

**COMMENTARY TO OWNER’S RIDER TO
STANDARD FORM OF AGREEMENT BETWEEN
OWNER AND ARCHITECT FOR PROJECTS OF LIMITED SCOPE
(AIA DOCUMENT B104 – 2007)**

INTRODUCTION

Why an Owner’s Rider.

Real estate attorneys are often asked by their Owner and tenant clients, who may include home owners, commercial tenants, cooperative corporations, condominiums, building owners and/or apartment owners (all of whom are denominated the “Owner” in the B104 form and are referred to in this Commentary as “Owner”), to review construction documents for projects that, although significant for the Owner, are not major projects. Since the majority of construction contracts for smaller projects (if documented by a formal contract) utilize forms prepared by the American Institute of Architects (“AIA”), the Real Estate Construction Committee of the Real Property Law Section (the “RPLS”) of the New York State Bar Association saw a need for the development of an Owner’s Rider in order to (a) make the review process more efficient and cost effective and (b) close some gaps in the AIA form and address certain issues in a manner that more realistically reflects common practice.

In its initial effort, the RPLS published an Owner’s form of rider, and related commentary, to the American Institute of Architect’s Standard Form of Agreement between Owner and Contractor A107 (2007), which is available for download on the RPLS website.

The RPLS, after consultations with its own members and members of the Construction Law Committee of the New York County Lawyer’s Association, is now publishing a form of Owner’s Rider to the AIA’s form of architect’s agreement for projects of limited scope, the AIA Form B104-2007 (“AIA Form B104” or “B104”). As noted above, the form is intended to facilitate a real estate lawyer’s review and negotiation of the B104 (and may also be of use in reviewing other forms of architectural services agreements). HOWEVER, the RPLS recommends that an attorney specializing in construction law be involved in the negotiation of agreements for major construction projects and also for small projects where the need exists.

Available Architect Agreement Forms

AIA publishes many different forms of owner-architect agreements, including the B101 (the generic form intended to be appropriate for any size project), the B104 (intended for projects of limited scope), and the B105 (intended for residential projects and small commercial projects). The B101 is a more detailed form of architect’s agreement that, among other things, specifically details the various phases of the architect’s services (schematic phase, design phase, bidding phase, and contract administration). The B104 is designed for small, more discrete projects (typically renovations), and divides the architect’s work into two phases: design phase and construction phase.

The different forms of AIA agreements can be obtained through purchase of (1) a license (not usually economically feasible for firms that do not concentrate in construction) or (2) paper forms that can be obtained in New York City through:

AIA New York Chapter Center for Architecture
536 LaGuardia Place
New York, NY 10012
212-358-6113
212-696-5022 fax
info@aiany.org
www.aiany.org

Choice of Construction Contract for Use with B104

The B104 is intended to be used in conjunction with the AIA's Owner and Contractor Agreement Document A107-2007 (the "**A107 Construction Contract**"). See B104 Sections 3.4.1.1; 8.1.2, and 10.2, all of which refer specifically to the A107-2007. If the Owner uses a different form of construction contract, those sections of the B104 should be modified.

SPECIFIC ISSUES COVERED BY OWNER'S RIDER

Architect's General Responsibilities – Rider Par. 2

Article 2 of the B104 provides in essence that the architect will perform the services set out in the B104 with the professional skill and care ordinarily provided by other architects practicing in the same vicinity under similar circumstances. Because the B104 is unlikely to, in fact, set out in detail all of the services that the architect would normally be expected to provide, Rider Par. 2 instead provides that the parties' intention is that the architect will provide complete design, bidding, construction and construction completion services in accordance with the architect's proposal (which is intended to be attached as Exhibit A to the Rider), through the closeout of the project. The Owner's Rider incorporates the same standard of care utilized in Article 2 (i.e., the professional skill and care ordinarily provided by other architects practicing in the same vicinity under similar circumstances), but the standard care is made a defined term, which is subsequently used in the Rider.

Scope of Architect's Basic Services (Rider Par. 2)

For a fixed price or percentage fee agreement, the description of the Architect's Basic Services is arguably the most important part of the agreement for the Owner, because the architect will have the right to charge "extra" for any additional services. From the architect's standpoint the description of the architect's Basic Services is also critically important because an overbroad description can commit the architect to provide many hours of service for which he or she is inadequately compensated.

Different projects generate different expectations as to the architect's role and the scope of services expected to be included in the fixed fee. For example, a "name" architect hired to provide design services on a high profile project may not expect to oversee the actual construction and, if asked to perform such services, will request additional compensation. On the other hand, a home owner hiring an architect for a home renovation generally expects the architect to provide construction oversight services. Accordingly, the Owner's attorney needs to determine what the Owner's expectations are with respect to the role of the architect and conform the contract.

Section 3.1 of the B104 provides that the Architect's Basic Services includes the services described in Article 3 of the B104 plus usual and customary structural, mechanical and engineering services. That provision has been altered in the Owner's Rider to provide that the architect provides the services described in the B104 plus all architectural services described in the construction contract or construction management agreement (which documents may envision a larger involvement of the architect than is specified in the B104), eliminating possible gaps between the architect agreement and the construction contract. See Rider Par. 2(b)(i).

Article 3 of the B104 is arguably a little "skimpy" in its description of the Architect's Basic Services. The Owner's Rider therefore expands on the description of the architect's basic services by, among other things, covering the following issues:

1. The most glaring omission in the B104 is the absence of any requirement that the architect level the bids. That omission is addressed in Rider Par. 2(f).
2. B104 Section 3.4.1.1 provides that the architect will provide the construction administration services described in the A107 Construction Contract. Because the Owner may use a different form of construction contract, Rider Par. 2(b)(i) provides that the architect will provide the services described in the B104 plus all architectural services described in the construction contract or construction management agreement. In addition, Rider Par. 2(g)(i) supplements that Section 3.4.1.1 to provide that the architect will visit the site at regular intervals for the purpose of, among other things, assessing the quality of the work and identifying deficiencies (thus conforming the B104 to what is probably the Owner's central expectation).
3. Rider Par. 2(g)(iii) also deletes Section 3.4.3.2, clauses (2) and (3) of the B104, which is important because those provisions state that the architect's issuance of a certificate of payment to the contractor (which is a fundamental part of the architect's job during the construction phase) does not constitute a representation that the architect has reviewed, among other things, construction procedures or subcontractor or materialmen requisitions, all of which an Owner would ordinarily expect the architect to do. Although the architect may not have ultimate responsibility for "construction means, methods, techniques, sequences or procedures," as provided in B104 Section 3.4.1.2, because those matters are under the control of the contractor, it should nevertheless have reviewed them prior to issuing a certificate of payment and should also have reviewed subcontractor requisitions before issuing a certificate of payment to the contractor.

4. The Owner's Rider adds a new provision that makes the architect responsible for engaging the necessary professional consultants (e.g., electrical engineer, structural engineer, etc.) and for paying such professionals out of the architect's compensation for Architect's Basic Services. This clause forces the parties to focus on what consultants and professionals will be needed and the cost of those services. See Rider Par. 2(b)(v). From the Owner's standpoint, it's best to have the architect assume responsibility for all design aspects of the project, including engineering, electrical, HVAC and plumbing. The consolidation of responsibility avoids "pointing fingers," *vis a vis* the Owner, if there's a design defect. However, many architects are reluctant to assume responsibility for the work of engineers and other consultants and it may not be appropriate for the architect to assume such responsibility in larger projects or in projects where the engineering and mechanical aspects of the project overwhelm the design aspects. Whatever the ultimate result of the negotiation, the architect should, at a minimum, be responsible for coordinating or supervising the work of outside engineers and consultants so that their designs are properly integrated. Language to that effect is set out in Rider Par. 2(b)(vi). The owner's attorney needs to elect in Rider Par. 2(b)(vi), whether the architect's role is to supervise (which implies greater responsibility) or coordinate outside professionals.
5. Generally, the Owner expects the architect to design the project in compliance with all laws, and Paragraph 2(b) of the Owner's Rider incorporates that concept. Although the architect designing a building should understand setback requirements and design to meet such requirements, if the project involves complex zoning issues such as cantilevering, interpretation of zoning lot and development agreements, and similar issues, the Owner should consult with a zoning attorney and the architect agreement should be clear that the Owner is relying on counsel, not the architect, for advice concerning such issues. For most small projects, there will be no such complex issues. Accordingly, the Owner's Rider contains a blanket requirement for the architect to design the project in accordance with all applicable laws.
6. Rider Par. 2(b)(iii) of the Owner's Rider should be included if the project constitutes a place of public accommodation (e.g., a restaurant or a condominium lobby). It includes an acknowledgement that the architect will design the project in compliance with the applicable disabilities laws.
7. Rider Par. 2(d) adds a "Design" phase, incorporating a fairly detailed description of the architect's design services that is probably best suited to a more complex project. Accordingly, any attorney using the Owner's Rider should consider how much of this Paragraph should be included.
8. Rider Par. 2(e) adds a "Construction Documents" phase. This language was added to set out in detail the architect's responsibility for preparing detailed plans and specifications for the project, including reflected ceiling plans, electric plans, and detailed finish and millwork plans; and is intended for use in a larger or more complex project. The list should be modified to eliminate those categories of plans that are not applicable to the project. The Paragraph also, most importantly, imposes an obligation on the architect to

prepare complete and coordinated plans; and also to correct the construction documents, at no charge, except where the Owner is requesting a purely aesthetic change and the Owner has previously approved the construction documents.

9. Rider Par. 2(e) also requires the architect, in any project involving a coop apartment or condominium unit, to contact the building's managing agent about the building's design requirements and to coordinate his or her design with those requirements. If the "Owner" is a tenant renovating commercial space, Rider Par. 2(e) should be retained but appropriately modified.
10. As noted above, Rider Par. 2(g) sets out in some detail the architect's responsibilities during the construction phase. An important provision is the requirement that the architect assist the Owner in obtaining a certificate of occupancy or other required approvals. That requirement is extremely important because failure to obtain the required approvals can create serious problems down the road when the Owner wants to sell its property and the prospective buyer discovers that the project has not been signed off by the Building Dept. Another important requirement is the obligation of the architect to deliver copies of all plans used by the architect in building the project. Those plans may prove invaluable in subsequent renovations. Although the architect does not prepare "as built" plans, a function customarily performed by the contractor, it does require the architect to collect from the contractor the "as built" plans if such plans are required to be delivered by the construction documents.

Architect Compensation Generally; Change Order; Fee Payment Schedule – Rider Pars. 3 and 4

There are three common methods of computing an architect's compensation: (a) computing the fee as a percentage of the construction cost, (b) setting a fixed fee, or (c) basing the fee on the number of hours worked by the architect at an agreed hourly rate. The B104 allows the Owner and architect to set out the agreed basis for compensation.

Utilization of a percentage fee arrangement can be dangerous for the Owner because it provides an incentive for the architect to design an expensive project. If the architect's fee is a percentage of construction cost, the cost of FF&E is usually excluded from the computation of the construction cost against which the architect's fee is calculated. However, if the project involves the architect in selection of FF&E, then it may be appropriate to compensate the architect for such services. In such cases there is usually a different percentage applied to the FF&E than to the cost of construction. An alternative is to set a fixed fee for the architect's services with respect to selecting FF&E based on the architect's initial estimate of the FF&E, with no increase in compensation if the cost of the FF&E increases unless the increase is material.

A fixed fee arrangement protects the Owner from an unnecessarily expensive design, but can be dangerous for the architect if the Owner insists on multiple re-designs of the project without fault of the architect or if there are multiple change orders. Multiple change orders that do not increase the cost of the project may also be an issue for the architect in a percentage fee arrangement. With respect to change orders, a balance has to be struck between the architect's

obligation to modify its design and specifications in the normal course (because there will always be changes) and protecting the architect from an abusive situation in which the Owner either can't make up its mind and engages in multiple redesigns of the project or significantly changes the scope of the project.

Another central issue for negotiation is the fee payment schedule. If the architect is paid on an hourly basis, payment will generally be made monthly. On the other hand, if the architect is being paid a fixed fee, the architect and Owner need to reach agreement as to a payment schedule. The architect's proposal usually sets out the payment schedule, and the Rider is designed to include the proposal as an Exhibit (Exhibit A). If the payment schedule in the proposal does not match the expectations of the Owner, the schedule should be aligned. Owners' attorneys should note that the architect typically views design as the most important part of the job and usually wishes to front load the fees at the completion of design services and of preparation of construction documents (e.g., 70% of the fee). With respect to a small job, however, the Owner typically views the architect's role in the bidding process and construction contract administration (essentially, supervision of the actual construction) as being at least as important as the design services. Accordingly, the Owner needs to focus on the importance of the architect's contribution to all phases of the project and to allocate the fee accordingly. Among other things, the Owner may want to hold back a portion of the fee until all certificates of occupancy (if any) and building department approvals have been obtained, assuming the contractor has obtained the necessary sign-offs.

The Owner's Rider also provides for inclusion of an Exhibit setting out the architect's charges for additional services. See Rider Par. 4(a) and (b) referring to Exhibit B (which should list the additional charges). Rider Par. 4(c) requires the architect to submit monthly invoices, with detailed statements of services, to the Owner, with a final invoice to be submitted no later than 30 days after final completion of the project. The architect is also obligated to require its consultants to maintain accurate records. The intent of these provisions is to avoid billing surprises by requiring the architect to disclose how it will charge for additional services, provide monthly statements (which, however, should be modified if the billing arrangement is different), and complete its final billing in a timely manner.

Additional Services (Rider Par. 3)

"Additional Services" are those services not included in the "Architect's Basic Services" and include, under the B104, among other things, due diligence activities, such as financial feasibility studies and site analysis), landscape design, telecommunications and data, surveys, interior architectural design, LEED certification, and fast-track design services (see Section 4.1 of the B104). Paragraph 3 expands the list of Additional Services and, of critical importance, requires the architect to estimate the cost of the Additional Services and Owner's written authorization to perform such services.

The number of site visits the architect must make as part of the construction proves is often a bone of contention. The Rider (Rider Par. 2(g)) requires the architect to visit the site at "regular intervals" in order to, among other things, assess the quality of the work and identify any defects. Architects often want to limit the number of site visits they are required to make. The

compromise is sometimes that site visits in excess of a specified number are deemed Additional Services. But note that it is very difficult for the Owner to intelligently evaluate the number of appropriate site visits for most projects.

In addition, services rendered after a stated date (determined by the parties) are deemed Additional Services if construction has been delayed through no fault of the architect (see Section 4.2.3). This may create a problem if the parties have agreed to a fixed fee allocated between the various phases of the project and work slows down during one of the phases so that the architect does not perform the expected work during the negotiated construction period. For example, if the contract is to be performed over a period of 6 months, with construction administration services performed in the 6th month; and the construction work takes 7 months because of a slow-down that occurs during the 6th month, the architect can bill its entire fee for the first 6 months' of work, even if it hasn't yet fully performed its construction administration services; and, in addition, bill for construction administration services as "Additional Services" on a time and materials basis during the 7th month although that work was paid for but not performed in the 6th month.

One method of dealing with such construction delays is for the Owner to suspend the job pursuant to Section 9.2, pay the architect on a time and materials basis for any consultation or work performed during the period of suspension, and pay the architect for any shut-down and start-up costs. Section 4.2.3 would then have to be modified to extend the stated date to reflect any period of suspension. Other possible approaches include:

1. Tying the architect's compensation during the construction administration period (which is when the problem usually arises) to an agreed number of site visits, with provision that the full construction administration fee is payable only if the architect provides the agreed number of site visits.
2. Tying the architect's compensation during the construction administration period to an agreed number of site visits, with provision that if the contract period is extended but the architect has not fully performed the applicable services during the contract period, the architect will be paid on a time and materials basis but Owner will receive a credit against the additional services fee for work not yet performed by the architect.
3. Providing that the fees are to be increased by an amount to be mutually agreed upon by Owner and architect if the construction work extends beyond the scheduled date. The obvious problem with this solution is that it incorporates an agreement to agree, which is generally unenforceable.
4. Providing that the fee is to be "equitably adjusted," taking into account (1) any reduction in the scope of services actually performed prior to the applicable date below the scope of services initially contracted for (or reasonably expected to be performed) by the parties and (2) the amount of work yet to be performed by the architect.

Termination for Convenience (Rider Par. 10)

If the Owner/architect relationship is not "working out," the Owner may wish to terminate the architect's services "for convenience" and without resorting to a declaration of default. If the Owner terminates for convenience, the B104 allows the architect to recover compensation for all

services through the date of termination, demobilization expenses, and future, unearned profit (as provided in Sections 9.5, 9.6 and 9.7 of the B104). The architect's argument is that it is entitled to recover future, unearned profit because of its lost opportunity costs. For small projects, this issue will generally be resolved in favor of the Owner. For larger jobs, where there may be definite lost opportunity costs, it may be appropriate to negotiate a sliding scale compromise under which the Owner pays the architect a percentage of its unearned profit, with the percentage declining as the project progresses. If the architect is very much in demand, then the architect may insist on full reimbursement for unearned lost profits, with the sole exception perhaps being a convenience termination in connection with the abandonment of the project. Attorneys should note that New Jersey architects seem to take a much tougher stance on this issue than New York City attorneys.

There are a number of possible approaches to determining the architect's compensation after a termination for convenience, including:

- a. Payment for services rendered through the date of termination plus compensation at the architect's stated rates for demobilization and transition costs; or
- b. Payment for services rendered through the date of termination plus a fixed termination fee (which is intended to cover demobilization and transition costs). If this option is selected, the contract should provide that the termination fee cannot exceed the compensation that would have been payable if the architect had fully performed the agreement.

The Owner's Rider adopts option (a) above.

Ownership of Plans and Specifications (Rider Par. 12)

Article 7 of the B104 grants the Owner a license to use the architect's plans and specifications for the purpose of constructing and modifying the Project if Owner substantially performs its obligations under the Agreement. Under the form Rider, the Owner is granted a permanent license to use the architect's plans and specifications without regard to Owner's compliance with its obligations under the Agreement on the theory that the architect has independent remedies for any breach of the Agreement. A more aggressive Owner position would be to grant Owner complete ownership of the architect's plans and specifications; and, in fact, some categories of owners demand ownership of the instruments of service, including government entities, some developers, and persons that own or lease a large number of facilities. Such Owners want to avoid an argument that the Owner has used a design element designed by the architect for one project in another project.

To the extent the Owner is granted a license, a number of issues need to be considered, including (a) the scope of the Owner's license (is the right limited to the particular project, or can the plans be used for other projects), (b) Owner's right to use the plans if the architect is terminated for convenience (the architect might argue that the license should only be granted if the architect completes the job and is paid in full; the Owner's position would be that as long as it has paid the architect all compensation owed him or her through termination, the Owner should have the right to use the plans, whatever their stage of development), and (c) the scope of Owner's obligation to

indemnify the architect against third party claims based on alleged design defects if Owner switches to another architect. With respect to the scope of the indemnification, the issue is whether the architect should be granted full indemnification as to third party claims based on design defects or a more limited indemnification that excludes from Owner's indemnification obligation claims arising from the architect's negligent design (even if the design was incomplete because of early termination).

Dispute Resolution; Remedies (Rider Par. 7)

1. **Mediation.** The B104 (Section 8.2) requires mediation of disputes. Mediation is useful when the principals are reasonable and have a genuine interest in resolving the dispute, but is a waste of time if either party is irrational, seeking an edge, or seeking to delay resolution of the dispute. Some attorneys feel that mediation is close to useless on the theory that if the parties can't reach agreement, mediation is unlikely to be of much use. Other attorneys have found mediation to be useful. The fact is that the utility of mediation probably cannot be determined at the time of contract execution. Accordingly, Rider Par. 7 of the Owner's Rider authorizes mediation only if both parties consent.
2. **Offset Right and Continuance of Services during Dispute.** If a dispute develops over the architect's fees, services or any other matter, the architect wants to ensure that Owner will continue to pay for ongoing services and will not offset its damages against the architect's fees. Accordingly, Section 11.10.3 of the B104 prohibits the Owner from withholding payment to the architect (unless the architect has been found liable), even if the Owner has incurred damages because of the architect's failures (including costs incurred for change orders needed to deal with correction of design defects). Owner attorneys often attempt to strike this clause. An Owner-oriented solution is to require the architect to continue performing as long as Owner pays the undisputed portion of any fees. Another (or supplemental) method of dealing with such disputes is to require the senior principals to meet and attempt to resolve differences before Owner attempts to exercise any offset right; to require fast track arbitration of any disputes; or to negotiate a threshold, so that if a dispute is less than \$_____, the architect must continue to work, but if the dispute exceeds \$_____, or if the cumulative total of all disputes exceeds \$_____, a meeting of senior principals, and/or fast track arbitration, will be required. Paragraph 10(i) of the Owner's Rider resolves the conflict in a very simple way by expressly granting Owner a right of offset so long as the amounts withheld bear a reasonable relationship to the anticipated loss or claim.
3. **Consequential Damages and Limitation of Damages.** Section 8.1.3 of the B104 includes a mutual waiver of consequential damages. The consequential damages waiver operates to preclude the Owner from seeking damages for lost income if the construction work is delayed by the architect's breach of the agreement. It would also potentially preclude the architect from seeking lost profits except that B104 Section 9.7 expressly allows the architect to recover lost profits. From the Owner's standpoint, the waiver is particularly important if the building under construction is a commercial building or apartment building because construction delays mean lost rentals and possibly loss of tenants. In addition to the consequential damages waiver, many architect proposals

further limit the architect's liability for all damages to its fee. If the Owner's attorney wishes to address the question of consequential damages, one possible compromise is to permit consequential damages to be recovered from the architect but to limit such damages to (a) the limits of the architect's insurance plus fees or (b) the architect's available insurance (a less favorable formulation since there may be multiple claims against the architect) plus fees. For major construction the Owner may require the architect to obtain additional insurance.

The Owner's Rider leaves intact the mutual waiver of consequential damages on the theory that for most small jobs, consequential damages are likely to be an insignificant part of the Owner's damages, but that decision should obviously be re-evaluated if the Owner will, in fact, incur potentially significant consequential damages if the architect breaches. The Owner's Rider also eliminates the architect's right to seek lost profits (see discussion above), effectively barring the architect from recovering consequential damages.

Coops, Condos, Commercial Tenants – Rider Par. 14

Attorneys should note that cooperatives, condominiums, homeowner's associations, and commercial building owners often adopt rules and regulations governing construction and may also impose additional requirements through an alteration agreement the unit owner must execute. Paragraph 14(a) of the Owner's Rider requires the architect to comply with the building's rules and regulations and also with any alteration agreement signed by the tenant or unit owner. Those rules, regulations and agreements, together with a copy of any applicable lease "alterations" provision, should be attached as Exhibit E to the Rider, so as to ensure that the architect has, in fact, reviewed the building's requirements.

CONCLUSION

The Owner's Rider is intended to provide a more uniform approach to the review and negotiation of AIA Form B104 architect contracts; and it is the RPLS' hope that the Owner's Rider will serve that function, making architect contracts easier and more efficient to negotiate. Naturally, each attorney using the form must review the Owner's Rider, determine if its provisions are appropriate for the project, and make appropriate modifications.

Dated as of January 2016

Real Estate Construction Committee of the Real
Property Law Section of the New York State Bar
Association