Agreement." See Section 5.11.

Too often, the contracts between the owner and the architect and the owner and the contractor have been negotiated in separate vacuums with changes being made to one document and not the other, resulting in an inconsistent expression of responsibilities among the various parties. This added language now places the responsibility upon the owner, who is contracting with the architect and contractor, to ensure that there is a coordinated expression of responsibilities which should lead to common understandings and expectations among the principal project participants. To further advance this goal, this new provision in B101 also requires that the owner "provide the Architect a copy of the executed agreement between the Owner and Contractor, including the General Conditions of the Contract for Construction." See Section 5.11.

This added language now places the responsibility upon the owner, who is contracting with the architect and contractor, to ensure that there is a coordinated expression of responsibilities which should lead to common understandings and expectations among the principal project participants.

Revisions to the Instruments of Service Provisions

B101 makes very significant changes to the treatment of the architect's instruments of service and to the licenses provided to the owner upon completion of the project, upon termination for convenience, and upon termination for cause.

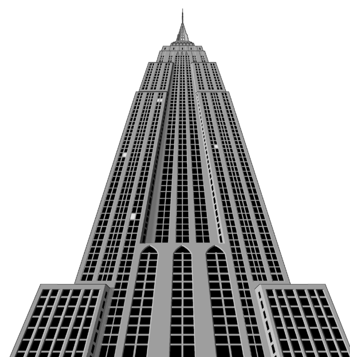
Upon execution of the agreement, and if the owner has substantially performed all of its obligations, including that of prompt payment, the owner obtains a non-exclusive license not only to construct, use, and maintain the project, *but also to alter and add to it.* See Section 7.3.1. The license granted under prior forms B141 and B151 did not permit the owner to alter or add to the project.

If the owner terminates the architect's services for convenience, the new Owner-Architect agreement commands that the owner pay a licensing fee as compensation for a license to continue use of the architect's Instruments of Service solely for purposes of completing, using and maintaining the project as the parties shall determine. See Section 11.9. Note that the uses listed do not include alteration or addition to the project. If the architect terminates the agreement because the owner suspends the project more than 90 cumulative days for reasons other than the fault of the architect, this same result applies.

If the owner terminates the architect's services for convenience, the new Owner-Architect agreement commands that the owner pay a licensing fee as compensation for the owner's continued use of architect's Instruments of Service solely for purposes of completing, using and maintaining the project

If the architect terminates its agreement with the owner for cause, the non-exclusive license granted to the owner for construction, use, maintenance, alteration and addition terminates. *The most significant revision to the licensing arrangements relates to an owner's decision to terminate for cause.* In prior forms, if the owner terminated for cause, the owner's license was terminated unless and until the architect was "adjudged in default of this Agreement." In that case, upon

continued on page 3



the issuance of that judgment, the original license would be deemed terminated and replaced by a second non-exclusive license permitting the owner to authorize other design professionals to use the architect's instruments of service to complete, use and maintain the project. Now, the owner no longer needs to wait for a judgment of default as to the architect. Rather, the owner is granted another license to complete the project with another architect. However, if it is ultimately determined that the owner's termination for cause was not justified, then the owner's use will have been unjustified and the architect will be entitled to compensation, at least, for that use.

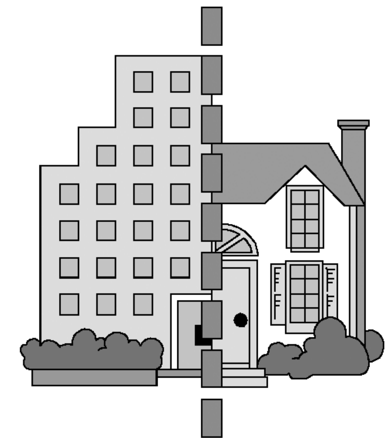
Finally, if the owner terminates the architect's services for convenience but continues to use the architect's instruments of service (or following completion of the project uses the documents for alterations or additions and does not retain the architect to do so), under B101 the architect and its consultants will be released from any and all claims and causes of action arising from such use. Additionally, to the extent permitted by law, the owner will be obligated "to indemnify and hold harmless the architect and its consultants from all costs and expenses, including the cost of defense, related to claims and causes of action asserted by any third person or entity to the extent such costs and expenses arise from the owner's use" of those services. See Section 7.3.1. You should note that this release and indemnification protection does not exist if the owner rightfully terminates the agreement for cause. But it should apply if it is determined the owner's termination was wrongful. Finally, you should add the term "defend" to this language to compel the owner to provide for your defense at the start of such claims (rather than reimburse you for the costs you incur in providing your own defense).

Now, the owner no longer needs to wait for a judgment of default as to the architect, but rather can continue to use the license originally granted.

Revisions to the Claims and Disputes Provisions

The provisions governing claims and disputes between the owner and the architect have been substantially modified and those changes have been coordinated with changes made to the claims and disputes provisions in A201.

The most important changes are to the provisions governing the statute of limitations applicable to claims between the owner and the architect, and to claims between the owner and the contractor. Now, for such claims, the party asserting them must bring them within the period specified by applicable



law (the applicable statute of limitations) "but in any case not more than ten years after the date of Substantial Completion of the Work." The language regarding when the statute begins to run has been deleted.

In forms B141 and B151, the statute of limitations began to run as of the date of substantial completion for claims arising before that time, and by the time of final completion for claims arising after substantial completion. This provision barred claims by an owner against an architect in certain circumstances in which the owner did not know that there was a basis to bring a claim (claims for latent defects could be barred). Were that language not within forms B141 and B151, Pennsylvania's common law would permit the owner, in certain instances, to make use of a common-law remedy known as the "discovery rule" permitting the owner to bring his claim even though the error or omission upon which he was suing existed well before the expiration of the applicable statute of limitations.

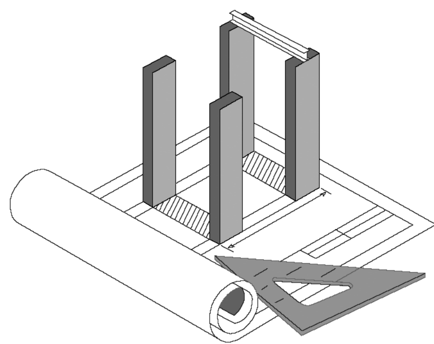
It is because of this result that representatives of owners have

continued on page 4

sought to strike the language in forms B141 and B151 during our contract negotiations with them. Thus, it is our belief that the new language largely benefits owners.

As noted, A201 has been similarly revised. See Section 13.7 of A201, 2007 edition.

In addition to changing the language of forms B141 and B151 relating to the statute of limitations, the committee has made changes to the procedure for the resolution of claims. In sum, arbitration of such claims is no longer mandatory, although mediation of any disputes between the parties remains a condition to the parties proceeding further, whether by litigation, arbitration, or other means to resolve the claims. Under Section 8.2.4, the owner and architect are presented with a "Check the appropriate box" choice of selecting either arbitration, litigation, or some other method for the resolution of a claim that cannot be resolved through mediation. If the parties fail to check one of those boxes (i.e., "Arbitration, Litigation" or "Other"), then by default any claims or disputes between the parties will be resolved through litigation, not arbitration.



Additionally, if the parties do chose to arbitrate a dispute, they may now consolidate that arbitration with any arbitration proceeding in which one of them is involved with other parties, if both proceedings raise common questions of law and fact. The parties may also join to their arbitration another person or entity substantially involved in the issues raised by the arbitration. That is, consolidation of various arbitration proceedings, and the joinder of parties, is no longer generally prohibited, as they had been under forms B141 and B151. See Sections 8.3.4.1 and 8.3.4.2.

We believe that both the movement away from mandatory arbitration, and the removal of the prohibitions against consolidation and joinder, are positive changes.

Miscellaneous Provisions – Revisions

There are a number of changes to the miscellaneous provisions to the Owner-Architect agreement. Among the more significant is the change to the governing law provision. Now, the Owner-Architect agreement shall be governed by the law of the place where the project is located, not the law of the principal place of the architect. Whether or not this change proves favorable or not will be determined on a case-by-case basis. However, we do note that for projects that are developed other than in the United States of America (e.g., projects on Indian reservations, or in foreign countries), the architect may find himself at a significant disadvantage in litigating a case before a "home town crowd" according to the law of that "home town."

Conclusion

We believe that most of the changes presented by B101, not the least of which is its single-part formatting, are favorable. Those that we do not believe are favorable or may pose a challenge in the future, we have commented upon above. Of course, we will have a more informed judgment as we begin using these agreements and we develop experiences and a body of case law interpreting them and producing specific results. As we do, we shall comment upon them.

[In our next article of this series, we shall address changes to some of the other forms within the conventional family of documents. Certainly, should you have any questions in the interim, please let us know.]

©2008 Powell, Trachtman, Logan, Carrle & Lombardo, P.C.
This bulletin is intended for general information purposes only and does not constitute legal advice. The reader should consult with legal counsel to determine how laws, suggestions and illustrations apply to specific situations.

The PTLC&L
Design Professional's Practice Bulletin

Volume 12 • Number 1 EDITORS: RICHARD J. DAVIES, ESQUIRE NEIL P. CLAIN, JR., ESQUIRE March 2008

POWELL
TRACHTMAN
LOGAN
CARRLE
&
LOMBARDO
A PROFESSIONAL CORPORATION

475 Allendale Road
Suite 200
King Of Prussia, PA 19406
(610) 354-9700
Fax (610) 354-9760

1814 East Route 70
Suite 350
Cherry Hill, NJ 08003
(856) 663-0021
Fax (856) 663-1590

114 North Second Street
Harrisburg, PA 17101
(717) 238-9300
Fax (717) 238-9325

The 2007 AIA Conventional Family Of Documents -- Continued

By Richard J. Davies, Esquire

This is the second of a series of articles started in our December 2007 issue discussing the 2007 edition of the AIA Conventional Family of documents released in October 2007.

Revisions to Owner's Responsibilities

One of the more important revisions to the owner's responsibilities contained within B101 is the owner's expressed obligation to "coordinate the services of its own consultants with those services provided by the Architect" and to "furnish copies of the scope of services in the contracts between the Owner and the Owner's consultant" as requested by the architect. See Section 5.6.

As many of you know, in the past, the architect has been left to coordinate the work of the various owner's consultants because the agreement did not clearly express that this was the owner's responsibility. Often we would hear the owner remark that, because his consultants were providing designs which needed to be coordinated with those of the architect's, the architect should be responsible for that coordination function. This added language to the agreement should now make it clear to the owner whose obligation it is to coordinate the services of those consultants.

The owner also has new responsibilities relating to his contract with the contractor. Now, before executing the contract of construction, the owner is obligated to "coordinate the Architect's duties and responsibilities set forth in the Contract for Construction with the Architect's services set forth in this

continued on page 2

A Note From The Editors:
This Bulletin addresses recent developments affecting Design Professionals as well as business concerns as important as the specific professional and technical issues they face.

Contents:

The 2007 AIA Conventional Family Of Documents -- Continued....................1