

AIA Contracts



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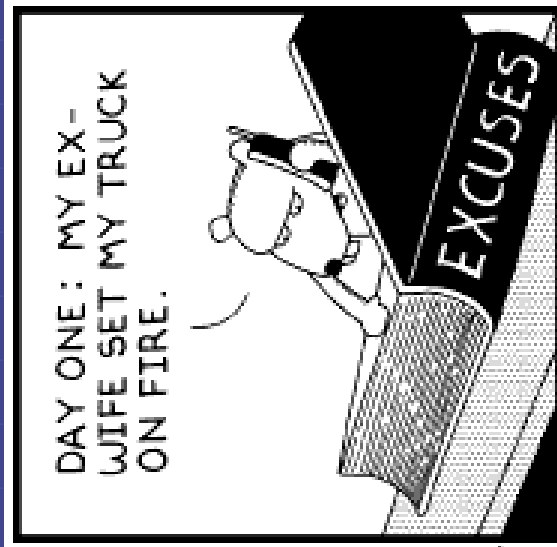
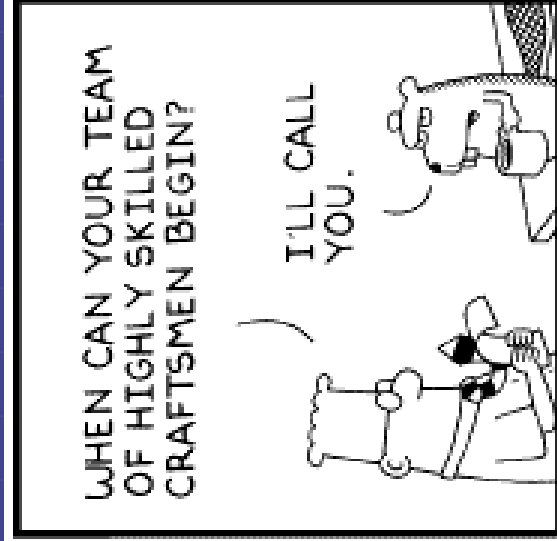
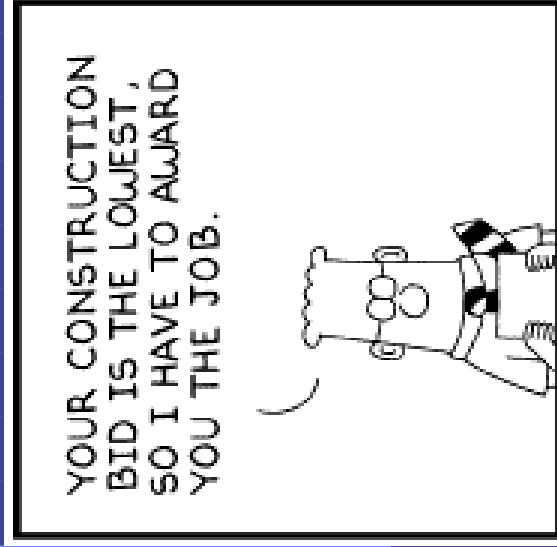
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I. Overview - AIA Document Series and Project Delivery

Forms of Project Delivery

- ◆ Design-Bid-Build
- ◆ CM As Agent
- ◆ CM As Constructor
- ◆ Design/Build

Design-Bid-Build



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Design-Bid-Build

- ◆ Traditional – The “Three-Legged Stool”
- ◆ Advantages
 - complete the documents without interruption
 - simple, straightforward projects
- ◆ Disadvantages
 - DP is left alone to prepare cost estimates
 - may attract weaker contractors
 - does not work well on complex projects or jobs with tight schedules
- ◆ Risk Level: **Moderate to High**

Design-Bid-Build: Variations

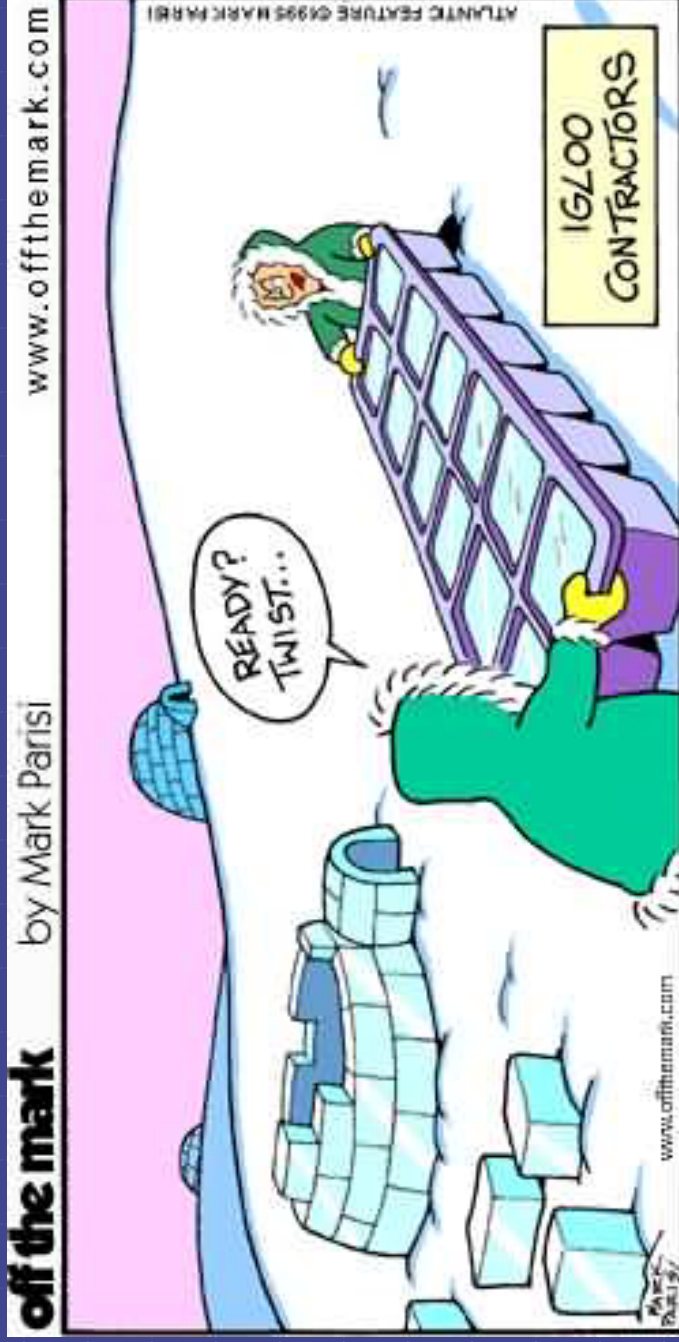
- ◆ **Multiple Prime Contractors**
 - Risk Level: **High**
- ◆ **Pre-Qualified Bidders**
 - Risk Level: **Moderate** to **High**
- ◆ **Design-Negotiate-Build**
 - Risk Level: **Moderate** to **High**

Agency CM

- ◆ CM acts as the Owner's agent in:
 - cost estimating
 - scheduling
 - Buyout
 - construction administration
- ◆ Advantages
 - DP relieved of cost responsibility
 - CM helps with design
 - DP relieved of many CA functions
- ◆ Disadvantages
 - greater amount of paperwork
 - repeated "value engineering" exercises
 - DP surprised by cost increases
- ◆ Risk Level: **High**

Agency CM: Variations

◆ Project Management



CM As Constructor

- ◆ CM is at risk for construction cost, quality, schedule
 - CM typically pre-selected
- ◆ Advantages
 - Collaborative effort among the Owner, DP, and contractor
 - Quality of the DP's documents improved
- ◆ Disadvantages
 - Requires careful management of pre-construction
 - VE can run amok
- ◆ Risk Level: **Low** to **Moderate**

Fast Track

- ◆ Not really a separate method of project delivery
- ◆ Advantages
 - Early Occupancy
 - Lower financing costs
- ◆ Disadvantages
 - Higher Incidence of Claims
 - Cost for Coordination
- ◆ Risk Level: **High**

Design/Build

- ◆ One party (usually contractor) manages entire process
 - Design-Builder at risk for all aspects
- ◆ Advantages
 - Single-source responsibility
 - Fewer claims
- ◆ Disadvantages
 - Unsettled law re: DP's risk
 - Question re: quality
- ◆ Risk Level: **Low** to **Moderate**

III. The A201 “Family of Documents”

Owner-Contractor Agreements

- ◆ AIA A101 and A111, supplemented by General Conditions Document A201
- ◆ EJCDC C-520, C-525 supplemented by General Conditions Document No. C-700, (2002)

A101 Fixed Price - Advantages & Disadvantages

- ◆ Traditional - The “Three-Legged Stool”. Owner generally at risk for construction cost escalation
- ◆ Advantages
 - complete the documents without interruption
 - simple, straightforward projects
- ◆ Disadvantages
 - DP is left alone to prepare cost estimates
 - Bid jobs may attract weaker contractors
 - does not work well on complex projects or jobs with tight schedules
- ◆ Risk Level: **Moderate to High**

A1111 Negotiated Price ---

Advantages & Disadvantages

- ◆ Contractor is generally at risk for construction cost, quality, schedule
 - Contractor typically pre-selected
- ◆ Advantages
 - Collaborative effort among the Owner, DP, and contractor
 - Quality of the DP's documents improved
- ◆ Disadvantages
 - Requires careful management of pre-construction
 - VE can run amok
- ◆ Risk Level: **Moderate**

A111 -- Some Key Issues

- ◆ Contractor's Preconstruction Services
 - value engineering, cost estimating, and scheduling
- ◆ Accounting and Cost Control
 - "labor burden", "general conditions", insurance costs
- ◆ Timing of GMP and "Value Engineering".

Contractor - Subcontractor Agreements

- ◆ AIA A401 - Infrequently Used
- ◆ AGC Forms - used on the vast majority of projects locally

Contractor - Subcontractor Agreements

- ◆ AIA A401 more “sub-friendly”:
 - Timing of claims - 5.3
 - Pay-when-paid vs. pay-if-paid - 12.1, 4.7.1
 - But see 11.1 re: general’s obligations to hold payments “for” subs.

Design Professional-Owner Agreements.

- ◆ AIA Form B141 (1997 ed.)
- ◆ AIA B151 (1997)
- ◆ EJCDC Document E-500 (2003 ed.)

Architect – Consultant Agreements

- ◆ AIA Form C141 (1997 ed.) (Architect Consultant Agreement)
- ◆ EJCDC Forms 1910-10 and 1910-14 (1996 ed.)

AIA C141 - Some Key Issues

- ◆ Coordination w/ Prime Agreement
- ◆ Design-to-budget, VE
- ◆ Schedule Issues
- ◆ Submittal Review
- ◆ Additional Services
- ◆ Pay-When-Paid
- ◆ Indemnity
- ◆ Insurance
- ◆ Claims - E&O and Disputes

V. Owner - Architect Agreements B141 & B151

Goals in Developing B141-1997.

- ◆ Allow architects to provide greater range of services
- ◆ Tie fee negotiations and the architect's services
- ◆ More clearly describe services
- ◆ Clarify owner's role, responsibilities and obligations
- ◆ Make conflicts easier to resolve
- ◆ Offer more options for compensation and project delivery methods
- ◆ Outline project assumptions in more detail (e.g., scope, budget, site, and schedule)

B141-1997 Structure.

- ◆ Three interrelated sections.
 - Part One - Standard Form of Agreement
 - ◆ Identifies project parameters, participants, and overall responsibilities and terms that affect all parties.
 - Part Two - Standard Form of Architect's Services
 - ◆ Scope of services for a particular project.
 - Part Three
 - ◆ Optional supplemental scope of services
 - can be used to further expand or elaborate on the architect's role.

B141 Part II

- ◆ Part II Scope Documents
 - Historic Preservation
 - Security
 - Design & Construction Administration
 - Programming
 - Site Evaluation
 - FF&E
 - Interior Design
 - Facility Support
 - Commissioning

B141 Part II – Some Concerns

◆ Could Become the New “Basic Services” Benchmark. *E.g.*,

- 2.6.4.3 - Obligation to specify “appropriate” performance and design criteria for required submittals. *Cf.* A201, 3.12.10 (“all” vs. “appropriate”)
- 2.6.5.4 - Requirements to maintain records of changes in construction, submittals and contractor’s application of payments.
- 2.7.2 - A post-construction review of facility operations and performance.
- 2.5.2 - Assist the owner in establishing a list of prospective bidders or contractors.

B141 Part III

- ◆ Part III Reference Documents
 - On-Site Construction Administration
 - Value Analysis
 - Architect as CMA

Practical Use

- ◆ Use B151
- ◆ Brevity of Language
- ◆ Architect-Consultant Contracts
- ◆ New Issues
 - RFIs
 - Mold
 - Design-Build

Criticisms of AIA 1997 B141

- ◆ Difficult to use
- ◆ Too “flexible”
- ◆ Ignores Owner interests
- ◆ Tells Owner What You Won't Do

The Result: Owner-Generated Documents – Some Examples

Basic Services shall include, subject to any contrary provisions in this Agreement, such services as Owner may reasonably deem necessary for the satisfactory completion of the Project.

The Result: Owner-Generated Documents – Some Examples ct'd

At the time of completion of the Schematic Design Phase, Developer, Architect and Contractor have agreed that this Agreement shall be assigned from Developer to Contractor, without changing the responsibilities of Architect. Upon assignment of this Agreement to the Contractor, all of the Developer's rights and responsibilities under this Agreement shall be assigned to the Contractor. This assignment shall be accomplished with a change order executed by Developer, Architect and Contractor.

The Result: Owner-Generated Documents – Some Examples ct'd

The Services provided and the manner in which they are provided, will be of a quality conforming to the highest standard generally accepted in the applicable industry, in strict compliance with the terms of this Agreement and the Description of Services. For the term of this Agreement, Supplier will supply Services to correct any deficiency in the Services provided at no additional cost to Owner or, at Owner's option, refund the cost of the Services which are deficient. Owner reserves any other remedies which may be available.

B141 Issues - Fluctuating Fees

- ◆ 1.1.6 - Change in program
- ◆ 1.3.3 - Change in services
- ◆ 1.5.9 - Change in Schedule
- ◆ 2.8.1 - Quantify construction Site Services
- ◆ 2.8.2 - Mandatory Changes
- ◆ 2.8.3 - Optional add-ons

B141 Issues -- Owner Responsibilities

- ◆ 1.2.2.1 - Provide “Full” Information re Project
- ◆ 1.2.2.2 - Periodically update budget
- ◆ 2.2.1.1 - Owner Provides Program

B141 Issues -- Copyright Limitations

- ◆ 1.3.2.2 - Non-exclusive License, Limited Purpose
- ◆ Termination Provisions
 - Cease all reproduction
 - Return all originals and copies within 7 days
- ◆ *If Adjudged to be in Default*
 - New license, only for Completion, Use or Maintenance of Project

B141 Issues – Ownership of Copyrights

- ◆ What Owners Want:
 - Full Ownership of Documents and Copyrights
- ◆ What Owners Get:
 - License to use Documents
- ◆ Negotiating Points
 - License achieves same purpose
 - Importance of reusing details
 - Risk of liability
 - Payment Leverage

B141 Issues -- Waiver Of Owner Rights

- ◆ 1.3.7.3 - Reduced Statute of Limitations
- ◆ 1.3.6 - Consequential Damages
- ◆ 2.1.7, 2.1.7.5 - Design to Budget Provisions
- ◆ 1.3.8.5 - Termination for Convenience

B141 Issues – Missing Provisions

- ◆ No Insurance Requirements
- ◆ No Prompt Payment Requirements
- ◆ No Indemnity Provisions

Indemnity Clauses

- ◆ What Owners Ask For:
 - Indemnity for Damages “ arising out of Architects Acts or Omissions”
- ◆ What Owners should get:
 - Indemnity for Damages due to “Negligence”
- ◆ Negotiating Points
 - Minnesota Statute 337.01 et seq.
 - Insurance limitations

VI. Claims and Claim Preparation

A. Claims -- Identification & Notice

A201 4.3.1 defines a “claim” as”

....a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term “Claim” also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract.

B. Recordkeeping

A201 4.3.1 states that “[t]he responsibility to substantiate Claims shall rest with the party making the Claim.” Paragraph 4.4.4 of A201 gives the Architect authority to request additional documentation in support of claims. See also 4.3.7.2 regarding need to document weather conditions.

C. Delay Claims

A201 4.3.7 states:

Claims for Additional Time

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

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

Delay Claims, ct'd

A201 8.3 states:

DELAYS AND EXTENSIONS OF TIME

- 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control, or by delay authorized by the Owner pending mediation and arbitration, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.
- 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Paragraph 4.3.
- 8.3.3 This Paragraph 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

D. Differing Site Conditions

A201 4.3.4 states:

Claims for Concealed or Unknown Conditions. If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then **notice** by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within 21 days after the Architect has given notice of the decision. If the conditions encountered are materially different, the Contract Sum and Contract Time shall be equitably adjusted, but if the Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Architect for initial determination, subject to further proceedings pursuant to Paragraph 4.4.

DSC Claims -- Key Issues

- ◆ “Type 1” Clause -- reliance
- ◆ Type 1 Clause – “Material Difference”
- ◆ “Type 2” Clause – Unusual or different from what might be expected
- ◆ Both clauses --- Almost always fights over notice
- ◆ Damages – Generally d < between cost of what work would have cost to do if it was as indicated, vs. cost of doing the work under the actual circumstances...both sides of equation must be “fair and reasonable”

E. Defective Plans

3.2.1 Since the Contract Documents are complementary, before starting each portion of the Work, the Contractor shall carefully study and compare the various Drawings and other Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Subparagraph 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, any errors, inconsistencies or omissions discovered by the Contractor shall be reported promptly to the Architect as a request for information in such form as the Architect may require.

3.2.2 Any design errors or omissions noted by the Contractor during this review shall be **reported** promptly to the Architect, but it is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional unless otherwise specifically provided in the Contract Documents. The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations, but any nonconformity discovered by or made known to the Contractor shall be reported promptly to the Architect.

Defective Plans, ct'd

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

3.2.3 If the Contractor believes that additional cost or time is involved because of clarifications or instructions issued by the Architect in response to the Contractor's notices or requests for information pursuant to Subparagraph 3.2.1 and 3.2.2, the Contractor shall make Claims as provided in Subparagraphs 4.3.6 and 4.3.7. If the Contractor fails to perform the obligations of Subparagraphs 3.2.1 and 3.2.2, the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations. The Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents or for differences between field measurements or conditions and the Contract Documents unless the Contractor recognized such error, inconsistency, omission or differences and knowingly failed to report it to the Architect.

Defective Plans – Owner's Warranties

- ◆ Performance vs. Design Spec
- ◆ Scope of implied warranty
 - Accuracy, adequacy
- ◆ Application of warranty: results vs. performance
- ◆ Effect of disclaimers
- ◆ Flow-down of warranty

Defective Plans – Contractor's Remedies

- ◆ vs. A/E
 - Liable only if negligent
 - Foreseeability of contractor's reliance
 - Contractor must follow plans & specs
- ◆ vs. Owner
 - Warranty may apply even in absence of A/E negligence
 - Contractor gets increased cost of performance (but see changed conditions clause)

F. Acceleration Claims

Most acceleration claims under A201 can comfortably fit within paragraph 8.3.

VII. Dispute Resolution

A. Notice

Notice, Written: 2.3, 2.4, 3.3.1, 3.9, 3.12.9, 3.12.10, 4.3, 4.4.8, 4.6.5, 5.2.1, 8.2.2, 9.7, 9.10, 10.2.2, 10.3, 11.1.3, 11.4.6, 12.2.2, 12.2.4, **13.3**, 14

§ 4.3.6 If the Contractor believes additional cost is involved for reasons including but not limited to (1) a written interpretation from the Architect, (2) an order by the Owner to stop the Work where the Contractor was not at fault, (3) a written order for a minor change in the Work issued by the Architect, (4) failure of payment by the Owner, (5) termination of the Contract by the Owner, (6) Owner's suspension or (7) other reasonable grounds, Claim shall be filed in accordance with this Section 4.3.

§ 4.3.7 Claims for Additional Time

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

B. Architect Review

§ 4.4.2 The Architect will review Claims and within ten days of the receipt of the Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Architect is unable to resolve the Claim if the Architect lacks sufficient information to evaluate the merits of the Claim or if the Architect concludes that, in the Architect's sole discretion, it would be inappropriate for the Architect to resolve the Claim. **§ 4.4.5** The Architect will approve or reject Claims by written decision, which shall state the reasons therefor and which shall notify the parties of any change in the Contract Sum or Contract Time or both. The approval or rejection of a Claim by the Architect shall be final and binding on the parties but subject to mediation and arbitration.

§ 4.4.6 When a written decision of the Architect states that (1) the decision is final but subject to mediation and arbitration and (2) a demand for arbitration of a Claim covered by such decision must be made within 30 days after the date on which the party making the demand receives the final written decision, then failure to demand arbitration within said 30 days' period shall result in the Architect's decision becoming final and binding upon the Owner and Contractor. If the Architect renders a decision after arbitration proceedings have been initiated, such decision may be entered as evidence, but shall not supersede arbitration proceedings unless the decision is acceptable to all parties concerned.

C. Mediation

§ 4.5.1 Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Sections 4.3.10, 9.10.4 and 9.10.5 shall, after initial decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

§ 4.5.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to the Contract and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

D. Arbitration

§ 4.6.1 Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Sections 4.3.10, 9.10.4 and 9.10.5, shall, after decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Section 4.5.

§ 4.6.2 Claims not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association, and a copy shall be filed with the Architect.

E. Litigation and Litigation Avoidance – Case Studies

Claims: Case Study

On a fast-track project, following issuance of CDs for the various bid packages, there were numerous bulletins, addenda, Architect's Supplemental Instructions, Construction Change Directives, and Requests For Information reflecting a variety of changes and Clarifications to the CDs. As a result, the "Construction Documents" are now a rather daunting compilation of full-size drawings and 8-1/2" x 11" sheets.

As construction gets into full swing and the prime Contractors (there is no General) get ready to buy out the remaining portions of the project, the Owner asks the A/E to issue, as an ASI, a "benchmark" set of drawings incorporating all the earlier CCDs, ASIs, RFIs, etc. The Owner wants this new "benchmark" set to serve as the "Contract Documents" henceforth.

What is your reaction as the A/E?

Claims: Case Study #2

New building, with spread footing, to be constructed a few feet adjacent to existing buried condenser water pipes. System needed to remain in operation during construction. Owner's as-builts showed approximate location of pipes; A/E recommended additional surveys to determine location more precisely. Owner refused, directed A/E to show pipes on construction drawings as shown on as-builts.

Construction documents showed approximate location of pipes, directed Contractor to hand excavate if necessary to determine actual location and to install sheet piling to protect the pipes.

During excavation, which occurred during the Fall while the condenser wasn't operating, it was discovered that the footing for one of the thrust blocks restraining the underground pipes extended 21 inches into the area where the new building's foundation was to be constructed. This condition had not been shown on the as-builts.

Claims: Case Study #2, ct'd

Contractor stopped work and issued an RFI requesting instructions on the interference, and claimed that sheet piling couldn't have been installed so close to the existing line, anyway.

A/E maintained the sheet piling could be installed and, among other options, proposed relocating the line slightly in the area of the interference while the condenser was shut down.

Owner rejected all options, ordered A/E to move the new building. A/E verbally told Owner this wasn't necessary, but when Owner insisted, A/E consulted with CM, who told A/E the building needed to be moved four feet.

A/E revised the documents and the building was moved. Owner's total claimed cost for this series of events was about \$450,000.

Claims: Case Study # 2, ct'd

Discussion Questions

1. Do you agree the A/E did everything it could have done in this situation? If not, what more could it have done?
2. What does this case study say about the meaning of "professionalism"? What is appropriate "client service" in a case like this?
3. Is earth retention a "means and method" of construction? What is the A/E's proper role in this area?