of "TOTAL CONTRACT AMOUNT" , we are concerned that it is too vague and could include either: (1) the original contract amount or (2) the original amount and any subsequent change orders approved by the County/entity. Change orders may change/increase the original contract amount due to change of scope of work, authorized by the customer.

RECOMMENDATION: THE BILL SHOULD BE MODIFIED TO READ, "THE AMOUNT OF RETAINAGE FEE IS BASED ON THE FINAL CONTRACT AWARD AUTHORIZED BY EACH ENTITY". This will include any change orders.

3) RETAINAGE VS. COUNTY CLAIM: What recourse does the County have if the amount of claim by the County is greater than the retainage amount set-aside for the contractor(s)?

4) ESCROW ACCOUNT: In regard to the escrow account, until the contractor(s) have completed a project to the satisfaction of the owner, all funds in a escrow account belong to the County. The SB 489 states "...contractor to establish the escrow account in a state or national bank, federally chartered savings and loan association, or federally chartered savings bank with offices located in Kansas". Also, the bill allows the contractor, to substitute securities at anytime, and if requested, the County must comply with such request. Frankly, this will cause enormous additional administrative burden and expense to the County.

Senator Jordan, we have received additional comments from departments that have also determined that SB 489 will significantly impact current and future major construction projects, but I am awaiting receipt of those statements. I will fax them to you as soon as I receive them.

Thank you for your consideration of our concerns. Should you have any questions or require specific additional information, please let me know. SB 489 is up for discussion and possible action in committee on Thursday,

February 12, at 9:00am. Johnson County will attend, please let me know if I should make some of our experts available for testimony or questions by the committee.

Thank you!
Michelle Miller
Johnson County Intergovernmental Relations
785-235-3862 (tel&fax)

RFC-822 Header:
RECEIVED: from SMTPG2 by mail.ksleg.state.ks.us ; 10 FEB 98 10:42:11 UT
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id m0y2HxR-0001WAC; Tue, 10 Feb 98 09:50 CST
Message-Id: <m0y2HxR-0001WAC@smtpg2>
Date: Tuesday, 10 February 1998 10:36am ET
To: sen_nick_jordan@mail.ksleg.state.ks.us
Cc: sen_ben_vidricksen@mail.ksleg.state.ks.us, kac01@ink.org, Norry.Shahangian
From: Michelle.Miller@jocoks.com
Subject: SB 489 Construction Contracts

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CAPITAL PROJECTS DEPARTMENT

510 North Main, Suite 602
Wichita, Kansas 67203
Telephone: (316) 383-8002
Fax: (316) 383-7696

Kenneth W. Arnold
Director

TO: Willie Martin, Intergovernmental Relations
FROM: Kenneth W. Arnold, Director
DATE: February 11, 1998
SUB: Senate Bill 489

This department opposes Senate Bill 489 because it: 1. reduces withholding on facility projects (construction, reconstruction, renovation, remodeling or repair of any building or structure) from ten percent (10%) to five percent (5%) on payment and on the entire contract amount, 2. authorizes the contractor to request that these withheld funds on projects of more than \$1,000,000 be placed in escrow, and 3. requires the County to pay the contractor these withheld funds within five working days, if appropriate securities are substituted.

The reasons for our opposition follows:

Point 1. We currently utilize either American Institute of Architects (AIA) or National Construction Law Center, Inc. (NCLC) contract documents. The NCLC documents are written specifically from a building owner's perspective and they provide for us to withhold ten percent (10%) of the cost of the contract work (See Attachment A, page VI, paragraph 7 (C)). At the same time, NCLC protects the contractor if the owner fails to make a payment to the contractor within thirty (30) days of when payment is due. (See Attachment A, page VIII, paragraph 7 (G)).

The AIA documents allow the owner to write in a percentage of retainage to be withheld. We have used ten percent (10%) most of the time, and after ninety percent (90%) of the work is complete, we have for some larger projects, reduced the retainage to five percent (5%). (See Attachment B, page 4, paragraphs 5.6, 5.7 and 5.8.) At the same time, if agreed to by the owner and the contractor, the AIA documents protect the contractor if the owner fails to make payments. (See Attachment B, page 5, paragraph 7.2.)

[Please note that NCLC has only one contact form (*NCLC Document 10*) for use between the owner and contractor. However, AIA has a whole series of owner/contractor agreements with similar provisions as indicated above in each form we've used.]

In concert with the Legal Department, we've moved toward almost exclusive use of the NCLC documents because these are written from an owner's perspective and better serve and protect the County as Owner as opposed to the AIA documents.

Ten percent (10%) retainage is fairly standard in the industry in this area at least, and it has not caused the County to not receive bids or be able to complete contracts with contractors we've used. We feel the ten percent (10%) is appropriate, but that at any rate, the County should be allowed to set the rate on facility projects and it should be allowed to set it no matter what the value of the contract.

Point 2. We do not currently utilize escrow accounts for facility projects, nor do we feel they are appropriate. The funds paid to contractors come from taxpayer funds, and we have an obligation to all of the taxpayers to use all of their tax dollars wisely. To break out funds to set up escrow accounts would reduce the overall funds which Finance can invest for the taxpayers to help reduce everyone's overall tax burden. To allow escrow funds for contractors would appear to benefit those few contractors to the detriment of all.

Point 3. As we understand, the County's turn around time on payments to anyone, except in a valid emergency, is generally five (5) to ten (10) working days. However, we specify in our facility contracts allowing at least ten (10) calendar days.

In conclusion, this department opposes Senate Bill 489 as outlined above. We feel very good about the contract language, retainage percentages, etc. that we use to benefit the County and its taxpayers. We see no valid reason to require the changes spelled out in the bill.

Please feel free to call us if you have any questions.

Attachments

cc: Bob Rogers, Assistant County Manager
Don Brace, Bureau of Central Services, Director
Mike Pepoon, Assistant County Counselor
Darren Muci, Purchasing Manager

NATIONAL CONSTRUCTION LAW CENTER, INC.

FIXED PRICE CONSTRUCTION
CONTRACT BETWEEN
OWNER AND CONTRACTOR

NCLC DOCUMENT 10
1994 EDITION

These contract documents should be used only after consultation with counsel. The documents are not intended as legal advice appropriate to any specific situation, nor do they purport to address all issues which may arise between the contracting parties. The documents should be amended or supplemented where appropriate in order to address specific contractual concerns.

This FIXED PRICE CONSTRUCTION CONTRACT BETWEEN OWNER AND CONTRACTOR
(the "Contract") is made and entered into by and between _____
_____ (the "Owner")

and _____ (the "Contractor").
This Contract is executed under seal, and shall be effective on the date executed by the last party
to execute it.

This Contract is for the construction of a project identified as _____

_____ (the "Project").

NOW, THEREFORE, in consideration of the mutual promises, covenants and agreements
stated herein, and for other good and valuable consideration, the sufficiency of which is hereby
acknowledged, the parties agree:

2-6

(This page has been left blank intentionally)

1.

DOCUMENTS INCORPORATED BY REFERENCE

This Contract includes the plans and specifications for the Project identified thereon as such, plus the following (if any): _____

all of which are hereby incorporated herein by reference and made a part hereof. Change Orders issued hereafter, and any other amendments executed by the Owner and the Contractor, shall become and be a part of this Contract. Documents not included or expressly contemplated in this Paragraph 1 do not, and shall not, form any part of this Contract.

2.

REPRESENTATIONS OF THE CONTRACTOR

In order to induce the Owner to execute this Contract and recognizing that the Owner is relying thereon, the Contractor, by executing this Contract, makes the following express representations to the Owner:

- (A) The Contractor is fully qualified to act as the contractor for the Project and has, and shall maintain, any and all licenses, permits or other authorizations necessary to act as the contractor for, and to construct, the Project;
- (B) The Contractor has become familiar with the Project site and the local conditions under which the Project is to be constructed and operated;
- (C) The Contractor has received, reviewed and carefully examined all of the documents which make up this Contract, including, but not limited to, the plans and specifications, and has found them in all respects to be complete, accurate, adequate, consistent, coordinated and sufficient for construction.

3.

INTENT AND INTERPRETATION

With respect to the intent and interpretation of this Contract, the Owner and the Contractor agree as follows:

- (A) This Contract, together with the Contractor's and Surety's performance and payment bonds for the Project, if any, constitute the entire and exclusive agreements between the parties with reference to the Project, and said Contract supersedes any and all prior discussions, communications, representations, understandings, negotiations, or agreements. This Contract also supersedes any bid documents;

(B) Anything that may be required, implied or inferred by the documents which make up this Contract, or any one or more of them, shall be provided by the Contractor for the Contract Price;

(C) Nothing contained in this Contract shall create, nor be interpreted to create, privity or any other relationship whatsoever between the Owner and any person except the Contractor;

(D) When a word, term, or phrase is used in this Contract, it shall be interpreted or construed first, as defined herein; second, if not defined, according to its generally accepted meaning in the construction industry; and third, if there is no generally accepted meaning in the construction industry, according to its common and customary usage;

(E) The words "include", "includes", or "including", as used in this Contract, shall be deemed to be followed by the phrase, "without limitation";

(F) The specification herein of any act, failure, refusal, omission, event, occurrence or condition as constituting a material breach of this Contract shall not imply that any other, non-specified act, failure, refusal, omission, event, occurrence or condition shall be deemed not to constitute a material breach of this Contract;

(G) The Contractor shall have a continuing duty to read, examine, review, compare and contrast each of the documents which make up this Contract, shop drawings, and other submittals and shall give written notice to the Owner and the Architect of any conflict, ambiguity, error or omission which the Contractor may find with respect to these documents before proceeding with the affected work. The express or implied approval by the Owner or the Architect of any shop drawings or other submittals shall not relieve the Contractor of the continuing duties imposed hereby, nor shall any such approval be evidence of the Contractor's compliance with this Contract. The Owner has requested the Architect to only prepare documents for the Project, including the plans and specifications for the Project, which are accurate, adequate, consistent, coordinated and sufficient for construction. HOWEVER, THE OWNER MAKES NO REPRESENTATION OR WARRANTY OF ANY NATURE WHATSOEVER TO THE CONTRACTOR CONCERNING SUCH DOCUMENTS. The Contractor again hereby acknowledges and represents that it has received, reviewed and carefully examined such documents, has found them to be complete, accurate, adequate, consistent, coordinated and sufficient for construction, and that the Contractor has not, does not, and will not rely upon any representations or warranties by the Owner concerning such documents, as no such representations or warranties have been or are hereby made;

(H) In the event of any conflict, discrepancy, or inconsistency among any of the documents which make up this Contract, the following shall control:

- (1) As between figures given on plans and scaled measurements, the figures shall govern;
- (2) As between large scale plans and small scale plans, the large scale plans shall govern;
- (3) As between plans and specifications, the requirements of the specifications shall govern;
- (4) As between this document and the plans or specifications, this document shall govern.

4.

OWNERSHIP OF THE DOCUMENTS WHICH MAKE UP THE CONTRACT

The documents which make up this Contract, and each of them, as well as any other documents furnished by the Owner, shall remain the property of the Owner. The Contractor shall have the right to keep one (1) copy of the Contract upon completion of the Project; provided, however, that in no event shall the Contractor use, or permit to be used, any portion or all of such Contract on other projects without the Owner's prior written authorization.

5.

CONTRACTOR'S PERFORMANCE

The Contractor shall perform all of the work required, implied or reasonably inferable from this Contract including, but not limited to, the following:

- (A) Construction of the Project;
- (B) The furnishing of any required surety bonds and insurance;
- (C) The provision or furnishing, and prompt payment therefor, of labor, supervision, services, materials, supplies, equipment, fixtures, appliances, facilities, tools, transportation, storage, power, fuel, heat, light, cooling, or other utilities, required for construction and all necessary building permits and other permits required for the construction of the Project;
- (D) The creation and submission to the Owner of detailed and comprehensive as-built drawings depicting all as-built construction. Said as-built drawings shall be submitted to the Owner upon final completion of the Project and receipt of same by the Owner shall be a condition precedent to final payment to the Contractor.

6.

TIME FOR CONTRACTOR'S PERFORMANCE

(A) The Contractor shall commence the performance of this Contract on _____ and shall diligently continue its performance to and until final completion of the Project. The Contractor shall accomplish Substantial Completion of the Project on or before _____;

(B) The Contractor shall pay the Owner the sum of _____ Dollars (\$ _____) per day for each and every calendar day of unexcused delay in achieving Substantial Completion beyond the date set forth herein for Substantial Completion. Any sums due and payable hereunder by the Contractor shall be payable, not as a penalty, but as liquidated damages representing an estimate of delay damages likely to be sustained by the Owner, estimated at the time of executing this Contract. When the Owner

reasonably believes that Substantial Completion will be unexcusably delayed, the Owner shall be entitled, but not required, to withhold from any amounts otherwise due the Contractor an amount then believed by the Owner to be adequate to recover liquidated damages applicable to such delays. If and when the Contractor overcomes the delay in achieving Substantial Completion, or any part thereof, for which the Owner has withheld payment, the Owner shall promptly release to the Contractor those funds withheld, but no longer applicable, as liquidated damages;

(C) The term "Substantial Completion", as used herein, shall mean that point at which, as certified in writing by the Architect, the Project is at a level of completion in strict compliance with this Contract such that the Owner or its designee can enjoy beneficial use or occupancy and can use or operate it in all respects, for its intended purpose. Partial use or occupancy of the Project shall not result in the Project being deemed substantially complete, and such partial use or occupancy shall not be evidence of Substantial Completion;

(D) All limitations of time set forth herein are material and are of the essence of this Contract.

7.

FIXED PRICE AND CONTRACT PAYMENTS

(A) The Owner shall pay, and the Contractor shall accept, as full and complete payment for the Contractor's timely performance of its obligations hereunder the fixed price of

_____ Dollars (\$ _____).
The price set forth in this Subparagraph 7(A) shall constitute the Contract Price, which shall not be modified except by Change Order as provided in this Contract;

(B) Within ten (10) calendar days of the effective date hereof, the Contractor shall prepare and present to the Owner and the Architect the Contractor's Schedule of Values apportioning the Contract Price among the different elements of the Project for purposes of periodic and final payment. The Contractor's Schedule of Values shall be presented in whatever format, with such detail, and backed up with whatever supporting information the Architect or the Owner requests. The Contractor shall not imbalance its Schedule of Values nor artificially inflate any element thereof. The violation of this provision by the Contractor shall constitute a material breach of this Contract. The Contractor's Schedule of Values will be utilized for the Contractor's Payment Requests but shall only be so utilized after it has been acknowledged in writing by the Architect and the Owner;

(C) The Owner shall pay the Contract Price to the Contractor in accordance with the procedures set forth in this Paragraph 7. On or before the _____ day of each month after commencement of performance, but no more frequently than once monthly, the Contractor may submit a Payment Request for the period ending the _____ day of the month. Said Payment Request shall be in such format and include whatever supporting information as may be required by the Architect, the Owner, or both. Therein, the Contractor may request payment for ninety percent (90%) of that part of the Contract Price allocable to Contract requirements properly provided, labor, materials and equipment properly incorporated in the Project, and materials or equipment necessary for the Project and properly stored at the Project site (or elsewhere if offsite storage is approved in writing by the Owner), less the total amount of previous payments received from the Owner. Any payment on account of stored materials or equipment will be subject to the Contractor providing written proof that the Owner has title to such materials or equipment and that they are fully insured against loss or damage. Each such Payment Request shall be signed by the Contractor and shall constitute the Contractor's representation that the quantity of work has reached the level for which

payment is requested, that the work has been properly installed or performed in strict compliance with this Contract, and that the Contractor knows of no reason why payment should not be made as requested. Thereafter, the Architect shall review the Payment Request and may also review the work at the Project site or elsewhere to determine whether the quantity and quality of the work is as represented in the Payment Request and is as required by this Contract. The Architect shall approve in writing the amount which, in the opinion of the Architect, is properly owing to the Contractor. The Owner shall make payment to the Contractor within thirty (30) days following the Architect's written approval of each Payment Request. The amount of each such payment shall be the amount approved for payment by the Architect less such amounts, if any, otherwise owing by the Contractor to the Owner or which the Owner shall have the right to withhold as authorized by this Contract. The Architect's approval of the Contractor's Payment Requests shall not preclude the Owner from the exercise of any of its rights as set forth in Subparagraph 7(F) hereinbelow. The submission by the Contractor of a Payment Request also constitutes an affirmative representation and warranty that all work for which the Owner has previously paid is free and clear of any lien, claim, or other encumbrance of any person whatsoever. As a condition precedent to payment, the Contractor shall, if required by the Owner, also furnish to the Owner properly executed waivers of lien, in a form acceptable to the Owner, from all subcontractors, materialmen, suppliers or others having lien rights, wherein said subcontractors, materialmen, suppliers or others having lien rights, shall acknowledge receipt of all sums due pursuant to all prior Payment Requests and waive and relinquish any liens, lien rights or other claims relating to the Project site. Furthermore, the Contractor warrants and represents that, upon payment of the Payment Request submitted, title to all work included in such payment shall be vested in the Owner;

(D) When payment is received from the Owner, the Contractor shall immediately pay all subcontractors, materialmen, laborers and suppliers the amounts they are due for the work covered by such payment. In the event the Owner becomes informed that the Contractor has not paid a subcontractor, materialman, laborer, or supplier as provided herein, the Owner shall have the right, but not the duty, to issue future checks and payment to the Contractor of amounts otherwise due hereunder naming the Contractor and any such subcontractor, materialman, laborer, or supplier as joint payees. Such joint check procedure, if employed by the Owner, shall create no rights in favor of any person or entity beyond the right of the named payees to payment of the check and shall not be deemed to commit the Owner to repeat the procedure in the future;

(E) Neither payment to the Contractor, utilization of the Project for any purpose by the Owner, nor any other act or omission by the Owner shall be interpreted or construed as an acceptance of any work of the Contractor not strictly in compliance with this Contract;

(F) The Owner shall have the right to refuse to make payment and, if necessary, may demand the return of a portion or all of the amount previously paid to the Contractor due to:

- (1) The quality of a portion, or all, of the Contractor's work not being in accordance with the requirements of this Contract;
- (2) The quantity of the Contractor's work not being as represented in the Contractor's Payment Request, or otherwise;
- (3) The Contractor's rate of progress being such that, in the Owner's opinion, substantial or final completion, or both, may be unexcusably delayed;
- (4) The Contractor's failure to use Contract funds, previously paid the Contractor by the Owner, to pay Contractor's Project-related obligations including, but not limited to, subcontractors, laborers and material and equipment suppliers;

- (5) Claims made, or likely to be made, against the Owner or its property;
- (6) Loss caused by the Contractor;
- (7) The Contractor's failure or refusal to perform any of its obligations to the Owner.

In the event that the Owner makes written demand upon the Contractor for amounts previously paid by the Owner as contemplated in this Subparagraph 7(F), the Contractor shall promptly comply with such demand;

(G) If within thirty (30) days from the date payment to the Contractor is due, the Owner, without cause or basis hereunder, fails to pay the Contractor any amounts then due and payable to the Contractor, the Contractor shall have the right to cease work until receipt of proper payment after first providing ten (10) days' written notice of its intent to cease work to the Owner. Any payment not made within thirty (30) days after the date due shall bear interest at the rate of _____ percent (____ %) per annum;

(H) When Substantial Completion has been achieved, the Contractor shall notify the Owner and the Architect in writing and shall furnish to the Architect a listing of those matters yet to be finished. The Architect will thereupon conduct an inspection to confirm that the work is in fact substantially complete. Upon its confirmation that the Contractor's work is substantially complete, the Architect will so notify the Owner and Contractor in writing and will therein set forth the date of Substantial Completion. If the Architect, through its inspection, fails to find that the Contractor's work is substantially complete, and is required to repeat all, or any portion, of its Substantial Completion inspection, the Contractor shall bear the cost of such repeat inspection(s) which cost may be deducted by the Owner from any payment then or thereafter due to the Contractor. Guarantees and equipment warranties required by this Contract shall commence on the date of Substantial Completion. Upon Substantial Completion, the Owner shall pay the Contractor an amount sufficient to increase total payments to the Contractor to one hundred percent (100%) of the Contract Price less any amounts attributable to liquidated damages, together with _____ percent (____ %) of the reasonable costs as determined by the Owner for completing all incomplete work, correcting and bringing into conformance all defective and nonconforming work, and handling any outstanding or threatened claims;

(I) When the Project is finally complete and the Contractor is ready for a final inspection, it shall notify the Owner and the Architect thereof in writing. Thereupon, the Architect will perform a final inspection of the Project. If the Architect confirms that the Project is complete in full accordance with this Contract and that the Contractor has performed all of its obligations to the Owner hereunder, the Architect will furnish a final Approval for Payment to the Owner certifying to the Owner that the Project is complete and the Contractor is entitled to the remainder of the unpaid Contract Price, less any amount withheld pursuant to this Contract. If the Architect is unable to issue its final Approval for Payment and is required to repeat its final inspection of the Project, the Contractor shall bear the cost of such repeat inspection(s), which costs may be deducted by the Owner from the Contractor's final payment;

(J) If the Contractor fails to achieve final completion within _____ days of the date of Substantial Completion, the Contractor shall pay the Owner the sum of _____ Dollars (\$ _____) per day for each and every calendar day of unexcused delay in achieving final completion beyond the date set forth herein for final completion of the work. Any sums due and payable hereunder by the Contractor shall

be payable, not as a penalty, but as liquidated damages representing an estimate of delay damages likely to be sustained by the Owner, estimated at or before the time of executing this Contract. When the Owner reasonably believes that final completion will be unexcusably delayed, the Owner shall be entitled, but not required, to withhold from any amounts otherwise due the Contractor an amount then believed by the Owner to be adequate to recover liquidated damages applicable to such delays. If and when the Contractor overcomes the delay in achieving final completion, or any part thereof, for which the Owner has withheld payment, the Owner shall promptly release to the Contractor those funds withheld, but no longer applicable, as liquidated damages;

(k) Prior to being entitled to receive final payment, and as a condition precedent thereto, the Contractor shall furnish the Owner, in the form and manner required by Owner, if any, with a copy to the Architect:

(1) An affidavit that all of the Contractor's obligations to subcontractors, laborers, equipment or material suppliers, or other third parties in connection with the Project, have been paid or otherwise satisfied;

(2) If required by the Owner, separate releases of lien or lien waivers from each subcontractor, lower tier subcontractor, laborer, supplier or other person or entity who has, or might have a claim against the Owner or the Owner's property,

(3) If applicable, consent(s) of surety to final payment;

(4) All product warranties, operating manuals, instruction manuals and other record documents, drawings and things customarily required of the Contractor, or expressly required herein, as a part of or prior to Project closeout;

(L) The Owner shall, subject to its rights set forth in Subparagraph 7(F) above, make final payment of all sums due the Contractor within ten (10) days of the Architect's execution of a final Approval for Payment.

8.

INFORMATION AND MATERIAL SUPPLIED BY THE OWNER

(A) The Owner shall furnish to the Contractor, prior to the execution of this Contract, any and all written and tangible material in its possession concerning conditions below ground at the site of the Project. Such written and tangible material is furnished to the Contractor only in order to make complete disclosure of such material as being in the possession of the Owner and for no other purpose. By furnishing such material, the Owner does not represent, warrant, or guarantee its accuracy either in whole, in part, implicitly or explicitly, or at all, and shall have no liability therefor. The Owner shall also furnish, if appropriate, the legal description of the Project site, and any required survey;

(B) The Owner shall obtain all required authorizations, approvals, easements, and the like excluding the building permit and other permits or fees required of the Contractor by this Contract, or permits and fees customarily the responsibility of the Contractor;

(C) The Owner will provide the Contractor _____ copies of the complete Contract.

The Contractor will be charged, and shall pay the Owner, _____

Dollars (\$ _____) per additional copy of the Contract which it may require.

9.

CEASE AND DESIST ORDER

In the event the Contractor fails or refuses to perform the work as required herein, the Owner may instruct the Contractor to cease and desist from performing further work in whole or in part. Upon receipt of such instruction, the Contractor shall immediately cease and desist as instructed by the Owner and shall not proceed further until the cause for the Owner's instructions has been corrected, no longer exists, or the Owner instructs that the work may resume. In the event the Owner issues such instructions to cease and desist, and in the further event that the Contractor fails and refuses within seven (7) days of receipt of same to provide adequate assurance to the Owner that the cause of such instructions will be eliminated or corrected, then the Owner shall have the right, but not the obligation, to carry out the work with its own forces, or with the forces of another contractor, and the Contractor shall be fully responsible and liable for the costs of performing such work by the Owner. The rights set forth herein are in addition to, and without prejudice to, any other rights or remedies the Owner may have against the Contractor.

10.

DUTIES, OBLIGATIONS AND RESPONSIBILITIES OF THE CONTRACTOR

In addition to any and all other duties, obligations and responsibilities of the Contractor set forth in this Contract, the Contractor shall have and perform the following duties, obligations and responsibilities to the Owner:

- (A) The Contractor is again reminded of its continuing duties set forth in Subparagraph 3(G) which are by reference hereby incorporated in this Subparagraph 10(A). The Contractor shall not perform work without adequate plans and specifications, or, as appropriate, approved shop drawings, or other submittals. If the Contractor performs work knowing or believing it involves an error, inconsistency or omission in the Contract without first providing written notice to the Architect and Owner, the Contractor shall be responsible for such work and pay the cost of correcting same;
- (B) All work shall strictly conform to the requirements of this Contract;
- (C) The work shall be strictly supervised, the Contractor bearing full responsibility for any and all acts or omissions of those engaged in the work on behalf of the Contractor;
- (D) The Contractor hereby warrants that all labor furnished under this Contract shall be competent to perform the tasks undertaken, that the product of such labor shall yield only first-class results, that all materials and equipment provided shall be new and of high quality, that the completed work will be complete, of high quality, without defects, and that all work strictly complies with the requirements of this Contract. Any work not strictly complying with the requirements of this Subparagraph shall constitute a breach of the Contractor's warranty;
- (E) The Contractor shall obtain and pay for all required permits, fees and licenses customarily obtained by the Contractor. The Contractor shall comply with all legal requirements applicable to the work;
- (F) The Contractor shall employ and maintain at the Project site only competent supervisory personnel. Key supervisory personnel assigned by the Contractor to this Project are as follows:

2.14

NAME

FUNCTION

NAME	FUNCTION

So long as the individuals named above remain actively employed or retained by the Contractor, they shall perform the functions indicated next to their names unless the Owner agrees to the contrary in writing. In the event one or more individuals not listed above subsequently assumes one or more of those functions listed above, the Contractor shall be bound by the provisions of this Subparagraph 10(F) as though such individuals had been listed above;

(G) The Contractor, within fifteen (15) days of commencing the work, shall provide to the Owner and the Architect, and comply with, the Contractor's schedule for completing the work. Such schedule shall be in a form acceptable to the Owner. The Contractor's schedule shall be updated no less frequently than monthly (unless the parties otherwise agree in writing) and shall be updated to reflect conditions encountered from time to time and shall apply to the total Project. Each such revision shall be furnished to the Owner and the Architect. Strict compliance with the requirements of this Subparagraph 10(G) shall be a condition precedent to payment to the Contractor, and failure by the Contractor to strictly comply with said requirements shall constitute a material breach of this Contract;

(H) The Contractor shall keep an updated copy of this Contract at the site. Additionally, the Contractor shall keep a copy of approved shop drawings and other submittals. All of these items shall be available to the Owner and the Architect at all regular business hours. Upon final completion of the work, all of these items shall be finally updated and provided to the Owner and shall become the property of the Owner;

(I) Shop drawings and other submittals from the Contractor do not constitute a part of the Contract. The Contractor shall not do any work requiring shop drawings or other submittals unless such shall have been approved in writing by the Architect. All work requiring approved shop drawings or other submittals shall be done in strict compliance with such approved documents. However, approval by the Architect or the Owner shall not be evidence that work installed pursuant thereto conforms with the requirements of this Contract. The Owner and the Architect shall have no duty to review partial submittals or incomplete submittals. The Contractor shall maintain a submittal log which shall include, at a minimum, the date of each submittal, the date of any resubmittal, the date of any approval or rejection, and the reason for any approval or rejection. The Contractor shall have the duty to carefully review, inspect and examine any and all submittals before submission of same to the Owner or the Architect;

(J) The Contractor shall maintain the Project site in a reasonably clean condition during performance of the work. Upon final completion, the Contractor shall thoroughly clean the Project site of all debris, trash and excess materials or equipment;

(K) At all times relevant to this Contract, the Contractor shall permit the Owner and the Architect to enter upon the Project site and to review or inspect the work without formality or other procedure.

11.
INDEMNITY

The Contractor shall indemnify and hold the Owner harmless from any and all claims, liability, damages, loss, cost and expense of every type whatsoever including, without limitation, attorneys' fees and expenses, in connection with the Contractor's performance of this Contract, provided that such claims, liability, damage, loss, cost or expense is due to sickness, personal injury, disease or death, or to loss or destruction of tangible property (other than the work itself), including loss of use resulting therefrom, to the extent caused by the Contractor, or anyone for whose acts the Contractor may be liable, regardless of whether such liability, claim, damage, loss, cost or expense is caused in part by the Owner.

12.
THE PROJECT ARCHITECT

The architect for this Project is _____
(the "Architect"). In the event the Owner should find it necessary or convenient to replace the Architect, the Owner shall retain a replacement architect and the role of the replacement architect shall be the same as the role of the Architect. Unless otherwise directed by the Owner in writing, the Architect will perform those duties and discharge those responsibilities allocated to the Architect in this Contract. The duties, obligations and responsibilities of the Architect shall include, but are not limited to, the following:

- (A) Unless otherwise directed by the Owner in writing, the Architect shall act as the Owner's agent from the effective date of this Contract until final payment has been made, to the extent expressly set forth in this Contract;
- (B) Unless otherwise directed by the Owner in writing, the Owner and the Contractor shall communicate with each other in the first instance through the Architect;
- (C) When requested by the Contractor in writing, the Architect shall render interpretations necessary for the proper execution or progress of the work;
- (D) The Architect shall draft proposed Change Orders;
- (E) The Architect shall approve, or respond otherwise as necessary concerning shop drawings or other submittals received from the Contractor;
- (F) The Architect shall be authorized to refuse to accept work which is defective or otherwise fails to comply with the requirements of this Contract. If the Architect deems it appropriate, the Architect shall be authorized to call for extra inspection or testing of the work for compliance with requirements of this Contract;
- (G) The Architect shall review the Contractor's Payment Requests and shall approve in writing those amounts which, in the opinion of the Architect, are properly owing to the Contractor as provided in this Contract;
- (H) The Architect shall, upon written request from the Contractor, perform those inspections required in Paragraph 7 hereinabove;

(I) The Architect shall be authorized to require the Contractor to make changes which do not involve a change in the Contract Price or in the time for the Contractor's performance of this Contract consistent with the intent of this Contract;

(J) THE DUTIES, OBLIGATIONS AND RESPONSIBILITIES OF THE CONTRACTOR UNDER THIS CONTRACT SHALL IN NO MANNER WHATSOEVER BE CHANGED, ALTERED, DISCHARGED, RELEASED, OR SATISFIED BY ANY DUTY, OBLIGATION OR RESPONSIBILITY OF THE ARCHITECT. THE CONTRACTOR IS NOT A THIRD-PARTY BENEFICIARY OF ANY CONTRACT BY AND BETWEEN THE OWNER AND THE ARCHITECT. IT IS EXPRESSLY ACKNOWLEDGED AND AGREED THAT THE DUTIES OF THE CONTRACTOR TO THE OWNER ARE INDEPENDENT OF, AND ARE NOT DIMINISHED BY, ANY DUTIES OF THE ARCHITECT TO THE OWNER.

13.

CLAIMS BY THE CONTRACTOR

Claims by the Contractor against the Owner are subject to the following terms and conditions:

(A) All Contractor claims against the Owner shall be initiated by a written claim submitted to the Owner and the Architect. Such claim shall be received by the Owner and the Architect no later than seven (7) calendar days after the event, or the first appearance of the circumstances, causing the claim, and same shall set forth in detail all known facts and circumstances supporting the claim;

(B) The Contractor and the Owner shall continue their performance hereunder regardless of the existence of any claims submitted by the Contractor;

(C) In the event the Contractor discovers previously concealed and unknown site conditions which are materially at variance from those typically and ordinarily encountered in the general geographical location of the Project, the Contract Price shall be modified, either upward or downward, upon the written claim made by either party within seven (7) calendar days after the first appearance to such party of the circumstances. As a condition precedent to the Owner having any liability to the Contractor due to concealed and unknown conditions, the Contractor must give the Owner and the Architect written notice of, and an opportunity to observe, such condition prior to disturbing it. The failure by the Contractor to give the written notice and make the claim as provided by this Subparagraph 13(C) shall constitute a waiver by the Contractor of any rights arising out of or relating to such concealed and unknown condition;

(D) In the event the Contractor seeks to make a claim for an increase in the Contract Price, as a condition precedent to any liability of the Owner therefor, the Contractor shall strictly comply with the requirements of Subparagraph 13(A) above and such claim shall be made by the Contractor before proceeding to execute any additional or changed work. Failure of the condition precedent to occur shall constitute a waiver by the Contractor of any claim for additional compensation;

(E) In connection with any claim by the Contractor against the Owner for compensation in excess of the Contract Price, any liability of the Owner for the Contractor's cost shall be strictly limited to direct cost incurred by the Contractor and shall in no event include indirect cost or consequential damages of the Contractor. The Owner shall not be liable to the Contractor for claims of third-parties including subcontractors, unless and until liability of the Contractor has been established therefor in a court of competent jurisdiction;

(F) In the event the Contractor should be delayed in performing any task which at the time of the delay is then critical, or which during the delay becomes critical, as the sole result of any act or omission by the Owner or someone acting in the Owner's behalf, or by Owner-authorized Change Orders, unusually bad weather not reasonably anticipatable, fire or other Acts of God, the date for achieving Substantial Completion, or, as applicable, final completion, shall be appropriately adjusted by the Owner upon the written claim of the Contractor to the Owner and the Architect. A task is critical within the meaning of this Subparagraph 13(F) if, and only if, said task is on the critical path of the Project schedule so that a delay in performing such task will delay the ultimate completion of the Project. Any claim for an extension of time by the Contractor shall strictly comply with the requirements of Subparagraph 13(A) above. If the Contractor fails to make such claim as required in this Subparagraph 13(F), any claim for an extension of time shall be waived.

14.

SUBCONTRACTORS

Upon execution of this Contract, the Contractor shall identify to the Owner and the Architect, in writing, those parties intended as subcontractors on the Project. The Owner shall, in writing, state any objections the Owner may have to one or more of such subcontractors. The Contractor shall not enter into a subcontract with an intended subcontractor with reference to whom the Owner objects. All subcontracts shall afford the Contractor rights against the subcontractor which correspond to those rights afforded to the Owner against the Contractor herein, including those rights of Contract termination as set forth hereinbelow.

15.

CHANGE ORDERS

One or more changes to the work within the general scope of this Contract, may be ordered by Change Order. The Contractor shall proceed with any such changes, and same shall be accomplished in strict accordance with the following terms and conditions:

(A) Change Order shall mean a written order to the Contractor executed by the Owner and the Architect after execution of this Contract, directing a change in the work and may include a change in the Contract Price or the time for the Contractor's performance, or any combination thereof;³

(B) Any change in the Contract Price resulting from a Change Order shall be determined as follows:

(1) By mutual agreement between the Owner and the Contractor as evidenced by (a) the change in the Contract Price being set forth in the Change Order, (b) such change in the Contract Price, together with any conditions or requirements relating thereto, being initialed by both parties and (c) the Contractor's execution of the Change Order; or,

(2) If no mutual agreement occurs between the Owner and the Contractor, the change in the Contract Price, if any, shall be derived by determining the reasonable actual costs incurred or savings achieved, resulting from revisions in the work. Such reasonable actual costs or savings shall include a component for direct jobsite overhead and profit but shall not include home-office overhead or other indirect costs or components. Any such costs or savings shall be documented in the format, and with such content and detail as the Owner or the Architect requires.

(C) The execution of a Change Order by the Contractor shall constitute conclusive evidence of the Contractor's agreement to the ordered changes in the work, this Contract as thus amended, the Contract Price and the time for performance by the Contractor. The Contractor, by executing the Change Order, waives and forever releases any claim against the Owner for additional time or compensation for matters relating to or arising out of or resulting from the work included within or affected by the executed Change Order;

(D) The Contractor shall notify and obtain the consent and approval of the Contractor's surety with reference to all Change Orders if such notice, consent or approval are required by the Owner, the Architect, the Contractor's surety or by law. The Contractor's execution of the Change Order shall constitute the Contractor's warranty to the Owner that the surety has been notified of, and consents to, such Change Order and the surety shall be conclusively deemed to have been notified of such Change Order and to have expressly consented thereto.

16.

DISCOVERING AND CORRECTING DEFECTIVE OR INCOMPLETE WORK

(A) In the event that the Contractor covers, conceals or obscures its work in violation of this Contract or in violation of a directive from the Owner or the Architect, such work shall be uncovered and displayed for the Owner's or Architect's inspection upon request, and shall be reworked at no cost in time or money to the Owner;

(B) If any of the work is covered, concealed or obscured in a manner not covered by Subparagraph 16(A) above, it shall, if directed by the Owner or the Architect be uncovered and displayed for the Owner's or Architect's inspection. If the uncovered work conforms strictly with this Contract, the costs incurred by the Contractor to uncover and subsequently, replace such work shall be borne by the Owner. Otherwise, such costs shall be borne by the Contractor;

(C) The Contractor shall, at no cost in time or money to the Owner, correct work rejected by the Owner or by the Architect as defective or failing to conform to this Contract. Additionally, the Contractor shall reimburse the Owner for all testing, inspections and other expenses incurred as a result thereof;

(D) In addition to its warranty obligations set forth elsewhere herein, the Contractor shall be specifically obligated to correct any and all defective or nonconforming work for a period of twelve (12) months following final completion upon written direction from the Owner;

(E) The Owner may, but shall in no event be required to, choose to accept defective or nonconforming work. In such event, the Contract Price shall be reduced by the greater of (1) the reasonable costs of removing and correcting the defective or nonconforming work, and (2) the difference between the fair market value of the Project as constructed and the fair market value of the Project had it not been constructed in such a manner as to include defective or nonconforming work. If the remaining portion of the unpaid Contract Price, if any, is insufficient to compensate the Owner for the acceptance of defective or nonconforming work, the Contractor shall, upon written demand from the Owner, pay the Owner such remaining compensation for accepting defective or nonconforming work.

17.

TERMINATION BY THE CONTRACTOR

If the Owner repeatedly fails to perform its material obligations to the Contractor for a period of thirty (30) days after receiving written notice from the Contractor of its intent to terminate hereunder, the contractor may terminate performance under this Contract by written notice to the Owner and the Architect. In such event, the Contractor shall be entitled to recover from the Owner as though the Owner had terminated the Contractor's performance under this Contract for convenience pursuant to Subparagraph 19(A) hereunder.

18.

OWNER'S RIGHT TO SUSPEND CONTRACTOR'S PERFORMANCE

(A) The Owner shall have the right at any time to direct the Contractor to suspend its performance, or any designated part thereof, for any reason whatsoever, or without reason, for a cumulative period of up to _____ calendar days. If any such suspension is directed by the Owner, the Contractor shall immediately comply with same;

(B) In the event the Owner directs a suspension of performance under this Paragraph 18, through no fault of the Contractor, the Owner shall pay the Contractor as full compensation for such suspension the Contractor's reasonable costs, actually incurred and paid, of:

- (1) demobilization and remobilization, including such costs paid to subcontractors;
- (2) preserving and protecting work in place;
- (3) storage of materials or equipment purchased for the Project, including insurance thereon;
- (4) performing in a later, or during a longer, time frame than that contemplated by this Contract.

19.

TERMINATION BY THE OWNER

The Owner may terminate this Contract in accordance with the following terms and conditions:

(A) The Owner may, for any reason whatsoever, terminate performance under this Contract by the Contractor for convenience. The Owner shall give written notice of such termination to the Contractor specifying when termination becomes effective. The Contractor shall incur no further obligations in connection with the work and the Contractor shall stop work when such termination becomes effective. The Contractor shall also terminate outstanding orders and subcontracts. The Contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders. The Owner may direct the Contractor to assign the Contractor's right, title and interest under termination orders or subcontracts to the Owner or its designee. The Contractor shall transfer title and deliver to the Owner such completed or partially completed work and materials,

equipment, parts, fixtures, information and Contract rights as the Contractor has. When terminated for convenience, the Contractor shall be compensated as follows:

- (1) The Contractor shall submit a termination claim to the Owner and the Architect specifying the amounts due because of the termination for convenience together with costs, pricing or other data required by the Owner or the Architect. If the Contractor fails to file a termination claim within one (1) year from the effective date of termination, the Owner shall pay the Contractor, an amount derived in accordance with Subparagraph (3) below;
- (2) The Owner and the Contractor may agree to the compensation, if any, due to the Contractor hereunder;
- (3) Absent agreement to the amount due to the Contractor, the Owner shall pay the Contractor the following amounts:
 - (a) Contract prices for labor, materials, equipment and other services accepted under this Contract;
 - (b) Reasonable costs incurred in preparing to perform and in performing the terminated portion of the work, and in terminating the Contractor's performance, plus a fair and reasonable allowance for direct jobsite overhead and profit thereon (such profit shall not include anticipated profit or consequential damages); provided however, that if it appears that the Contractor would have not profited or would have sustained a loss if the entire Contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss, if any;
 - (c) Reasonable costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to Subparagraph 19(A) of this Paragraph. These costs shall not include amounts paid in accordance with other provisions hereof.

The total sum to be paid the Contractor under this Subparagraph 19(A) shall not exceed the total Contract Price, as properly adjusted, reduced by the amount of payments otherwise made, and shall in no event include duplication of payment.

(B) If the Contractor does not perform the work, or any part thereof, in a timely manner, supply adequate labor, supervisory personnel or proper equipment or materials, or if it fails to timely discharge its obligations for labor, equipment and materials, or proceeds to disobey applicable law, or otherwise commits a violation of a material provision of this Contract, then the Owner, in addition to any other rights it may have against the Contractor or others, may terminate the performance of the Contractor and assume possession of the Project site and of all materials and equipment at the site and may complete the work. In such case, the Contractor shall not be paid further until the work is complete. After final completion has been achieved, if any portion of the Contract Price, as it may be modified hereunder, remains after the cost to the Owner of completing the work, including all costs and expenses of every nature incurred, has been deducted by the Owner, such remainder shall belong to the Contractor. Otherwise, the Contractor shall pay and make whole the Owner for such cost. This obligation for payment shall survive the termination of the Contract. In the event the employment of the Contractor is terminated by the Owner for cause pursuant to this Subparagraph 19(B) and it is subsequently determined by a Court of competent jurisdiction that such termination was without cause, such termination shall thereupon be deemed a Termination for Convenience under Subparagraph 19(A) and the provisions of Subparagraph 19(A) shall apply.

20.

INSURANCE

The Contractor shall have and maintain insurance in accordance with the requirements of Exhibit "A" attached hereto and incorporated herein by reference.

21.

SURETY BONDS

The Contractor shall furnish separate performance and payment bonds to the Owner. Each bond shall set forth a penal sum in an amount not less than the Contract Price. Each bond furnished by the Contractor shall incorporate by reference the terms of this Contract as fully as though they were set forth verbatim in such bonds. In the event the Contract Price is adjusted by Change Order executed by the Contractor, the penal sum of both the performance bond and the payment bond shall be deemed increased by like amount. The performance and payment bonds furnished by the Contractor shall be in form suitable to the Owner and shall be executed by a surety, or sureties, reasonably acceptable to the Owner.

22.

PROJECT RECORDS

All documents relating in any manner whatsoever to the Project, or any designated portion thereof, which are in the possession of the Contractor, or any subcontractor of the Contractor, shall be made available to the Owner or the Architect for inspection and copying upon written request by the Owner. Furthermore, said documents shall be made available, upon request by the Owner, to any state, federal or other regulatory authority and any such authority may review, inspect and copy such records. Said records include, but are not limited to, all drawings, plans, specifications, submittals, correspondence, minutes, memoranda, tape recordings, videos, or other writings or things which document the Project, its design, and its construction. Said records expressly include those documents reflecting the cost of construction to the Contractor. The Contractor shall maintain and protect these documents for no less than four (4) years after final completion of the Project, or for any longer period of time as may be required by law or good construction practice.

23.

APPLICABLE LAW

The law is hereby agreed to be the law of the State where the Project is situated.

2-22

SUCCESSORS AND ASSIGNS

Each party binds itself, its successors, assigns, executors, administrators or other representatives to the other party hereto and to successors, assigns, executors, administrators or other representatives of such other party in connection with all terms and conditions of this Contract. The Contractor shall not assign this Contract without prior written consent of the Owner.

OWNER

CONTRACTOR

SEAL
(TYPED NAME)

SEAL
(TYPED NAME)

By: _____
(SIGNATURE)

By: _____
(SIGNATURE)

(PRINTED NAME, TITLE AND ADDRESS)

(PRINTED NAME, TITLE AND ADDRESS)

(DATE OF EXECUTION)

(DATE OF EXECUTION)

2-23

reasonably believes that Substantial Completion will be unexcusably delayed, the Owner shall be entitled, but not required, to withhold from any amounts otherwise due the Contractor an amount then believed by the Owner to be adequate to recover liquidated damages applicable to such delays. If and when the Contractor overcomes the delay in achieving Substantial Completion, or any part thereof, for which the Owner has withheld payment, the Owner shall promptly release to the Contractor those funds withheld, but no longer applicable, as liquidated damages;

(c) The term "Substantial Completion", as used herein, shall mean that point at which, as certified in writing by the Architect, the Project is at a level of completion in strict compliance with this Contract such that the Owner or its designee can enjoy beneficial use or occupancy and can use or operate it in all respects, for its intended purpose. Partial use or occupancy of the Project shall not result in the Project being deemed substantially complete, and such partial use or occupancy shall not be evidence of Substantial Completion;

(d) All limitations of time set forth herein are material and are of the essence of this Contract.

7.

FIXED PRICE AND CONTRACT PAYMENTS

(A) The Owner shall pay, and the Contractor shall accept, as full and complete payment for the Contractor's timely performance of its obligations hereunder the fixed price of

_____ Dollars (\$ _____).
The price set forth in this Subparagraph 7(A) shall constitute the Contract Price, which shall not be modified except by Change Order as provided in this Contract;

(B) Within ten (10) calendar days of the effective date hereof, the Contractor shall prepare and present to the Owner and the Architect the Contractor's Schedule of Values apportioning the Contract Price among the different elements of the Project for purposes of periodic and final payment. The Contractor's Schedule of Values shall be presented in whatever format, with such detail, and backed up with whatever supporting information the Architect or the Owner requests. The Contractor shall not imbalance its Schedule of Values nor artificially inflate any element thereof. The violation of this provision by the Contractor shall constitute a material breach of this Contract. The Contractor's Schedule of Values will be utilized for the Contractor's Payment Requests but shall only be so utilized after it has been acknowledged in writing by the Architect and the Owner;

(C) The Owner shall pay the Contract Price to the Contractor in accordance with the procedures set forth in this Paragraph 7. On or before the _____ day of each month after commencement of performance, but no more frequently than once monthly, the Contractor may submit a Payment Request for the period ending the _____ day of the month. Said Payment Request shall be in such format and include whatever supporting information as may be required by the Architect, the Owner, or both. Therein, the Contractor may request payment for ninety percent (90%) of that part of the Contract Price allocable to Contract requirements properly provided, labor, materials and equipment properly incorporated in the Project, and materials or equipment necessary for the Project and properly stored at the Project site (or elsewhere if offsite storage is approved in writing by the Owner), less the total amount of previous payments received from the Owner. Any payment on account of stored materials or equipment will be subject to the Contractor providing written proof that the Owner has title to such materials or equipment and that they are fully insured against loss or damage. Each such Payment Request shall be signed by the Contractor and shall constitute the Contractor's representation that the quantity of work has reached the level for which

payment is requested, that the work has been properly installed or performed in strict compliance with this Contract, and that the Contractor knows of no reason why payment should not be made as requested. Thereafter, the Architect shall review the Payment Request and may also review the work at the Project site or elsewhere to determine whether the quantity and quality of the work is as represented in the Payment Request and is as required by this Contract. The Architect shall approve in writing the amount which, in the opinion of the Architect, is properly owing to the Contractor. The Owner shall make payment to the Contractor within thirty (30) days following the Architect's written approval of each Payment Request. The amount of each such payment shall be the amount approved for payment by the Architect less such amounts, if any, otherwise owing by the Contractor to the Owner or which the Owner shall have the right to withhold as authorized by this Contract. The Architect's approval of the Contractor's Payment Requests shall not preclude the Owner from the exercise of any of its rights as set forth in Subparagraph 7(F) hereinbelow. The submission by the Contractor of a Payment Request also constitutes an affirmative representation and warranty that all work for which the Owner has previously paid is free and clear of any lien, claim, or other encumbrance of any person whatsoever. As a condition precedent to payment, the Contractor shall, if required by the Owner, also furnish to the Owner properly executed waivers of lien, in a form acceptable to the Owner, from all subcontractors, materialmen, suppliers or others having lien rights, wherein said subcontractors, materialmen, suppliers or others having lien rights, shall acknowledge receipt of all sums due pursuant to all prior Payment Requests and waive and relinquish any liens, lien rights or other claims relating to the Project site. Furthermore, the Contractor warrants and represents that, upon payment of the Payment Request submitted, title to all work included in such payment shall be vested in the Owner;

(D) When payment is received from the Owner, the Contractor shall immediately pay all subcontractors, materialmen, laborers and suppliers the amounts they are due for the work covered by such payment. In the event the Owner becomes informed that the Contractor has not paid a subcontractor, materialman, laborer, or supplier as provided herein, the Owner shall have the right, but not the duty, to issue future checks and payment to the Contractor of amounts otherwise due hereunder naming the Contractor and any such subcontractor, materialman, laborer, or supplier as joint payees. Such joint check procedure, if employed by the Owner, shall create no rights in favor of any person or entity beyond the right of the named payees to payment of the check and shall not be deemed to commit the Owner to repeat the procedure in the future;

(E) Neither payment to the Contractor, utilization of the Project for any purpose by the Owner, nor any other act or omission by the Owner shall be interpreted or construed as an acceptance of any work of the Contractor not strictly in compliance with this Contract;

(F) The Owner shall have the right to refuse to make payment and, if necessary, may demand the return of a portion or all of the amount previously paid to the Contractor due to:

(1) The quality of a portion, or all, of the Contractor's work not being in accordance with the requirements of this Contract;

(2) The quantity of the Contractor's work not being as represented in the Contractor's Payment Request, or otherwise;

(3) The Contractor's rate of progress being such that, in the Owner's opinion, substantial or final completion, or both, may be unexcusably delayed;

(4) The Contractor's failure to use Contract funds, previously paid the Contractor by the Owner, to pay Contractor's Project-related obligations including, but not limited to, subcontractors, laborers and material and equipment suppliers;

- (5) Claims made, or likely to be made, against the Owner or its property;
- (6) Loss caused by the Contractor;
- (7) The Contractor's failure or refusal to perform any of its obligations to the Owner.

In the event that the Owner makes written demand upon the Contractor for amounts previously paid by the Owner as contemplated in this Subparagraph 7(F), the Contractor shall promptly comply with such demand;

(G) If within thirty (30) days from the date payment to the Contractor is due, the Owner, without cause or basis hereunder, fails to pay the Contractor any amounts then due and payable to the Contractor, the Contractor shall have the right to cease work until receipt of proper payment after first providing ten (10) days' written notice of its intent to cease work to the Owner. Any payment not made within thirty (30) days after the date due shall bear interest at the rate of _____ percent (____%) per annum;

(H) When Substantial Completion has been achieved, the Contractor shall notify the Owner and the Architect in writing and shall furnish to the Architect a listing of those matters yet to be finished. The Architect will thereupon conduct an inspection to confirm that the work is in fact substantially complete. Upon its confirmation that the Contractor's work is substantially complete, the Architect will so notify the Owner and Contractor in writing and will therein set forth the date of Substantial Completion. If the Architect, through its inspection, fails to find that the Contractor's work is substantially complete, and is required to repeat all, or any portion, of its Substantial Completion inspection, the Contractor shall bear the cost of such repeat inspection(s) which cost may be deducted by the Owner from any payment then or thereafter due to the Contractor. Guarantees and equipment warranties required by this Contract shall commence on the date of Substantial Completion. Upon Substantial Completion, the Owner shall pay the Contractor an amount sufficient to increase total payments to the Contractor to one hundred percent (100%) of the Contract Price less any amounts attributable to liquidated damages, together with _____ percent (____%) of the reasonable costs as determined by the Owner for completing all incomplete work, correcting and bringing into conformance all defective and nonconforming work, and handling any outstanding or threatened claims;

(I) When the Project is finally complete and the Contractor is ready for a final inspection, it shall notify the Owner and the Architect thereof in writing. Thereupon, the Architect will perform a final inspection of the Project. If the Architect confirms that the Project is complete in full accordance with this Contract and that the Contractor has performed all of its obligations to the Owner hereunder, the Architect will furnish a final Approval for Payment to the Owner certifying to the Owner that the Project is complete and the Contractor is entitled to the remainder of the unpaid Contract Price, less any amount withheld pursuant to this Contract. If the Architect is unable to issue its final Approval for Payment and is required to repeat its final inspection of the Project, the Contractor shall bear the cost of such repeat inspection(s), which costs may be deducted by the Owner from the Contractor's final payment;

(J) If the Contractor fails to achieve final completion within _____ days of the date of Substantial Completion, the Contractor shall pay the Owner the sum of _____

_____ Dollars (\$ _____) per day for each and every calendar day of unexcused delay in achieving final completion beyond the date set forth herein for final completion of the work. Any sums due and payable hereunder by the Contractor shall

INSTRUCTION SHEET

FOR AIA DOCUMENT A101, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR where the Basis of Payment is a STIPULATED SUM—1987 EDITION

A. GENERAL INFORMATION

1. Purpose

AIA Document A101 is intended for use on construction projects where the basis of payment is a stipulated sum (fixed price). It is suitable for any arrangement between the Owner and Contractor where the cost has been set in advance, either by bidding or by negotiation.

2. Related Documents

This document has been prepared for use in conjunction with the 1987 edition of AIA Document A201, General Conditions of the Contract for Construction, which is adopted into A101 by a specific reference. This integrated set of documents is suitable for most projects; however, for projects of limited scope, use of AIA Document A107 may be considered.

The A101 document may be used as one part of the Contract Documents which record the Contract for Construction between the Owner and the Contractor. The other Contract Documents are:

- General Conditions (i.e., A201)
- Supplementary Conditions
- Drawings
- Specifications
- Modifications

Although the AIA does not produce standard documents for Supplementary Conditions, Drawings or Specifications, a variety of model and guide documents are available, including AIA's MASTERSPEC.

3. Arbitration

This document incorporates ARBITRATION by adoption of AIA Document A201, which provides for arbitration according to the Construction Industry Arbitration Rules of the American Arbitration Association. Arbitration is BINDING AND MANDATORY in most states and under the federal Arbitration Act. In a minority of states, arbitration provisions relating to future disputes are not enforceable, but arbitration is enforceable if agreed to after the dispute arises. A few states require that the contracting parties be especially notified that the written contract contains an arbitration provision by: a warning on the face of the document, specific placement of the arbitration provision within the document or specific discussions among the parties prior to signing the document.

Arbitration provisions have been included in most AIA contract forms since 1888 in order to encourage alternative dispute resolution procedures and to provide users of AIA documents with legally enforceable arbitration provisions when the parties choose to adopt arbitration into their contract. Individuals may, however, choose to delete the arbitration provisions based upon their business decisions with the advice of counsel. To obtain a copy of the Construction Industry Arbitration Rules, write the American Arbitration Association, 140 West 51st Street, New York, NY 10020.

4. Use of Non-AIA Forms

If a combination of AIA documents and non-AIA documents is to be used, particular care must be taken to achieve consistency of language and intent. Certain owners require the use of owner-contractor agreements and other contract forms which they prepare. Such forms should be carefully compared with the standard AIA forms for which they are being substituted before execution of an agreement. If there are any significant omissions, additions or variances from the terms of the related standard AIA forms, both legal and insurance counsel should be consulted.

5. Letter Forms of Agreement

Letter forms of agreement are generally discouraged by the AIA, as is the performance of a part or the whole of the Work on the basis of oral agreements or understandings. The standard AIA agreement forms have been developed through more than seventy-five years of experience and have been tested repeatedly in the courts. In addition, the standard forms have been carefully coordinated with other AIA documents.

6. Use of Current Documents

Prior to using any AIA document, the user should consult the AIA, an AIA component chapter or a current AIA Documents Price List to determine the current edition of each document.

7. Limited License for Reproduction

AIA Document A101 is a copyrighted work and may not be reproduced or excerpted from in substantial part without the express written permission of the AIA. The A101 document is intended to be used as a consumable—that is, the original document purchased by the user is intended to be consumed in the course of being used. There is no implied permission to reproduce this document, nor does membership in The American Institute of Architects confer any further rights to reproduce them.

A limited license is hereby granted to retail purchasers to reproduce a maximum of ten copies of a completed or executed A101, but only for use in connection with a particular Project. A101 may not be reproduced for Project Manuals. Rather, if a user wishes to

include it as an example in a Project Manual, the normal practice is to purchase a quantity of the pre-printed forms and blank in each of the Project Manuals. Partial modifications, if any, may be accomplished without completing the form by using separate Supplementary Conditions.

Upon reaching agreement concerning the Contract Sum and other conditions, the form may be removed from the manual and such information, except for the signatures, may be added to the blank spaces of the form. The user may then reproduce up to ten copies to facilitate the execution (signing) of multiple original copies of the form, or for other administrative purposes in connection with a particular Project. Please note that at least three original copies of A101 should be signed by the parties as required by the last provision of A101.

B. CHANGES FROM THE PREVIOUS EDITION

1. Format Changes

Two new articles have been added: Article 8, Termination or Suspension; and Article 9, Enumeration of Contract Documents.

2. Changes in Content

The 1987 edition of A101 revises the 1977 edition to reflect changes made in the most recent (1987) edition of A201. It incorporates alterations proposed by architects, contractors, owners and professional consultants. The following are some of the significant changes made to the contents from the 1977 edition of A101:

Article 1: A specific statement has been added that the Contract represents the entire agreement between the parties, superseding previous negotiations and writings.

Article 2: Space has been provided to describe any exceptions to the description of Contractor's scope of Work.

Article 3: In the title of this article, "Time of Commencement" has been changed to "Date of Commencement."

Article 4: Space has been provided for insertion of the amounts relating to alternates and unit prices.

Article 5: The Progress Payments article has been substantially rewritten and expanded. Detailed directions have been added on how and when payments shall be calculated and applied for.

Article 6: Further details have been added to clarify the conditions under which final payment shall be made by the Owner.

Article 7: The reference to definitions contained in the Conditions of the Contract has been deleted because the A201 document is now specifically adopted by reference under Article 9.

Article 8: This is a new article containing references to the General Conditions.

Article 9: This article is new. The A101 Document and the A201 Document are explicitly enumerated as parts of the Contract Documents. Spaces are provided for information specifically identifying the other Contract Documents, including the Supplementary Conditions, Specifications, Drawings and Addenda, if any.

Signature Page: It is noted above the signature lines that this agreement is executed on at least three original copies. See the instructions pertaining to Limited License for Reproduction.

C. COMPLETING THE A101 FORM

1. Prospective bidders should be informed of any additional provisions which may be included in A101, such as liquidated damages or provisions for stored materials, by an appropriate notice in the Bidding Documents and the Supplementary Conditions.

2. Modifications

Users are encouraged to consult an attorney before completing an AIA document. Particularly with respect to contractor's licensing laws, duties imposed by building codes, interest charges, arbitration and indemnification, this document may require modification with the assistance of legal counsel to fully comply with state or local laws regulating these matters.

Generally, necessary modifications may be accomplished by writing or typing the appropriate terms in the blank spaces provided on the form or by Supplementary Conditions, special conditions or amendments included in the Project Manual and referenced in this document. The form may also be modified by striking out language directly on the original pre-printed form. Care must be taken in making these kinds of deletions, however. Under NO circumstances should pre-printed language be struck out in such a way as to render it illegible (as, for example, with blocking tape, correction fluid or X's that completely obscure the text). This may raise suspicions of fraudulent concealment or suggest that the completed and signed document has been tampered with. Handwritten changes should be initialed by both parties to the contract.

It is definitely not recommended practice to retype the standard document. Besides being outside the limited license for reproduction granted under these Instructions, retyping can introduce typographical errors and cloud the legal interpretation given to a standard clause when blended with modifications.

Retyping eliminates one of the principal advantages of the standard form documents. By merely reviewing the modifications to be made to a standard form document, parties familiar with that document can quickly understand the essence of the proposed relationship. Commercial exchanges are greatly simplified and expedited, good-faith dealing is encouraged, and otherwise latent clauses are exposed for scrutiny. In this way, contracting parties can more fairly measure their risks.

3. Cover Page

Date: The date represents the date the Agreement becomes effective. It may be the date that an oral agreement was reached, the date the Agreement was originally submitted to the owner, the date authorizing action was taken or the date of actual execution. It

will be the date from which the Contract Time is measured unless a different date is inserted under Paragraph 3.1.

Identification of Parties: Parties to this Agreement should be identified using the full address and legal name under which the Agreement is to be executed, including a designation of the legal status of both parties (sole proprietorship, partnership, joint venture, unincorporated association, limited partnership or corporation [general, closed or professional], etc.). Where appropriate, a copy of the resolution authorizing the individual to act on behalf of the firm or entity should be attached.

Project Description: The proposed Project should be described in sufficient detail to identify (1) the official name or title of the facility, (2) the location of the site, if known, (3) the proposed building type and usage, and (4) the size, capacity or scope of the Project, if known.

Architect: As in the other Contract Documents, the Architect's full legal or corporate titles should be used.

4. Article 1—The Contract Documents

The Contract Documents must be enumerated in detail in Article 9. The Contractor's bid itself may be incorporated into the Contract; similarly, other bidding documents, bonds, etc., may be incorporated, especially in public work.

5. Article 2—The Work of This Contract

Portions of the Work which are the responsibility of persons other than the Contractor and which have not been otherwise indicated should be listed here.

6. Article 3—Date of Commencement and Substantial Completion

The following items should be included as appropriate:

Paragraph 3.1

The date of commencement of the Work should be inserted if it is different from the date of the Agreement. It should not be earlier than the date of execution (signing) of the Contract. After the first sentence, enter either the specific date of commencement of the Work, or if a notice to proceed is to be used, enter the sentence, "The date of commencement shall be stipulated by the notice to proceed." When time of performance is to be strictly enforced, the statement of starting time should be carefully weighed.

Paragraph 3.2

The time within which Substantial Completion of the Work is to be achieved may be expressed as a number of days (preferably calendar days) or as a specified date. Any requirements for earlier Substantial Completion of portions of the Work should be entered here if not specified elsewhere in the Contract Documents.

Also insert any provisions for liquidated damages relating to failure to complete on time. Liquidated damages are not a penalty to be inflicted on the Contractor, but must bear an actual and reasonably estimable relationship to the Owner's loss if construction is not completed on time. If liquidated damages are to be assessed because delayed construction will result in actual loss to the Owner, the amount of damages due for each day lost should be entered in the Supplementary Conditions or the Agreement. Factors such as confidentiality or the need to inform Subcontractors about the amount of liquidated damages will help determine the location chosen.

The provision for liquidated damages, which should be carefully reviewed or drafted by the Owner's attorney, may be as follows:

The Contractor and the Contractor's surety, if any, shall be liable for and shall pay the Owner the sums hereinafter stipulated as liquidated damages for each calendar day of delay until the Work is substantially complete: Dollars
(\$).

For further information on liquidated damages, penalties and bonus provisions, see AIA Document A511, Guide for Supplementary Conditions, Paragraph 9.11.

7. Article 4—Contract Sum

Paragraph 4.1

Enter the Contract Sum payable to the Contractor.

Paragraph 4.2

Identify any alternates described in the Contract Documents and accepted by the Owner. If decisions on alternates are to be made subsequent to execution of A101, attach a schedule showing the amount of each alternate and the date until which that amount is valid.

Paragraph 4.3

Enter any unit prices, cash allowances or cash contingency allowances.

If unit prices are not covered in greater detail elsewhere in the Contract Documents, the following provision for unit prices is suggested:

The unit prices listed below shall determine the value of extra Work or changes in the Work, as applicable. They shall be considered complete and shall include all material and equipment, labor, installation costs, overhead and profit. Unit prices shall be used uniformly for additions or deductions.

Specific allowances for overhead and profit on Change Orders may be included under this paragraph to forestall disputes over future Change Order costs.

8. Article 5—Progress Payments

Paragraph 5.2

Insert the time period covered by each Application for Payment if it differs from the one given.

Paragraph 5.3

Insert the time schedule for presenting Applications for Payment. Insert the day of the month progress payments are due, indicating whether such day is to be in the same or the following month after receipt by the Architect of the relevant Application for Payment. The last day upon which Work may be included in an Application should normally be no less than 14 days prior to the payment date, in consideration of the 7 days required for the Architect's evaluation of an Application and issuance of a Certificate for Payment and the time subsequently accorded the Owner to make payment in Article 9 of A201. The Contractor may prefer a few additional days to prepare the Application.

Due dates for payment should be acceptable to both the Owner and Contractor. They should allow sufficient time for the Contractor to prepare an Application for Payment, for the Architect to certify payment, and for the Owner to make payment. They should also be in accordance with time limits established by this Article and Article 9 of A201.

Subparagraph 5.6.1

Indicate the percent retainage, if any, to be withheld when computing the amount of each progress payment.

The Owner frequently pays the Contractor 90 percent of the earned sum when payments fall due, retaining 10 percent to ensure faithful performance. These percentages may vary with circumstances and localities. The AIA endorses the practice of reducing retainage as rapidly as possible, consistent with the continued protection of all affected parties. See AIA Document A511, Guide for Supplementary Conditions, for a complete discussion.

Subparagraph 5.6.2

Insert any additional retainage to be withheld from that portion of the Contract Sum allocable to materials and equipment stored at the site.

Payment for materials stored off the site should be provided for in a specific agreement and enumerated in Paragraph 7.3. Provisions regarding transportation to the site and insurance protecting Owner's interests should be included.

Subparagraph 5.7.1

Enter the percentage of the Contract Sum to be paid to the Contractor upon Substantial Completion.

Paragraph 5.8

Describe any arrangements to reduce or limit retainages indicated in Subparagraphs 5.6.1 and 5.6.2, if not explained elsewhere in the Contract Documents.

A provision for reducing retainage should provide that the reduction will be made only if the Architect judges that the Work is progressing satisfactorily. If the Contractor has furnished a bond, demonstration of the surety's consent to reduction in or partial release of retainage must be provided before such reduction is effected. Use of AIA Document G707A is recommended.

9. Article 6—Final Payment

Insert the date by which Owner shall make final payment, if it differs from the one stated.

When final payment is requested, the Architect should ascertain that all claims have been settled or should define those which remain unsettled. The Architect should obtain the Contractor's certification required by Article 9 of A201 and must determine that, to the best of the Architect's knowledge and belief and according to final inspection, the requirements of the Contract have been fulfilled.

10. Article 7—Miscellaneous Provisions

Paragraph 7.2

Enter any agreed-upon interest rate due on overdue payments.

Paragraph 7.3

Insert other provisions here.

11. Article 9—Enumeration of Contract Documents

A detailed enumeration of all Contract Documents must be made in this Article.

D. EXECUTION OF THE AGREEMENT

The Agreement should be executed in not less than triplicate by the Owner and the Contractor. Each person executing the Agreement should indicate the capacity in which they are acting (i.e., president, secretary, partner, etc.) and the authority under which they are executing the Agreement. Where appropriate, a copy of the resolution authorizing the individual to act on behalf of the firm or entity should be attached.



AIA Document A101

Standard Form of Agreement Between Owner and Contractor

*where the basis of payment is a
STIPULATED SUM*

1987 EDITION

*THIS DOCUMENT HAS IMPORTANT LEGAL CONSEQUENCES; CONSULTATION WITH
AN ATTORNEY IS ENCOURAGED WITH RESPECT TO ITS COMPLETION OR MODIFICATION.*

*The 1987 Edition of AIA Document A201, General Conditions of the Contract for Construction, is adopted
in this document by reference. Do not use with other general conditions unless this document is modified.*

This document has been approved and endorsed by The Associated General Contractors of America.

AGREEMENT

made as of the _____ day of _____ in the year of
Nineteen Hundred and _____

BETWEEN the Owner:

(Name and address)

and the Contractor:

(Name and address)

The Project is:

(Name and location)

The Architect is:

(Name and address)

The Owner and Contractor agree as set forth below.

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ARTICLE 1
THE CONTRACT DOCUMENTS

The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, addenda issued prior to execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement; these form the Contract, and are as fully a part of the Contract as if attached to this Agreement or repeated herein. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Contract Documents, other than Modifications, appears in Article 9.

ARTICLE 2
THE WORK OF THIS CONTRACT

The Contractor shall execute the entire Work described in the Contract Documents, except to the extent specifically indicated in the Contract Documents to be the responsibility of others, or as follows:

ARTICLE 3
DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

3.1 The date of commencement is the date from which the Contract Time of Paragraph 3.2 is measured, and shall be the date of this Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Owner.

(Insert the date of commencement, if it differs from the date of this Agreement or, if applicable, state that the date will be fixed in a notice to proceed.)

Unless the date of commencement is established by a notice to proceed issued by the Owner, the Contractor shall notify the Owner in writing not less than five days before commencing the Work to permit the timely filing of mortgages, mechanic's liens and other security interests.

3.2 The Contractor shall achieve Substantial Completion of the entire Work not later than

(Insert the calendar date or number of calendar days after the date of commencement. Also insert any requirements for earlier Substantial Completion of certain portions of the Work, if not stated elsewhere in the Contract Documents.)

, subject to adjustments of this Contract Time as provided in the Contract Documents.

(Insert provisions, if any, for liquidated damages relating to failure to complete on time.)

ARTICLE 4
CONTRACT SUM

4.1 The Owner shall pay the Contractor in current funds for the Contractor's performance of the Contract the Contract Sum of _____ Dollars (\$ _____), subject to additions and deductions as provided in the Contract Documents.

4.2 The Contract Sum is based upon the following alternates, if any, which are described in the Contract Documents and are hereby accepted by the Owner:

(State the numbers or other identification of accepted alternates. If decisions on other alternates are to be made by the Owner subsequent to the execution of this Agreement, attach a schedule of such other alternates showing the amount for each and the date until which that amount is valid.)

4.3 Unit prices, if any, are as follows:

ARTICLE 5
PROGRESS PAYMENTS

5.1 Based upon Applications for Payment submitted to the Architect by the Contractor and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents.

5.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month, or as follows:

5.3 Provided an Application for Payment is received by the Architect not later than the _____ day of a month, the Owner shall make payment to the Contractor not later than the _____ day of the _____ month. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than _____ days after the Architect receives the Application for Payment.

5.4 Each Application for Payment shall be based upon the schedule of values submitted by the Contractor in accordance with the Contract Documents. The schedule of values shall allocate the entire Contract Sum among the various portions of the Work and be prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment.

5.5 Applications for Payment shall indicate the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment.

5.6 Subject to the provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

5.6.1. Take that portion of the Contract Sum properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the total Contract Sum allocated to that portion of the Work in the schedule of values, less retainage of _____ percent (_____ %). Pending final determination of cost to the Owner of changes in the Work, amounts not in the dispute may be included as provided in Subparagraph 7.3.7 of the General Conditions even though the Contract Sum has not yet been adjusted by Change Order;

5.6.2 Add that portion of the Contract Sum properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the completed construction (or, if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing), less retainage of _____ percent (_____ %);

5.6.3 Subtract the aggregate of previous payments made by the Owner; and

5.6.4 Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Paragraph 9.5 of the General Conditions.

5.7 The progress payment amount determined in accordance with Paragraph 5.6 shall be further modified under the following circumstances:

5.7.1 Add, upon Substantial Completion of the Work, a sum sufficient to increase the total payments to _____ percent (_____ %) of the Contract Sum, less such amounts as the Architect shall determine for incomplete Work and unsettled claims; and

5.7.2 Add, if final completion of the Work is thereafter materially delayed through no fault of the Contractor, any additional amounts payable in accordance with Subparagraph 9.10.3 of the General Conditions.

5.8 Reduction or limitation of retainage, if any, shall be as follows:

(If it is intended, prior to Substantial Completion of the entire Work, to reduce or limit the retainage resulting from the percentages inserted in Subparagraphs 5.6.1 and 5.6.2 above, and this is not explained elsewhere in the Contract Documents, insert here provisions for such reduction or limitation.)

ARTICLE 6
FINAL PAYMENT

Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when (1) the Contract has been fully performed by the Contractor except for the Contractor's responsibility to correct nonconforming Work as provided in Subparagraph 12.2.2 of the General Conditions and to satisfy other requirements, if any, which necessarily survive final payment; and (2) a final Certificate for Payment has been issued by the Architect; such final payment shall be made by the Owner not more than 30 days after the issuance of the Architect's final Certificate for Payment, or as follows:

ARTICLE 7
MISCELLANEOUS PROVISIONS

7.1 Where reference is made in this Agreement to a provision of the General Conditions or another Contract Document, the reference refers to that provision as amended or supplemented by other provisions of the Contract Documents.

7.2 Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

(Insert rate of interest agreed upon, if any.)

(Usury laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at the Owner's and Contractor's principal places of business, the location of the Project and elsewhere may affect the validity of this provision. Legal advice should be obtained with respect to deletions or modifications, and also regarding requirements such as written disclosures or waivers.)

7.3 Other provisions:

ARTICLE 8
TERMINATION OR SUSPENSION

8.1 The Contract may be terminated by the Owner or the Contractor as provided in Article 14 of the General Conditions.

8.2 The Work may be suspended by the Owner as provided in Article 14 of the General Conditions.

ARTICLE 9
ENUMERATION OF CONTRACT DOCUMENTS

- 9.1** The Contract Documents, except for Modifications issued after execution of this Agreement, are enumerated as follows:
- 9.1.1** The Agreement is this executed Standard Form of Agreement Between Owner and Contractor, AIA Document A101, 1987 Edition.
- 9.1.2** The General Conditions are the General Conditions of the Contract for Construction, AIA Document A201, 1987 Edition.
- 9.1.3** The Supplementary and other Conditions of the Contract are those contained in the Project Manual dated _____, and are as follows:

Document	Title	Pages
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- 9.1.4** The Specifications are those contained in the Project Manual dated as in Subparagraph 9.1.3, and are as follows:
(Either list the Specifications here or refer to an exhibit attached to this Agreement.)

Section	Title	Pages
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9.1.5 The Drawings are as follows, and are dated
(Either list the Drawings here or refer to an exhibit attached to this Agreement.)

unless a different date is shown below:

Number	Title	Date
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9.1.6 The addenda, if any, are as follows:

Number	Date	Pages
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Portions of addenda relating to bidding requirements are not part of the Contract Documents unless the bidding requirements are also enumerated in this Article 9.

9.1.7 Other documents, if any, forming part of the Contract Documents are as follows:

(List here any additional documents which are intended to form part of the Contract Documents. The General Conditions provide that bidding requirements such as advertisement or invitation to bid, Instructions to Bidders, sample forms and the Contractor's bid are not part of the Contract Documents unless enumerated in this Agreement. They should be listed here only if intended to be part of the Contract Documents.)

This Agreement is entered into as of the day and year first written above and is executed in at least three original copies of which one is to be delivered to the Contractor, one to the Architect for use in the administration of the Contract, and the remainder to the Owner.

OWNER

CONTRACTOR

(Signature)

(Signature)

(Printed name and title)

(Printed name and title)



CAUTION: You should sign an original AIA document which has this caution printed in red. An original assures that changes will not be obscured as may occur when documents are reproduced.

2-38