II. BREACH OF CONTRACT OR NEGLIGENCE

A. Breach of Contract

The remedy for typical breaches of contract is money damages to make the aggrieved party whole and get the benefit of its bargain. Contract termination is not the remedy for garden variety breaches, and since two wrongs do not make a right, one party’s breach does not excuse a breach by the other party. However under certain circumstances a substantial enough breach of contract could potentially justify termination of a contract.

1. Industry Standard Contract Sources

Typical industry standard form architect contracts, such as the AIA B101 Agreement between Owner and Architect, includes basic information that could possibly give rise to a breach of contract. The most basic of all is identification of the parties to the contract, the owner and the architect (B101 page 1), basic information describing and defining the project which is the subject of the contract, such as the name, location and a detailed description of the project (B101 page 1), and other initial information and details of the project’s site and program (B101
§ 1.1). Could any of these give rise to a breach of contract substantial enough to justify termination? The breach must go to the essence of the contract. If the Architect is a corporate entity that ceases to exist during the course of the project, termination of the contract could be justified. “The Owner and Architect, respectively, bind themselves, their agents, successors, assigns and legal representatives to this Agreement;” however, an assignment would require written consent of the other party. (B101 § 10.3). Typical contracts include rights of succession and assignment that could alleviate this situation, but the assignment would have to be agreed to by the non-breaching party.

Typical industry standard form architect contracts include identification and roles of other parties involved in the project including authorized representatives of the architect and owner, the architect’s consultants, and the owner’s contractors and consultants. Could any of these give rise to a breach of contract substantial enough to justify termination? Probably not; however, there could be circumstances where key team members are identified by name as being an essential part of the understanding of the parties. Owners have been known to sometimes complain that the “A” Team attended and presented at the owner’s RFQ interview and after selection and execution of the contract have not been seen since, but replaced by the “B” Team. If the contract dealt with a commodity, there would be no issue. However with a professional services agreement, requiring particular skills, experience and sometimes subjective artistic qualities, the replacement of a key individual could undermine the essence of the entire contract. If someone who bargains for a Rembrandt sitting and later learns the portrait will painted by Bubba the Painter, termination of the contract may be justified since a later award of money damages for simple breach of contract may not make the owner whole.

Timing is often important on construction projects. At Section 1.2, the B101 Architect Agreement provides a space for inserting the owner’s “anticipated dates for commencement of construction and Substantial Completion of the Work.” Conspicuously missing from AIA architect agreements (in contrast to contractor agreements) are the magic words “time is of the essence of the agreement.” It would be challenging for owners to succeed with a simple breach of contract claim against a lackluster performing architect failing to complete the Contract Documents in time for the owner’s “anticipated date[] for commencement of construction” when time is not of the essence of the agreement.

Failure of the architect to maintain required professional liability insurance coverage could also constitute a breach of contract, potentially significant enough to warrant termination. This path was made easier after 2007 with AIA standard form architect agreement B101-2007 § 2.5 providing a place to insert any professional liability insurance coverage the architect must maintain for the duration of the agreement. Prior to the 2007 edition, AIA architect agreements only referenced professional liability insurance in the context of possible inclusion as a Reimbursement Expense if dedicated exclusively to a project or the expense of additional insurance coverage or limits requested by an owner were in excess of that normally carried by the architect (B141-1997 § 1.3.9.2 and B151-1997 § 10.2.1.6).
2. What’s Good for the Goose…

The AIA includes language in its architect agreements making certain that, if the owner fails to make payments to the architect, such failure shall be considered substantial non-performance and cause for termination. (B101 § 9.1). Although not outlined in the agreement, other justifications for an architect’s termination for cause could include an inability to reach agreement on additional services (related to failure to make proper payment), changes in the parties, substantially changed conditions or a breach of a substantial condition. In contrast, the AIA does not provide specifics as to grounds for justifying an owner terminating the architect for cause. However, the AIA does include such language in the A201 General Conditions vis-à-vis the contractor.

Below is illustrative A201 General Conditions contractor termination for cause language modified for use in an owner’s termination of Architect One:

§ 14.2 TERMINATION BY THE OWNER FOR CAUSE
§ 14.2.1 The Owner may terminate Architect One if Architect One:
   .1 repeatedly refuses or fails to provide qualified employees or subconsultants necessary to perform services properly and in a timely manner;
   .2 fails to make payment to subconsultants for services in accordance with the respective agreements between Architect One and its subconsultants;
   .3 repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or
   .4 otherwise is guilty of substantial breach of a provision of the Architect Agreement.

§ 14.2.2 When any of the above reasons exist, the Owner may without prejudice to any other rights or remedies of the Owner and after giving Architect One seven days’ written notice, terminate employment of Architect One, and may:
   .1 Exclude Architect One from the site and take possession of all Instruments of Service owned by Architect One;
   .2 Accept assignment of subconsultant agreements; and
   .3 Cause the services to be completed by whatever reasonable method the Owner may deem expedient.

The writer is not suggesting that such language could be included in architect agreements without vociferous objections from the architect; however, the parallels can be instructive.

B. Negligence

It is more difficult for an owner to support an allegation of negligence against an architect early in the project during the design phase compared to the end of the Construction Documents phase or during the Construction Administration phase. Many aspects of design are subjective, involving art, style, fashion and the like. Fortunately, there are no regulated fashion police in North Carolina.
A potential avenue for asserting a negligence claim against an architect during the design phase may be found in North Carolina Administrative Code’s General Obligations of Practice. The following amorphous personal and professional obligations of good practice are charged upon the architect: “(1) The concern and purpose of the profession of architecture are the creation of a physical environment of use, order, and beauty through the resources of design, economics, technology, and management. The physical environment includes a spectrum of elements serving man, from the artifact and the building to the community and the region.” and “(2) The profession of architecture calls for individuals of the highest integrity, judgment, business capacity and artistic and technical ability. An architect's honesty of purpose must be above suspicion. An architect acts as professional adviser to his client and his advice must be unprejudiced.” 21 NCAC 02 .0203

Things are more concrete and objective later in the project. There is no perfect set of plans, but the design depicted in the Contract Documents must comply with applicable building codes and include the proper use of materials and correct application of construction techniques and processes. During the construction phase, make sure that all of the necessary testing procedures have been accomplished, written approvals provided, lien releases obtained, operation manuals delivered to the owner, punch list work accomplished, substantial completion done, and other special requirements of the plans and specifications are satisfied. Otherwise, the architect certificates may be meaningless and their risk of being held liable for negligence is increased.

Sources for definitions of the professional standard of care for architects or engineers can be found in North Carolina regulations, North Carolina common law, and in the owner’s agreement with the architect or engineer. A design professional’s main legal defense to a negligence claim is proof of compliance with the professional standard of care. With the exception of negligence per se, the professional standard of care for a professional architect or engineer requires testimony of an architect or engineer expert witness skilled in the same discipline and experience, since the subject involves esoteric knowledge or uncertainty that calls for the professional’s judgment and is not within the “common knowledge” exception.

The North Carolina Administrative Code provides codified guidance on what constitutes “incompetence” for a North Carolina architect. This includes, but is not limited to, acting with reasonable care and competence; applying technical knowledge and skill ordinarily applied by architects of good standing; practicing in the same locality; taking into account all applicable state and municipal building laws and rules; and preparing and submitting plans for building permits that are complete and buildable, conforming with the State Building Code and local plan submission requirements, with the exercise of professional judgment in the sufficiency of documentation necessary for plan approval – however “this Rule does not alter any standard of liability applicable to licensees.” 21 NCAC 02 .0210.

In North Carolina, the common law professional standard of care is:

“An architect, in the performance of his contract with his employer, is required to exercise the ability, skill, and care customarily used by architects upon such

Parties to an owner/architect agreement may vary the professional standard of care from the common law standard. Below is a comparison of three industry standard form contracts for the standard of care:

**AIA B101 (2007):** “Consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances.” (§ 2.2)

**ConsensusDOCS 240 (2007):** “In accordance with the standard of professional skill and care required for a Project of similar size, scope and complexity, during the time in which the Services are provided.” (§ 2.1)

**EJCDC E500 (2002):** “The standard of care…will be the care and skill ordinarily used by members of the subject profession practicing under similar circumstances at the same time and in the same locality.” (§ 6.01.A)

Below is a comparison of three industry standard form contracts for the **standard for completeness**:

**AIA B101 (2007):** “Provide the professional services as set forth in this Agreement,” and “prepare Construction Documents setting forth in detail the quality levels of materials and systems and other requirements for the construction” (§§ 2.1, 3.4.1)

**ConsensusDOCS 240 (2007):** “Provide Architectural & Engineering Services Necessary to Design the Project,” and “Construction Documents shall describe all Work necessary to bid and construct the Project” (§§ 2.1, 3.2.5)

**EJCDC E500 (2002):** “Engineer…shall comply with applicable Laws and regulations” and “all policies and procedures of Owner applicable to Engineer's performance of services under this Agreement” (§ 6.01.E.1-2)

**C. Practice Points**

Below is a contract clause for use by the owner to assure that the “A” Team will perform under the architect agreement:

“The following individuals are designated as Key Project Team Members, whose participation is of the essence of this contract:

<table>
<thead>
<tr>
<th>Name</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The Key Project Team Members listed above shall not be removed and their respective scope of responsibilities shall not be materially changed (excepting for incapacity,
resignation, or termination) without the prior written consent of the Owner, which consent may be withheld in the Owner’s sole and absolute discretion. Should any Key Project Team Member be removed or reassigned to a different project or to a different role without the prior written consent of the Owner, then the Owner shall have the right to terminate the Agreement or equitably reduce the compensation payable thereunder to the extent Owner is negatively impacted or assess liquidated damages (and not as a penalty) in the amount of [TBD] Dollars ($[TBD]), whichever is more beneficial to the Owner. Further, the Owner reserves the right to require the replacement of any Key Project Team Member at the Owner’s reasonable discretion. Any personnel removed shall be replaced with personnel having equal or greater skill and experience.”

When time is an essential element of the project, consider inserting in the architect or engineer agreement the standard: “Time is of the essence of this agreement.”

II. REGULATORY AND LICENSING ISSUES

There are two major areas of concern in which the owner can run afoul going forward after termination of Architect/Engineer One. The first is regulatory – how and whether Architect/Engineer Two can step in to complete the project and be the architect/engineer of record. The second area of concern deals with ownership of intellectual property and the related need for the owner to use Architect/Engineer One’s documents to complete the project with Architect/Engineer Two. These concerns will be addressed in this order.

A. Who can Sign/Seal?

1. Architect

No architect shall affix his/her seal and signature to contract documents developed by others not under his responsible control. The North Carolina Administrative Code defines "responsible control" as:

“Responsible control includes that amount of control over and detailed professional knowledge of the content of technical submissions during their preparation as is ordinarily exercised by an architect applying the required professional standard of care, including:
(1) Dissemination of programmatic requirements;
(2) Ongoing coordination and correlation of services with other aspects of the total design of the project;
(3) Verification with consultant that owner's requirements are being met;
(4) Authority over the services of those who assisted in the preparation of the documents;
(5) Assumption of responsibility for the services;
(6) Incorporation of services and technical submissions into design documents to be issued for permitting purposes; and
(7) Incorporation and integration of information from manufacturers, suppliers, installers, the architect's consultants, owners, contractors, or other sources the architect reasonably
trusts that is incidental to and intended to be incorporated into the architect's technical submissions if the architect has coordinated and reviewed such information.”

21 NCAC 02 .0109(4) and 0206(d).

2. Engineer

A North Carolina engineer shall not affix the signature or seal to any engineering plan or document not prepared under the engineer’s “direct supervisory control,” i.e., “responsible charge,” which requires an engineer or employee to carry out all client contracts, provide internal and external financial control, oversee employee training, and exercise control and supervision over all job requirements to include research, planning, design, field supervision and work product review. Direct supervisory control may be accomplished face-to-face or by other means of communication. 21 NCAC 56 .0701(c)(3).

NC General Statutes defines “responsible charge” as “[d]irect control and personal supervision, either of engineering work or of land surveying, as the case may be.” NCGC § 89C-3(1).

B. How to Sign/Seal?

1. Architect

A North Carolina architect shall not sign nor seal drawings, specifications, reports or other professional work which were not prepared by the architect or under his/her responsible control. Documents shall be sealed as follows:

- When an architect of record has other in-house or outside registered architects on its team working on a particular project, the architect of record may sign and seal portions of the work that by law require architect preparation so long as the architect of record reviewed and either coordinated their preparation or integrated them into his work. Continuing, if portions of work by law do not require architect preparation, the architect of record may sign and seal such portions so long as the architect of record has reviewed and adopted in whole or in part such portions and has integrated them into his work. 21 NCAC 02 .0206(a)(1)

- An architect may release incomplete documents for interim review without being signed and sealed, if they are dated, bear the architect's name, and are conspicuously marked to indicate the documents are for interim review and not intended for bidding, procurement, permit, or construction purposes. 21 NCAC 02 .0206(a)(7).

- An architect shall not seal documents prepared by its structural, mechanical or electrical engineering consultants, since such documents must bear the seal and registration number of the responsible engineer. 21 NCAC 02 .0206(a)(8).

“Standard design documents” prepared by Architect One may be sealed by Architect Two provided: (1) Architect One’s seal appears on the documents to authenticate authorship; (2) Architect One places on each sheet of the documents the words "standard design document;" (3)
Architect Two identifies all modifications to Architect One’s standard design documents; (4) Architect Two assumes responsibility for the adequacy of the design and for the design conforming with applicable building codes; and (5) Architect Two signs and seals the standard design documents with a statement substantially as follows: "These documents have been properly examined by the undersigned. I have determined that they comply with existing local North Carolina codes, and I assume responsibility for the adequacy of the design for the specific application in North Carolina." 21 NCAC 02 .0206(b).

If required, post-construction record drawings based upon representations of contractors must not be sealed by the architect as long as the record documents bear the name of the architect and include language stating "these drawings are based in part upon the representations of others and are not for bidding, procurement, permit or construction purposes." 21 NCAC 02 .0206(c).

2. Engineer

An engineer may sign and seal drawings and documents depicting work of two or more engineers provided (1) it is designated by a note under the seal the specific subject matter for which each is responsible; and (2) in circumstances where Engineer One in responsible charge of the work is unavailable to complete the work, Engineer Two may take responsible charge by performing and documenting all professional services to include developing a design file including work or design criteria, calculations, code research, and any necessary and appropriate changes to the work. 21 NCAC 56 .0701(c)(3-4). Engineer Two need not redo drafting and non-professional services, but must be distinguished in a clean and obvious manner and accurately reflect Engineer Two’s work. The burden is on Engineer Two to show such compliance. Engineer Two must control and be responsible for the work product and the signed and sealed originals of all documents. 21 NCAC 56 .0701(c)(4).

Any revision by Engineer Two to final drawings, specifications or reports previously signed and sealed by Engineer One must be described and dated and, if not done under the responsible charge of Engineer Two, must be separately certified. 21 NCAC 56 .1103(a)(7) & (b)(6).

An engineer’s certification on a drawing, plan, specification, document or report signifies that it is the engineer’s final work unless the work is stamped or marked substantially as follows:

(1) "Preliminary - Do not use for construction;"
(2) "Progress Drawings - Do not use for construction;"
(3) "Preliminary Plat - Not for recordation, conveyances, or sales;"
(4) "Final Drawing - Not released for construction;"
(5) "Final Drawing - For Review Purposes Only;"
(6) "Not a Certified Document – This document originally issued and sealed by (name of licensee), (license number), on (date of sealing). This document shall not be considered a certified document;"
(7) "Not a Certified Document as to the Original Document but Only as to the Revisions - This document originally issued and sealed by (name of licensee), (license number), on (date of sealing). This document is only certified as to the revisions."
The purpose of such marking is to put the public on notice not to use as a final product, in which case certification is optional. 21 NCAC 56 .1103(c).

“Standard design plans” initially prepared and certified by Engineer One may subsequently be reviewed by Engineer Two “for code conformance, design adequacy, and site adaptation for the specific application within North Carolina.” Engineer Two assumes responsibility for such standard designs. Standard plans signed and sealed by Engineer One shall be sealed by Engineer Two after such review, who then assumes responsibility. In addition to the seal, Engineer Two must also include the following statement: "These plans have been properly examined by the undersigned. I have determined that they comply with existing local North Carolina codes, and have been properly site adapted for use in this area." 21 NCAC 56 .1106.

3. Seal Chart

The North Carolina Board of Architects and the North Carolina Board of Engineering and Land Surveying publish a Seal Brochure entitled “Requirements Regarding the Use of Professional Seals and the Practice of Architecture and Engineering in the State of North Carolina” (2003). See link: http://www.ncbarch.org/public/SealBrochure.pdf and Appendix A.1 Below are responses to key questions and concerns regarding signing and sealing documents as the architect or engineer of record. These should parallel the previous two subsections above.

Can a licensee seal an opinion letter or report concerning whether plans that he/she did not prepare comply with the building code?
- Architect: No.
- Engineer: No, unless hired by an agency or the owner to specifically do a code review of plans already bearing the valid seal of the licensee.

Can a licensee seal a document that was not personally prepared by licensee or under his/her direct responsible control?
- Architect & Engineer: No.

Can a licensee modify and seal deceased licensee’s sealed drawings without completely redrawing them?
- Architect & Engineer: Yes, only if licensee clearly marks modifications and puts written disclaimer on the plans.

Can a licensee modify and seal drawings previously sealed by another licensee who was terminated by the owner without completely redrawing them?
- Architect & Engineer: Yes, if licensee clearly marks modifications and puts written disclaimer on

1 As of the date of this manuscript, the 2003 Seal Brochure is in the process of being updated by the North Carolina Board of Architects and the North Carolina Board of Engineering and Land Surveying.
the plans.

Can a licensee seal plans begun or contracted for a person not properly licensed?

- Architect & Engineer: No, unless the licensee redraws the plans, making them his/her own work product.

C. Risks and Repercussions

1. Architect

It is “unprofessional conduct” for an architect to be found by a court to have infringed upon the copyrighted works of other architects or design professionals, and may be cause for the levy of a civil penalty or for denial, suspension, or revocation of a license or certificate of registration to practice architecture. 21 NCAC 02 .0209(11).

The North Carolina Board of Architecture can suspend or revoke Architect Two’s license or certificate of registration, or reprimand or levy a civil penalty up to $500.00 per violation if Architect Two is found guilty of dishonest conduct which includes representing that it is the author of drawings or specifications other than those prepared personally by or under Architect Two’s direct supervision. § 83A-15(a)(1)b. Any person, including Architect One, may file such a charge with the Board. § 83A-14. If Architect One is aware of such activity by Architect Two and does not act, Architect One could possibly be exposed to a charge of “unprofessional conduct” for “knowingly aiding or abetting others to evade or violate the provisions of this Chapter.” § 83A-15(a)(3)b.

2. Engineer

It is misconduct for Engineer Two to seal work done by Engineer One unless the work is performed under the "responsible charge" of Engineer Two. 21 NCAC 56 .1101.

The North Carolina State Board of Examiners for Engineers and Surveyors may reprimand or suspend an engineer; refuse to renew, reinstate, or revoke the certificate of licensure; or require additional education or, as appropriate, require re-examination for any engineer who is found guilty of violating any provisions of Chapter 89C – Engineering and Land Surveying of the North Carolina General Statutes, and Chapter 56 of North Carolina’s Administrative Code. NCGS § 89C-21(a)(4). The Board may also levy a civil penalty on the guilty engineer of up to $5,000. NCGS § 89C-21(c).

In addition, the guilty engineer’s corporation or business firm may have its certificate of authorization revoked or suspended by the Board for a period of time not exceeding two years, if the engineer is an officer or director. NCGS § 89C-21(b).
III. INTELLECTUAL PROPERTY

The most important issue that typically arises stemming from the termination of a design professional on a construction project is copyright ownership of the designer’s plans and specifications – more specifically whether and to what extent the owner can complete the project using Architect One’s plans. If Architect One were to file a copyright infringement action, the remedies sought could include injunctive relief, statutory and actual damages, profit recovery, and impounding and destruction of infringing copies. An injunction is dramatic because it could completely stop construction of a building. To sustain an injunction, Architect One would have to show irreparable harm that could not be compensated with damages. Granting an injunction on a construction project is difficult to obtain because it will likely lead to a great deal of waste in construction costs and uncertainty with the array of parties involved on a construction project who will not have a “dog in the fight.” Notwithstanding, the potential threat is dire and cannot be ignored. Your attention is directed to Appendix B for a high level Outline of Copyright Issues.

A. Basic Copyright Principals

1. What is included?

Some aspects of the design and drawings give rise to protectable rights, while others do not. Copyrights do include protectable rights. For example, "original works of authorship" - independently created by the author (as opposed to copied from other works) that possess at least some minimal degree of creativity are protected. The "overall form as well as arrangement and composition of spaces and elements in the design” can be included. 17 U.S.C. § 101(a).

Copyrights do not include non-protectable rights, such as “individual standard features” driven by function such as common windows, doors, other stable building components or those elements required by building codes, which includes elements intrinsic to the building in its most basic form – determined by its pragmatic, constructional, and technical requirements.

What constitutes copyright infringement? It depends on where you ask. The nation is divided into 11 regional circuits plus the District of Columbia with jurisdiction over copyright matters. Since the rules differ from one circuit to another, it is helpful to know the prevailing rules in the areas where you practice for purposes of drafting agreements and registering copyrights, as well as the prevailing rules in the areas where disputes arise and may be tried before a court of competent jurisdiction. North Carolina is in the Fourth Circuit, together with South Carolina, Maryland, Virginia and West Virginia. If Architect One were to assert a copyright infringement claim against Architect Two, pursuant to the prevailing two-party test respecting architectural works accepted by the Fourth Circuit, Architect One must show:

- The works are objectively similar, containing substantially similar protectable elements, including compilation; and
- The works are subjectively similar, expressing similar overall look and feel from the perspective of the intended audience for work.
Stated differently: Would an ordinary observer overlook disparities and regard aesthetic appeal of two works to be same?

2. **Bundle of Reserved Rights**

The owner of the copyright owns the following bundle of reserved rights: (a) reproduce the work in copies, (b) prepare derivative works (modify), (c) distribute copies of the work, (d) perform the work publicly, (e) display the work publicly, (f) authorize others to do so (e.g., license), and (g) pursue copyright infringement action in name of copyright owner.

3. **Copyright Ownership**

Without contract language addressing intellectual property ownership of the design and plans, the common law default rule is that the author of the work owns the copyright. In many situations the owner provides input, programming information and others ideas to the development of the design. There could also be processes and aspects of an owner’s design program that are unique and arguably proprietary in nature. However, by default, the architect will typically be deemed the author and owner of the copyright.

In the past some owners have attempted to argue the “work made for hire” doctrine which, if accepted, would mean the owner, as employer of the architect, would own the copyright. Even if the contract recited words to this effect, the doctrine does not apply to an owner/design professional relationship. A joint authorship theory is unlikely because client participation does not transform a client into an author or joint author of an architectural work.

Whether the Brooklyn Bridge or someone else’s copyright, you cannot give away something you do not own. So the parties can start with a clean slate, B101 § 7.1 provides “[t]he Architect and the Owner warrant that in transmitting Instruments of Service, or any other information, the transmitting party is the copyright owner of such information or has permission from the copyright owner to transmit such information for its use on the Project.”

An architect’s copyright attaches immediately upon creation of the work. Registration is not required. As discussed earlier, a transfer of ownership will take place either by copyright assignment or more likely by a grant of license. Depending on the terms in the architect agreement, the timing of the transfer could be (1) as the work is created, as a work for hire (unlikely per earlier discussion); (2) incrementally as payments are made; or (3) upon final payment. The architect’s leverage is greater when the transfer is tied to the final payment.

4. **Assignment of Copyright**

There are two ways rights of ownership of copyright are transferred from the architect to the owner. First is the broad notion of assignment of the copyright, which is generally not favored by design professionals. Second is the narrower grant of a license, which enables the owner to use the copyright while the architect retains ownership of the copyright.
A transfer of copyright ownership must be in writing. In contrast, while it is preferred that transfers of licenses to use copyrights be in writing, a license can be transferred by implication. Assuming the agreement is the common AIA B101 Architect Agreement, “no other license or right shall be deemed granted or implied under this Agreement. The Owner shall not assign, delegate, sublicense, pledge or otherwise transfer any license granted herein to another party without the prior written agreement of the Architect.” (B101 § 7.4).

The architect can assign the copyright to the owner with or without reservations. We discussed above seven types or bundles of reserved rights held by the copyright owner (reproduce the work in copies, prepare derivative works, distribute copies of the work, perform the work publicly, display the work publicly, authorize others to do so, and pursue copyright infringement action in name of copyright owner). Since the owner is not in the architecture business, it probably does not have a pressing need to own all of the reserved rights generally held by the architect. Either the architect could assign the copyright to the owner but reserve and not assign some of these rights (i.e., the right to prepare derivative work), or all of the rights can be assigned to the owner and then the owner grant a reverse license back to the architect.

5. Grant of License

Except in unusual circumstances, architects typically maintain their ownership in the copyright, and then grant a limited license to the owner for use of certain rights, typically with conditions such as the right of termination. If ownership is to remain with Architect One, the owner may consider trying to negotiate a written perpetual license to use and reproduce the instruments of service, even if Architect One is no longer engaged, regardless of whether termination is justified. Under B101 § 7.3.1, the license would be irrevocable only if the owner terminated for cause, in which case a recalcitrant architect could take the position that such termination was wrongful and not for proper cause, resulting in an arguable terminated license, leading to more litigation.

What is the difference between a perpetual and irrevocable license? A perpetual license never expires. Hence it has no term (in the sense of duration). It can be terminated however. The circumstances and effects of termination should be articulated, and the section on effects of termination should be among the “surviving provisions.” An irrevocable license cannot be revoked by the licensor, but the license can have a fixed (or renewable) term and ultimately expire or be earlier terminated under named circumstances (e.g., for cause, bankruptcy).

In the event ownership of intellectual property rights is not addressed in the written agreement between the owner and architect, the owner could attempt to later argue that it has an “implied license” to use the drawings to complete the building, whether or not the termination of the architect was wrongful. However, longstanding precedent has established that implied licenses are found only in narrow circumstances. Determination of the existence of an implied license is based on the outward manifestation of Architect One’s intent whether the work could be used in the future without involvement of Architect One. If the parties litigate and the termination is ruled unjustified, the owner may have to also pay the architect copyright damages and possibly attorneys’ fees.
Some issues to consider while transferring a license include the scope, reservations, exclusivity, subconsultants, payment and indemnification.

a. **Scope**

The first scope of license consideration is which elements to include. As mentioned above, there are protectable elements of the work which can arise if the design is new or unique, and then there are standard details that the architect has developed over the years and are part of his or her stock-in-trade. There is a very good chance that these functional standard details are not copyrightable, but it would be wise for the owner to be sure they are included in the license just in case there is ever a challenge. Most likely Architect Two will demand it and will require assurance and indemnity from the owner.

Another scope of license consideration is derivative works, which is new work based upon one or more pre-existing works. Examples include modified versions of the design, as well as photographs (unless the work is located in or ordinarily visible from a public space), paintings, or other representations of the design drawings or the building itself.

For architectural works, the scope of license must be defined vis-à-vis the project or beyond. AIA B101 § 7.3 defines this scope as “solely for use in constructing, using, maintaining, altering and adding to the Project.” As with all industry standard contracts, there will be conditions including, but not limited to, receipt of payment which will be further discussed below. EJCDC E-500 (2008) Agreement Between Owner and Engineer at § 6.03.E defines the scope “to use the Documents on the Project, extensions of the Project, and for related uses of the Owner.” ConsensusDOCS 240 (2007) Agreement Between Owner and Architect/Engineer at § 10.1.3 defines the scope as “solely for the purposes of maintaining, renovating, remodeling or expanding the Project at the Worksite.” The limited license could also be drafted to include use on other future projects if the owner is a “chain” or franchise operation – of course with additional conditions from the architect.

Should Architect One grant the owner an exclusive or non-exclusive license? Architect One granting a non-exclusive license to the owner permits Architect One to also grant others a license to the work if the need arises, within the scope of the license. If Architect One grants an exclusive license to the owner, Architect One will not be permitted to grant others a similar license to the work if the need arises. The ability to continue to use the intellectual tools of the trade developed over the career of the architect is very important unless the scope of the license at issue is narrow and unique. For this reason, unless the design is a signature-identifying factor to the owner, it is much more likely that the license will be non-exclusive which is generally agreeable to most owners.

A non-exclusive license may allow the owner unfettered use of the work. To what extent the Owner can use Architect One’s work should be spelled out in the license grant (if not an outright assignment). The ability to retain Architect Two to complete the project is important if the Contract Documents are not complete. The license could be drafted broadly to allow the owner to assign the rights to the work to others.
b. Architect Consultants

A party cannot convey a greater license than it possesses. To the extent the architect conveys a license to the owner, the architect must be sure the license flows down to its subconsultants. AIA C401 Agreement Between Architect and Consultant at § 7.1 provides: “[u]pon execution of this Agreement, the Consultant grants to the Architect a license to use the Consultant’s Instruments of Service in the same manner and to the same extent as the Architect has granted a license to the Owner in the Prime Agreement.”

c. Payment to Architect and Indemnification

Payment from the owner to the architect is commonly a condition for the transfer of intellectual property rights to the owner. While seldom the case, the architect has leverage in this regard. This includes the trigger time for the transfer, and if spelled out in the license can be revoked if specified conditions are not met. Industry standard contracts include language that address this is issue. The reader is referred to Appendix D - Comparison of Termination and Copyright Terms in Industry Standard Agreements, including AIA Document B101-2007 - Standard Form Agreement Between Owner and Architect, ConsensusDOCS 240 – Standard Form of Agreement Between Owner and Design Professional (2007) and EJCDC E500 Standard Form of Agreement Between Owner and Engineer for Professional Services (2002). Appendix D also includes various forms of indemnification that the owner will generally need to provide Architect One to manage the increased risk of not being retained for the duration of the project. For example, if the owner uses the work without consulting with Architect One, the owner is obligated to indemnify and defend Architect One from damages for its unauthorized use. Architect Two will be sensitive to copyright issues and will likely demand indemnification from the owner for infringement suits brought by Architect One.

The parameters and expectations for indemnification vary depending on whether the architect was at fault (in which case the owner terminated the architect for cause) or whether the architect was not at fault and was either terminated by the owner for convenience or the architect terminated the owner for cause (most likely for failure of payment). Under the unmodified B101 framework, if the owner uses the documents (e.g., in connection with alterations and/or additions to the project) in the future without retaining Architect One, the Owner releases Architect One from all claims arising out of such use. In addition, the owner agrees to indemnify and hold Architect One harmless from all costs and expenses (including defense costs) in connection with third-party claims arising out of the owner’s use of the documents. However, the indemnity does not apply if Architect One is properly terminated for cause.

B. Industry Standard Contracts

Compare contract terms – AIA and ConsensusDOCS:
AIA B101 Agreement Between Owner and Architect (2007):
- Architect and consultants are the owners of their respective instruments of service, retaining all rights, including copyrights (Section 7.2).
- Owner is granted a non-exclusive license in the instruments of service, solely for use in constructing, using, maintaining, altering and adding to the Project, provided the owner substantially performs, including making prompt payments of all sums due (Section 7.3).
- If the Owner does not pay all sums due, if the architect terminates the contract for cause, or if the Owner does not pay an extra fee (if applicable) after a termination for convenience, the Owner’s non-exclusive license terminates. (Section 7.3; Section 11.9).
  - Owner must indemnify the architect against third party claims arising from the owner’s unauthorized use of documents. (Section 7.3.1).
- If the Owner properly terminates the architect for cause, there is no indemnity against third party claims and no release of the architect from the owner’s claims arising from the use of the documents (Section 7.3.1).

Also refer to Appendix C - Use of Architect’s Instruments of Service, from the national AIA Website

ConsensusDOCS 240 Agreement Between Owner and Design Professional (2007):
- Owner receives ownership (except copyrights) of all documents, drawings, and data prepared by Architect or consultants for the Project, upon final payment for all sums due in the event of termination (Article 10.1)
- Owner granted copyright ownership, so long as:
  - Make all payments required, and
  - Pay stated copyright fee, if applicable (Article 10.1.1)
- Termination for convenience or for cause by either party, Owner can use documents to complete the project, so long as:
  - Pays all sums due (Article 10.1.2)
  - Owner indemnifies Architect for post-construction use of documents (Article 10.1.3)

C. Practice Points

Owners are wise to hedge their terminations for cause with an express rule of construction so that at a minimum it will be deemed a proposed termination for convenience:

In the event the Owner's termination for cause set out in paragraph _____ is deemed invalid or unjustified, then such termination shall automatically become a termination for convenience under paragraph _____.

If such language is not included up front in the agreement, the owner will be unable to argue this position after the fact.
IV. REPLACEMENT OF DESIGN PROFESSIONAL AND SUBCONSULTANTS

A. Relationships

Terminations on construction projects are generally considered the remedy of last resort since in most cases the result will inevitably lead to additional project and transaction costs and time. Generally there are no winners, but rather one party may not lose as much. Because of this dire situation, terminations of contractors are relatively rare, and terminations of architects are even more rare.

While not always the case, the owner’s selection process of a contractor is more often based on price. Contractors, sometimes pre-qualified or by invitation, bid on projects more like a commodity – apples-to-apples yields the lowest price. The resulting contract between the owner and contractor is usually heavily weighted on price (lower is better). This is a job-focused business contract and relationship. Down the chain, it is not unusual for “shotgun weddings” to occur with subcontractors and suppliers who may have no history or working together.

In contrast, owners hire architects very early in the project since projects need to be designed before they are built. The selection criteria are usually more subjective, involving style and taste. There is usually much interaction between the owner and architect, with relationships developing as the project is literally conceived. Emotions can get involved. This starts to sound akin to a domestic relationship with more invested.

The relationship and transition from Architect One to Architect Two share some characteristics with an architect providing bridging services and the design-builder’s architect that will complete the construction documents as the architect of record. A parallel but more complicated situation arises if an owner terminates a design-builder where the owner is not in privity with the architect. If the owner desires protection from being alienated from the design-builder’s architect, it is wise for an owner to seek an understanding up front in the design-build agreement so parallel terms may flow down to the agreement between the design-builder and architect. A further complication is where the architect is not fully paid by the design-builder. If the owner plans on moving forward with the architect sans the design-builder, the owner will need to assume the same obligations to the architect that were in place by the design-builder. The owner may need to consider using design-builder retainage as an offset for compensating the architect. Expect considerable push back from the design-builder.

B. Project Phases

The difficulty in replacing an architect during the course of a project varies by project phase. The “pain level” is low early in the project prior to obtaining institutional knowledge of the project. The “pain level” steadily increases during subsequent design phases hitting a peak after the Construction Documents are complete and a building permit is needed. The architect’s leverage is highest at the moment before signed and sealed Construction Documents are issued for permit and construction. Stated differently, this would be the most difficult time for an owner to have to find another architect to agree to step in as the architect of record so a permit
can be pulled and construction commence. Although unscientific and subjective, the chart below graphically depicts this phenomenon:

<table>
<thead>
<tr>
<th>Project Phase</th>
<th>Pain Level</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Programming</td>
<td>😊</td>
<td>Institutional Knowledge</td>
</tr>
<tr>
<td>Schematic Design</td>
<td>😊😊</td>
<td>Innovation w/ Undocumented Reasoning</td>
</tr>
<tr>
<td>Design Development</td>
<td>😊😊😊</td>
<td>Detailed Development w/ Undocumented Reasoning</td>
</tr>
<tr>
<td>Construction Documents</td>
<td>😊😊😊😊😊😊</td>
<td>Life Safety Code – Full Implementation, Design Teams</td>
</tr>
<tr>
<td>Permitting</td>
<td>😊😊😊😊😊😊</td>
<td>Sign and Seal, Certify Plans</td>
</tr>
<tr>
<td>Bid Phase</td>
<td>😊😊</td>
<td>Respond to RFIs, Issue Addenda</td>
</tr>
<tr>
<td>Construction Phase</td>
<td>😊😊😊😊😊</td>
<td>Shop Drawings, Submittals, Pay Applications</td>
</tr>
<tr>
<td>Project Completion</td>
<td>😊😊😊😊😊😊</td>
<td>Punch Lists, Certif. of Substantial Completion</td>
</tr>
<tr>
<td>Post Construction</td>
<td>😊😊😊😊😊😊</td>
<td>Follow up questions, Warranty Review</td>
</tr>
</tbody>
</table>

Interestingly, if the project is in the construction phase and Architect One is terminated by the owner, “the Owner shall employ a successor architect as to whom the Contractor has no reasonable objection and whose status under the Contract Documents shall be that of the Architect” (A201 § 4.1.3). The rationale would be that at the time the contractor entered the construction agreement with the owner, Architect One was known and the contractor was relying on Architect One’s skill and judgment in the administration of the project.

C. Liability scope

How should liability be allocated between Architect One and Architect Two? One possibility is for the liability percentage to track the payment schedule which varies from project to project – generally around 15% for Schematic Design, 20% for Design Development, 35% for Construction Documents, 5% for Bidding/Negotiations, and 25% for Construction Administration. However, this construct is specious since it is axiomatic that the vast percentage of liability arises from signing and sealing the Construction Documents.

A challenge is how to allocate risk with E&O coverage for Architect Two where Architect One only performed a percentage of the design. Those documents are clearly not signed and sealed; however, Architect One was obligated to perform these early design phase documents in accordance with the professional standard of care. Since Architect Two will be responsible for all of the final technical details and the project’s compliance with applicable building codes, if an owner has a future negligence claim arising from the building design or documents, the owner will first and primarily look to Architect Two who signs and seals the documents. Depending on language in the initial architect agreement, the owner can avoid waiving its rights for a negligence claim against Architect One. No matter what language is in
any of the architect agreements, common law allows third parties the right to assert a negligence claim against both Architect One and Architect Two. For this reason, architects have a strong interest in securing indemnification from the owner.

An owner is understandably at risk when changes are made to Architect One’s documents or when an owner exceeds the scope of its license. Who is responsible for changes? Architect One will likely demand that it be held harmless from “damages resulting from Architect Two’s changes made to the original design.” The owner will want to reframe and narrow the phrase so Architect One “will be liable unless the damage results solely from changes made to the original design.” As mentioned above in the Payment to Architect and Indemnification section, see Appendix D - Comparison of Termination and Copyright Terms in Industry Standard Agreements, for comparative indemnification terms.

D. Cooperation

The notion of an owner retaining separate architects for design services and construction administration services was first recognized by the AIA Documents Committee with their 2007 issuance of standard form agreements that can be used for such purposes. For example, B209–2007, Standard Form of Architect’s Services: Construction Contract Administration, for use where the Owner has retained another Architect for Design Services - establishes duties and responsibilities when an architect provides only construction phase services and the owner has retained another architect for design services. AIA B209 –2007 is a scope of services document only that needs to be used with another agreement containing terms, conditions, and compensation details, such as B102–2007, Standard Form of Agreement Between Owner and Architect without a Predefined Scope of Architect’s Services. The AIA B209 architect agreement sets out a scope of full traditional contract administration services for the “Contract Administration Architect” while expressly recognizing the role of the “Owner’s Design Architect,” in several areas requiring that the Contract Administration Architect consult with the Owner’s Design Architect. For example, the Contract Administration Architect shall coordinate its services with those services provided by the Owner’s Design Architect (§ 2.2), and as required herein to perform the Construction Contract Administration Services (§ 2.3), including before issuing interpretations and decisions in writing or in the form of drawings (§ 2.8); preparing, reproducing and distributing supplemental drawings, specifications and interpretations in response to requests for information by the Contractor relative to changed requirements and schedule revisions (§ 2.9); deciding matters relating to aesthetic effect (§ 2.10); issuing Certificates for Payment (§2.15.1); and making determinations on the dates of Substantial and Final Completion, issuing Certificates of Substantial Completion and issuing a final Certificate for Payment based upon a final inspection indicating the Work complies with the requirements of the Contract Documents (§ 2.18.1).

In addition to addressing the issue of coordination, AIA B209 –2007 also addresses head-on the intellectual property rights issue as follows (modified with Architect One/Two terminology):

“§ 4.1 The Owner shall provide Architect Two with a complete set of Contract Documents and shall obtain from Architect One the necessary license to permit Architect
Two to reproduce Architect One’s Instruments of Service and to use them in performing the Construction Contract Administration Services. The Owner shall indemnify Architect Two for any copyright claims arising from Architect Two’s use of Architect One’s Instruments of Service while performing the Construction Contract Administration Services.”

The discussion above is instructive in resolving interface issues between the “Contract Administration Architect” and the “Owner’s Design Architect,” and identifying the parallel challenges that will arise following an owner’s termination of Architect One and subsequent hiring of Architect Two to complete the project. The mentioned parallel challenges would be multiplied if the transition between the two architects does not conveniently come immediately after the Construction Documents are signed and sealed.

The lesson learned from the discussion above is an owner and the project can benefit with cooperation between Architect One and Architect Two, even if by way of post-termination negotiations. In some circumstances it would be very helpful if Architect Two could contact Architect One with discrete questions as the only person with understanding of the design assumptions and inter-relationships which led to the original design. Below is some contract language the writer has used that could go a long way towards averting problems that have been discussed in this manuscript.

In the event of any termination under this Article, the Architect consents to the Owner’s selection of another architect of the Owner’s choice to assist the Owner in completing the Project. The Architect agrees to cooperate and provide any information requested by the Owner in connection with the completion of the Project and consents to and authorizes the making of any reasonable changes to the design of the Project as the Owner and such other architect may desire. Any services provided by the Architect that are requested by the Owner after the date of termination shall be fairly compensated by the Owner pursuant to mutual agreement on the amount of compensation prior to the performance of such services.

As mentioned at the beginning of this manuscript, in comparison to contractor terminations, it is a relatively rare event that an architect is terminated on a project. But when it does happen, unless the parties are mindful of some of the “prenuptial” issues and terms discussed above, the result can be akin to a nasty and protracted divorce, including custody. Fortunately, with use of proper language in the Contract Documents, this can be minimized.

END
APPENDIX B
Outline of Copyright Issues

What are we talking about?
- **Does include** (Protectable rights):-
  - "Original works of authorship" - independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity
  - "Overall form as well as arrangement and composition of spaces and elements in the design" 17 U.S.C. § 101(a)
- **Does not include** (Non-protectable rights):
  - "Individual standard features" driven by function such as common windows, doors, other stable building components or those elements required by building codes.
  - Elements intrinsic to building in its most basic form – determined by pragmatic, constructional, and technical requirements.
  - Public domain elements.

Common law, statutory and other reserved rights in the Work, including Copyright:
1. **Bundle of Reserved Rights:**
   a. Reproduce the work in copies
   b. Prepare derivative works (modify)
   c. Distribute of copies of the work
   d. Perform the work publicly
   e. Display the work publicly
   f. And authorize others to do so (e.g., license)
2. **Ownership** - Author of the work owns the copyright
   a. Default – Architect
      1) Architect does not own work authored by Subconsultant unless assigned
   b. Exceptions
      1) “Work made of hire” doctrine
      2) Joint authorship
3. **Transfer**
   a. **Assignment of Copyright**
      1) Reservations:
         a) With reservations
         b) Without reservations
      2) Right to pursue copyright infringement action in name of copyright owner
   b. **Grant of License**
      1) Exclusivity:
         a) Exclusive
         b) Non-Exclusive
      2) Scope:
         a) Elements
            i. Protectable elements of the work
            ii. Information or designs previously developed (i.e., standard details)?
            iii. Public domain elements.
         b) Derivative works?
         c) Project
            i. For completing, constructing, using, maintaining, altering and adding to the Project.
            ii. For use on other future projects
            iii. In any way
   3) Reservations
      a) With Reservations
      b) Without Reservations
4. **Consult with Architect?**
   a) Explicitly approved in writing?
5. **Conditioned on payment to Architect?**
6. **Indemnify Architect?**
   a) Factors:
      i. Architect terminated for cause
      ii. Architect terminated for convenience
      iii. Owner terminated for cause
   b) Scope
      i. Indemnify, hold harmless, defend
      ii. from any claim, liability or cost, attorneys fees, defense costs;
         • **Architect friendly:** “for any damages resulting from changes made to design”
         • **Owner friendly:** “damages resulting from changes made to design such that original architect liable unless damage results solely from changes made to design”
      iii. arising or allegedly arising from use of works
   c) Disclaim warranty of fitness for particular purpose?
APPENDIX C

From the AIA Website:
Use of Architect’s Instruments of Service


Use of Architect’s Instruments of Service

Question

What rights does an Owner have to use the Architect’s Instruments of Service when the Project ends or the Architect’s services are terminated?

Answer

In B101™–2007, Standard Form of Agreement Between Owner and Architect, the Architect and the Architect’s consultants are deemed the authors and owners of their respective Instruments of Service, and they retain all common law and statutory rights, including copyright. In B101–2007, however, the license granted to the Owner to use the Instruments of Service has been substantially revised from B141™–1997 and B151™–1997. Under B101–2007, the Owner receives a license to use the Instruments of Service solely and exclusively for constructing, using, maintaining, altering and adding to the Project. This license will only terminate if the Architect rightfully terminates the Agreement for cause due to the Owner’s default. In the absence of such a termination by the Architect, the Owner retains the license to use the Instruments of Service after completion of the Project or the Owner’s termination of the Agreement. If the Owner subsequently uses the Instruments of Services without retaining the author of the Instruments of Service, the Owner agrees to release and indemnify the Architect for such uses. If the Owner rightfully terminates the Agreement for cause, however, the Owner is not required to release and indemnify the Architect for its further use of the Instruments of Service. If the Owner terminates the Agreement for its convenience, or the Architect terminates the Agreement due to the Owner’s suspension of the Project, B101 provides for the Owner to pay a licensing fee to the Architect for the Owner’s continued use of the Architect’s instruments of Service.

All of the 2007 owner-architect agreements treat use of Instruments of Service in the same way as B101 with the exception of B105™–2007, Standard Form of Agreement Between Owner and Architect for a Residential or Small Commercial Project. In B105–2007, the Owner’s right to use the Instruments of Service terminates when the Project is complete or when the Agreement is terminated. B105 does not contain a provision for termination for the Owner’s convenience.

Comparison of Termination and Copyright Terms in Industry Standard Agreements

- AIA Document B101-2007 - Standard Form Agreement Between Owner and Architect
- ConsensusDOCS 240 – Standard Form of Agreement Between Owner and Design Professional (2007)
- EJCDC E500 Standard Form of Agreement Between Owner and Engineer for Professional Services (2002)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Ownership of Documents</td>
<td>§ 7.2 The Architect and the Architect’s consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and shall retain all common law, statutory and other reserved rights, including copyrights. Submission or distribution of Instruments of Service to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publication in derogation of the reserved rights of the Architect and the Architect’s consultants.</td>
<td>10.1 OWNERSHIP OF TANGIBLE DOCUMENTS The Owner shall receive ownership of the property rights, except for copyrights, of all documents, drawings, specifications, electronic data and information (hereinafter &quot;Documents&quot;) prepared, provided or procured by the Architect/Engineer or by consultants retained by the Architect/Engineer and distributed to the Owner for this Project, upon the making of final payment to the Architect/Engineer or in the event of termination under Article 8, upon payment for all sums due to Architect/Engineer pursuant to Paragraphs 8.1 and 8.2.</td>
<td>6.03 Use of Documents A. All Documents are instruments of service in respect to this Project, and Engineer shall retain an ownership and property interest therein (including the copyright and the right of reuse at the discretion of the Engineer) whether or not the Project is completed. Owner shall not rely in any way on any Document unless it is in printed form, signed or sealed by the Engineer or one of its Subconsultants.</td>
</tr>
<tr>
<td>Grant of Ownership Rights</td>
<td>§ 7.3 Upon execution of this Agreement, the Architect grants to the Owner a nonexclusive license to use the Architect’s Instruments of Service solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that the Owner substantially performs its obligations, including prompt payment of all sums when due, under this Agreement. The Architect shall obtain similar nonexclusive licenses from the Architect’s consultants consistent with this Agreement. The license granted under this section permits the Owner to authorize the Contractor, Subcontractors, Sub-subcontractors, and material or equipment suppliers, as well as the Owner’s consultants and separate contractors, to reproduce applicable portions of the Instruments of Service solely and exclusively for use in performing services or construction for the Project. If the Architect rightfully terminates this Agreement for cause as provided in Section 9.4, the license granted in this Section 7.3 shall terminate.</td>
<td>10.1.1 COPYRIGHT The Parties agree that Owner _____shall/ _____shall not (indicate one) obtain ownership of the copyright of all Documents. The Owner’s acquisition of the copyright for all Documents shall be subject to the making of payments as required by Paragraph 10.1 and the payment of the fee reflecting the agreed value of the copyright set forth below: If the Parties have not made a selection to transfer copyright interests in the Documents, the copyright shall remain with the Architect/Engineer.</td>
<td>6.03. E. Owner may make and retain copies of Documents for information and reference in connection with use on the Project by Owner. Engineer grants Owner a limited license to use the Documents on the Project, extensions of the Project, and for related uses of the Owner, subject to receipt by Engineer of full payment for all services relating to preparation of the Documents and subject to the following limitations: (1) Owner acknowledges that such Documents are not intended or represented to be suitable for use on the Project unless completed by Engineer, or for use or reuse by Owner or others on extensions of the Project, on any other project, or for any other use or purpose, without written verification or adaptation by Engineer; (2) any such use or reuse, or any modification of the Documents, without written verification, completion, or adaptation by Engineer, as appropriate for the specific purpose intended, will be at Owner’s sole risk and without liability or legal exposure to Engineer or to its officers, directors, members, partners, agents, employees, and Subconsultants; (3) Owner shall indemnify and hold harmless Engineer and its officers, directors, members, partners, agents, employees, and Subconsultants from all claims, damages, losses, and expenses, including attorneys’ fees, arising out of or resulting from any use, reuse, or modification of the Documents without written verification, completion, or adaptation by Engineer; and (4) such limited license to Owner shall not create any rights in third parties.</td>
</tr>
<tr>
<td>---------------------------</td>
<td>--------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Termination of Copyright Interest</td>
<td>§ 11.9 COMPENSATION FOR USE OF ARCHITECT’S INSTRUMENTS OF SERVICE If the Owner terminates the Architect for its convenience under Section 9.5, or the Architect terminates this Agreement under Section 9.3, the Owner shall pay a licensing fee as compensation for the Owner’s continued use of the Architect’s Instruments of Service solely for purposes of completing, using and maintaining the Project as follows: § 7.3 - See above</td>
<td>10.1.2 USE OF DOCUMENTS IN EVENT OF TERMINATION In the event of a termination of this Agreement pursuant to Article 8, the Owner shall have the right to use, to reproduce, and to make derivative works of the Documents to complete the Project, regardless of whether there has been a transfer of copyright under Subparagraph 10.1.1; provided payment has been made pursuant to Paragraph 10.1.</td>
<td>6.05 Suspension and Termination… 6.05 D.1. In the event of any termination under Paragraph 6.05, Engineer will be entitled to invoice Owner and to receive full payment for all services performed or furnished in accordance with this Agreement and all Reimbursable Expenses incurred through the effective date of termination. Upon making such payment, Owner shall have the limited right to the use of Documents, at Owner’s sole risk, subject to the provisions of Paragraph 6.03.E. 6.05 D.2. In the event of termination by Owner for convenience or by Engineer for cause, Engineer shall be entitled, in addition to invoicing for those items identified in Paragraph 6.05.D.1, to invoice Owner and to payment of a reasonable amount for services and expenses directly attributable to termination, both before and after the effective date of termination, such as reassignment of personnel, costs of terminating contracts with Engineer’s Subconsultants, and other related close-out costs, using methods and rates for Additional Services as set forth in Exhibit C.</td>
</tr>
<tr>
<td>Standard of Care</td>
<td>§ 2.2 The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.</td>
<td>2.1 The Architect/Engineer shall furnish or provide the architectural and engineering services necessary to design the Project in accordance with the Owner’s requirements, as outlined in the Owner’s Program and other relevant data defining the Project, which is attached as Exhibit A. The architectural and engineering services shall include Basic Services plus Additional Services as may be authorized by the Owner.</td>
<td>6.01.A. Standard of Care. The standard of care for all professional engineering and related services performed or furnished by Engineer under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing under similar circumstances at the same time and in the same locality. Engineer makes no warranties, express or implied, under this Agreement or otherwise, in connection with Engineer’s services.</td>
</tr>
<tr>
<td>Fiduciary Relationship</td>
<td>None</td>
<td>2.2 RELATIONSHIP OF THE PARTIES The Architect/Engineer accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate and exercise the Architect/Engineer’s skill and judgment in furthering the interests of the Owner. The Architect/Engineer represents that it possesses the requisite skill, expertise, and licensing to perform the required services. The Owner and Architect/Engineer agree to work together on the basis of mutual trust, good faith and fair dealing, and shall take actions reasonably necessary to enable each other to perform this Agreement in a timely, efficient and economical manner. The Owner and Architect/Engineer shall endeavor to promote harmony and cooperation among all Project participants.</td>
<td>None</td>
</tr>
<tr>
<td>-------</td>
<td>-----------------</td>
<td>--------------------------</td>
<td>------------------</td>
</tr>
<tr>
<td></td>
<td>§ 2.1 The Architect shall provide the professional services as set forth in this Agreement.</td>
<td>2.1 The Architect/Engineer shall furnish or provide the architectural and engineering services necessary to design the Project in accordance with the Owner's requirements, as outlined in the Owner's Program and other relevant data defining the Project, which is attached as Exhibit A. The architectural and engineering services shall include Basic Services plus Additional Services as may be authorized by the Owner.</td>
<td>6.01.E. Compliance with Laws and Regulations, and Policies and Procedures: 1. Engineer and Owner shall comply with applicable Laws and regulations.</td>
</tr>
<tr>
<td></td>
<td>§ 3.4.1 Based on the Owner’s approval of the Design Development Documents, and on the Owner’s authorization of any adjustments in the Project requirements and the budget for the Cost of the Work, the Architect shall prepare Construction Documents for the Owner’s approval. The Construction Documents shall illustrate and describe the further development of the approved Design Development Documents and shall consist of Drawings and Specifications setting forth in detail the quality levels of materials and systems and other requirements for the construction of the Work. The Owner and Architect acknowledge that in order to construct the Work the Contractor will provide additional information, including Shop Drawings, Product Data, Samples and other similar submittals, which the Architect shall review in accordance with Section 3.6.4</td>
<td>3.2.5 CONSTRUCTION DOCUMENTS Based on the approved Design Development Documents and updated estimate of the Cost of Construction and Project Schedule, the Architect/Engineer shall prepare, for the Owner’s review and approval and the approval of governmental authorities, including any revisions necessary to secure such approvals, Construction Documents setting forth in detail the quality levels of and the requirements for construction of the Project, and consisting of drawings and specifications that comply with applicable codes, laws and regulations enacted at the time of their preparation at the location of the Project. When the Architect/Engineer submits the Construction Documents, the Architect/Engineer shall identify in writing all material changes and deviations for the Owner's approval that have taken place from the Design Development Documents and the previously approved estimate of the Cost of Construction and Project Schedule. The Construction Documents shall completely describe all work necessary to bid and construct the Project. Two printed sets and one reproducible set of the Construction Documents shall be provided to the Owner.</td>
<td>2. Prior to the Effective Date, Owner provided to Engineer in writing any and all policies and procedures of Owner applicable to Engineer's performance of services under this Agreement. Engineer shall comply with such policies and procedures, subject to the standard of care set forth in Paragraph 6.01.A, and to the extent compliance is not inconsistent with professional practice requirements.</td>
</tr>
<tr>
<td></td>
<td>3. This Agreement is based on Laws and Regulations and Owner-provided written policies and procedures as of the Effective Date. Changes after the Effective Date to these Laws and Regulations, or to Owner-provided written policies and procedures, may be the basis for modifications to Owner’s responsibilities or to Engineer’s scope of services, times of performance, or compensation.</td>
<td>3. This Agreement is based on Laws and Regulations and Owner-provided written policies and procedures as of the Effective Date. Changes after the Effective Date to these Laws and Regulations, or to Owner-provided written policies and procedures, may be the basis for modifications to Owner’s responsibilities or to Engineer’s scope of services, times of performance, or compensation.</td>
<td>6.01.E. Engineer shall not be required to sign any documents, no matter by whom requested, that would result in the Engineer having to certify, guarantee, or warrant the existence of conditions whose existence the Engineer cannot ascertain. Owner agrees not to make resolution of any dispute with the Engineer or payment of any amount due to the Engineer in any way contingent upon the Engineer signing any such documents.</td>
</tr>
<tr>
<td></td>
<td>6.02 Design Without Construction Phase Services A. Engineer shall be responsible only for those Construction Phase services expressly required of Engineer in Exhibit A, “Engineer’s Services”. With the exception of such expressly required services, Engineer shall have no design, Shop Drawing review, or other obligations during construction and Owner assumes all responsibility for the application and interpretation of the Contract Documents, review and response to Contractor claims, contract administration, processing Change Orders, revisions to the Contract Documents during construction, construction surety bonding and insurance requirements, construction observation and review, review of payment applications, and all other necessary Construction Phase engineering and professional services. Owner waives all claims against the Engineer that may be connected in any way to Construction Phase engineering or professional services except for those services that are expressly required of Engineer in Exhibit A, “Engineer’s Services.”</td>
<td>6.02 Design Without Construction Phase Services A. Engineer shall be responsible only for those Construction Phase services expressly required of Engineer in Exhibit A, “Engineer’s Services”. With the exception of such expressly required services, Engineer shall have no design, Shop Drawing review, or other obligations during construction and Owner assumes all responsibility for the application and interpretation of the Contract Documents, review and response to Contractor claims, contract administration, processing Change Orders, revisions to the Contract Documents during construction, construction surety bonding and insurance requirements, construction observation and review, review of payment applications, and all other necessary Construction Phase engineering and professional services. Owner waives all claims against the Engineer that may be connected in any way to Construction Phase engineering or professional services except for those services that are expressly required of Engineer in Exhibit A, “Engineer’s Services.”</td>
<td>6.02 Design Without Construction Phase Services A. Engineer shall be responsible only for those Construction Phase services expressly required of Engineer in Exhibit A, “Engineer’s Services”. With the exception of such expressly required services, Engineer shall have no design, Shop Drawing review, or other obligations during construction and Owner assumes all responsibility for the application and interpretation of the Contract Documents, review and response to Contractor claims, contract administration, processing Change Orders, revisions to the Contract Documents during construction, construction surety bonding and insurance requirements, construction observation and review, review of payment applications, and all other necessary Construction Phase engineering and professional services. Owner waives all claims against the Engineer that may be connected in any way to Construction Phase engineering or professional services except for those services that are expressly required of Engineer in Exhibit A, “Engineer’s Services.”</td>
</tr>
<tr>
<td>-------</td>
<td>----------------</td>
<td>--------------------------</td>
<td>-------------------</td>
</tr>
<tr>
<td>Document Use Indemnification</td>
<td><strong>§ 7.3.1</strong> In the event the Owner uses the Instruments of Service without retaining the author of the Instruments of Service, the Owner releases the Architect and Architect’s consultant(s) from all claims and causes of action arising from such uses. The Owner, to the extent permitted by law, further agrees 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 the Instruments of Service under this Section 7.3.1. The terms of this Section 7.3.1 shall not apply if the Owner rightfully terminates this Agreement for cause under Section 9.4.</td>
<td><strong>10.1.3</strong> OWNER’S USE OF DOCUMENTS AFTER COMPLETION OF PROJECT After completion of the Project, the Owner may reuse, reproduce or make derivative works from the Documents solely for the purposes of maintaining, renovating, remodeling or expanding the Project at the Worksite. The Owner’s use of the Documents without the Architect/Engineer’s involvement or on other projects is at the Owner’s sole risk, except for the Architect/Engineer’s indemnification obligations pursuant to Paragraph 3.9, and the Owner shall indemnify and hold harmless the Architect/Engineer and its consultants, and the agents, officers, directors and employees of each of them, from and against any and all claims, damages, losses, costs and expenses, including reasonable attorneys’ fees and costs, arising out of or resulting from any such prohibited use.</td>
<td><strong>6.03.E.</strong> Owner may make and retain copies of Documents for information and reference in connection with use on the Project by Owner. Engineer grants Owner a limited license to use the Documents on the Project, extensions of the Project, and for related uses of the Owner, subject to receipt by Engineer of full payment for all services relating to preparation of the Documents and subject to the following limitations: (1)… (2) any such use or reuse, or any modification of the Documents, without written verification, completion, or adaptation by Engineer, as appropriate for the specific purpose intended, will be at Owner’s sole risk and without liability or legal exposure to Engineer or to its officers, directors, members, partners, agents, employees, and Subconsultants; (3) Owner shall indemnify and hold harmless Engineer and its officers, directors, members, partners, agents, employees, and Subconsultants from all claims, damages, losses, and expenses, including attorneys’ fees, arising out of or resulting from any use, reuse, or modification of the Documents without written verification, completion, or adaptation by Engineer; and (4)</td>
</tr>
<tr>
<td>-------</td>
<td>----------------</td>
<td>--------------------------</td>
<td>-------------------</td>
</tr>
<tr>
<td>Mutual termination for cause</td>
<td>§ 9.4 Either party may terminate this Agreement upon not less than seven days’ written notice should the other party fail substantially to perform in accordance with the terms of this Agreement through no fault of the party initiating the termination.</td>
<td>8.1 TERMINATION BY EITHER PARTY Either Party may terminate this Agreement upon seven (7) Days’ written notice if the other Party materially breaches its terms through no fault of the initiating Party.</td>
<td>6.05.B. Termination: The obligation to provide further services under this Agreement may be terminated: 1. For cause, a. By either party upon 30 days written notice in the event of substantial failure by the other party to perform in accordance with the terms hereof through no fault of the terminating party. b. Notwithstanding the foregoing, this Agreement will not terminate under Paragraph 6.05.B.1.a if the party receiving such notice begins, within seven days of receipt of such notice, to correct its substantial failure to perform and proceeds diligently to cure such failure within no more than 30 days of receipt thereof; provided, however, that if and to the extent such substantial failure cannot be reasonably cured within such 30 day period, and if such party has diligently attempted to cure the same and thereafter continues diligently to cure the same, then the cure period provided for herein shall extend up to, but in no case more than, 60 days after the date of receipt of the notice.</td>
</tr>
<tr>
<td>Architect Termination</td>
<td>§ 9.1 If the Owner fails to make payments to the Architect in accordance with this Agreement, such failure shall be considered substantial nonperformance and cause for termination or, at the Architect’s option, cause for suspension of performance of services under this Agreement. If the Architect elects to suspend services, the Architect shall give seven days written notice to the Owner before suspending services. In the event of a suspension of services, the Architect shall have no liability to the Owner for delay or damage caused the Owner because of such suspension of services. Before resuming services, the Architect shall be paid all sums due prior to suspension and any expenses incurred in the interruption and resumption of the Architect’s services. The Architect’s fees for the remaining services and the time schedules shall be equitably adjusted.</td>
<td>9.1 CONTINUANCE OF SERVICES AND PAYMENT Unless otherwise agreed in writing, the Architect/Engineer shall continue to perform its Services during any dispute mitigation or resolution proceeding. If the Architect/Engineer continues to perform, the Owner shall continue to make payments in accordance with this Agreement for amounts not in dispute.</td>
<td>6.05. B. Termination: The obligation to provide further services under this Agreement may be terminated: 1. For cause, a. By Engineer: 1) upon seven days written notice if Owner demands that Engineer furnish or perform services contrary to Engineer’s responsibilities as a licensed professional; or 2) upon seven days written notice if the Engineer’s services for the Project are delayed or suspended for more than 90 days for reasons beyond Engineer’s control. 3) Engineer shall have no liability to Owner on account of such termination.</td>
</tr>
<tr>
<td>-------</td>
<td>-----------------</td>
<td>---------------------------</td>
<td>-------------------</td>
</tr>
<tr>
<td>Impact of Termination</td>
<td><strong>§ 7.3.1</strong> In the event the Owner uses the Instruments of Service without retaining the author of the Instruments of Service, the Owner releases the Architect and Architect’s consultant(s) from all claims and causes of action arising from such uses. The Owner, to the extent permitted by law, further agrees 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 the Instruments of Service under this Section 7.3.1. The terms of this Section 7.3.1 shall not apply if the Owner rightfully terminates this Agreement for cause under Section 9.4.</td>
<td><strong>10.1 OWNERSHIP OF TANGIBLE DOCUMENTS</strong> The Owner shall receive ownership of the property rights, except for copyrights, of all documents, drawings, specifications, electronic data and information (hereinafter &quot;Documents&quot;) prepared, provided or procured by the Architect/Engineer or by consultants retained by the Architect/Engineer and distributed to the Owner for this Project, upon the making of final payment to the Architect/Engineer or in the event of termination under Article 8, upon payment for all sums due to Architect/Engineer pursuant to Paragraphs 8.1 and 8.2.</td>
<td><strong>6.05.D. Payments Upon Termination:</strong> 1. In the event of any termination under Paragraph 6.05, Engineer will be entitled to invoice Owner and to receive full payment for all services performed or furnished in accordance with this Agreement and all Reimbursable Expenses incurred through the effective date of termination. Upon making such payment, Owner shall have the limited right to the use of Documents, at Owner’s sole risk, subject to the provisions of Paragraph 6.03.E.</td>
</tr>
<tr>
<td></td>
<td><strong>§ 7.3</strong> Upon execution of this Agreement, the Architect grants to the Owner a nonexclusive license to use the Architect’s Instruments of Service solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that the Owner substantially performs its obligations, including prompt payment of all sums when due, under this Agreement. The Architect shall obtain similar nonexclusive licenses from the Architect’s consultants consistent with this Agreement. The license granted under this section permits the Owner to authorize the Contractor, Subcontractors, Sub-subcontractors, and material or equipment suppliers, as well as the Owner’s consultants and separate contractors, to reproduce applicable portions of the Instruments of Service solely and exclusively for use in performing services or construction for the Project. If the Architect rightfully terminates this Agreement for cause as provided in Section 9.4, the license granted in this Section 7.3 shall terminate.</td>
<td><strong>10.1.2 USE OF DOCUMENTS IN EVENT OF TERMINATION</strong> In the event of a termination of this Agreement pursuant to Article 8, the Owner shall have the right to use, to reproduce, and to make derivative works of the Documents to complete the Project, regardless of whether there has been a transfer of copyright under Subparagraph 10.1.1, provided payment has been made pursuant to Paragraph 10.1.</td>
<td><strong>6.05.D. Payments Upon Termination:</strong> 2. In the event of termination by Owner for convenience or by Engineer for cause, Engineer shall be entitled, in addition to invoicing for those items identified in Paragraph 6.05.D.1, to invoice Owner and to payment of a reasonable amount for services and expenses directly attributable to termination, both before and after the effective date of termination, such as reassignment of personnel, costs of terminating contracts with Engineer’s Subconsultants, and other related close-out costs, using methods and rates for Additional Services as set forth in Exhibit C.</td>
</tr>
</tbody>
</table>