

4.1 DISPUTE RESOLUTION

There are a number of alternatives to dispute resolution available to parties of the contract. The leading ones are:

- **Negotiation:** Two or more disputing parties meet, in good faith, to arrive at a mutual agreement without the help of an outside party. This method can be effective for preserving business relationships and is cost effective.
- **Mediation:** A private, informal dispute resolution process in which a neutral third person, the mediator, helps the disputing parties reach an agreement. The mediator has no power to impose a decision on the parties.
- **Arbitration:** A process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing where both parties have an opportunity to be heard. When arbitration is voluntary, the disputing parties select the arbitrator who has the power to render a binding decision. Appeals are difficult to obtain.
- **Mini-Trial:** Attorneys for the parties present their cases to a judge or jury, which is usually done in an abbreviated time format. The judge or jury will then issue a binding or advisory ruling to the parties. This method can be effective for complex cases because of the need for brevity while still allowing for a hearing upon the facts.
- **Litigation:** A lawsuit. Legal action, including all proceedings therein. Contest in a court of law for the purpose of enforcing a right or seeking a remedy. This method tends to be the most time intensive and expensive. However, the parties generally can appeal the decision.

AIA Document A201, *General Conditions of the Contract for Construction*, contains paragraphs 4.5 MEDIATION, and 4.6 ARBITRATION. In an effort to allow other alternatives to dispute resolution, subparagraph 4.6.1 should be modified in supplementary conditions to replace the word "shall" with the word "may".

4.2 LIQUIDATED DAMAGES AND BONUSES

Bonus and liquidated damage clauses, if used, should be used only under the Single Contract System. When the Owner will benefit from early completion, a bonus is justified and equitable. Liquidated damages provisions may increase the cost of construction, and therefore they should be used only where warranted.

Legal opinion indicates that neither specific bonus nor damages provisions are a requirement, but any specified amount of damages should bear a reasonable relationship to the actual damages which may occur. It is recommended that the amount of the damages be established for each individual project or part thereof.

If more than one contract is used, these recommendations must be applicable to each contractor, subcontractor and supplier.

When using a liquidated damages clause, the following recommended supplementary condition (In reference to AIA A201, paragraph 9.8) may be used as a guide, but it should be adapted to meet the requirements of the individual project and it should be reviewed by legal counsel:

It is mutually agreed between the Contractor and Owner that time of completion is of the essence in this contract. The Contractor agrees that the Work embraced by this contract shall be substantially complete as defined in Subparagraph 9.8.1 of AIA A201 General Conditions of the Contract for Construction on or before

_____.
Should the Contractor neglect, fail or refuse to meet the above specific completion date, it shall pay to the Owner as liquidated damages the sum of _____
(\$ _____) per calendar day for each calendar day the Contractor remains in default. After _____
_____ this amount will be increased to _____
(\$ _____) per calendar day for each calendar day the Contractor remains in default.

This per diem sum for liquidated damages is mutually agreed upon between the Contractor and Owner because of the difficulty of ascertaining and establishing the actual damages which the Owner would sustain.

This sum shall not be construed as a penalty in any sense.

If the Contractor is delayed at any time in the progress of the Work by any cause enumerated in Subparagraph 8.3.1 of AIA A201 General Conditions of the Contract for Construction, then the date of substantial completion shall be extended in accordance with the provisions of Paragraph 8.3 of the General Conditions. Requests for an extension of time shall be documented in accordance with contract documents.

4.3 SUBSTANTIAL COMPLETION

Supplementary conditions should contain the following modification to Paragraph 9.8 of AIA A201:

Minor corrective work and minor seasonal work that cannot be completed due to weather conditions will not delay determination of substantial completion.

See also Chapter 2, paragraph 2.5 COMPLETION TIME.

4.4 PARTIAL OCCUPANCY OR USE BEFORE SUBSTANTIAL COMPLETION

Owners interested in occupancy before substantial completion should carefully review AIA A201, subparagraph 9.9.1 for considering such matters as insurance, security, utilities etc.

4.5 SCHEDULE OF VALUES (COST BREAKDOWN)

Use the Table of Contents from the Project Manual to establish the format for the Schedule of Values. The recommended form is AIA document G703 *Continuation Sheet*, which is the companion form to AIA document G702 *Application and Certificate for Payment*. Refer to AIA A201 Paragraph 9.2 for timing and content.

When a contractor uses its own spreadsheet format for a Schedule of Values and application and certificate for payment, an executed AIA G702 should also be attached for the Architect to sign.

Items of work of a general or temporary nature specified in AIA A201, Supplementary Conditions and Division 1 should be itemized in sufficient detail in the schedule of values (cost breakdown) so that payment may be made as the item of work is completed.

General payroll insurance should be included where the labor occurs.

Each item in the schedule of values should include its proper share of overhead and profit.

4.6 RETAINED PERCENTAGE

The use of retainage against progress payments has traditionally been recognized by all segments of the construction industry as a primary method of protecting the ability of the Owner to complete the project. Although some segments of the industry nation wide are suggesting zero retainage, the continued use of retainage is recommended, however, at a lower but uniform percentage rate throughout the project rather than a high starting rate and a reduced or zero retainage rate as completion nears. Subparagraph 9.1.1 of AIA A201 should be modified by the following Supplementary Condition:

9.1.1.1 There shall be retained 5% from each progress payment until the work is substantially complete, at which time the Architect may recommend release of retained sums in accordance with paragraph 9.8, or final payment in full in accordance with paragraph 9.10.

It should be recognized that the retained percentage represents money that has actually been earned by the Contractor and the withholding results in a hardship. To alleviate this hardship, yet provide the protection the retainage offers the Owner, it is recommended that the following supplementary condition also be added to Subparagraph 9.1.1 of AIA A201:

9.1.1.2 Prior to the start of construction the Owner and Contractor shall select an escrow agent to receive the retained percentage and enter into an escrow agreement. When each progress payment becomes due, the Owner shall issue two (2) checks. One, in the amount due the Contractor less the retainage, shall be issued to the order of the Contractor. The other, in the amount of the retention, shall be issued to the order of the escrow agent. The interest and principal shall accrue to the Contractor. In accordance with the Contract provisions, the escrow account shall be released to the Contractor under the provisions of Article 9.8.

When the escrow provisions for retainage apply to a contract, it is recommended that subcontract agreements provide for a distribution of accrued interest to major subcontractors and suppliers according to their interests.

4.6.1 RETAINED SECURITIES

The Contractor may elect to deposit securities with an escrow agent in lieu of cash retainage. The Owner may be required by statute, or may elect to accept escrowed securities in lieu of withholding cash retainage.

As of January 2006, Minnesota Statutes §15.71, §15.73 and §15.74 (*Laws 1980, c. 464, § 4, eff. July 1, 1980*) describe retained securities as an acceptable alternative form of retainage in publicly funded projects, list some types of securities permitted to be accepted as retained securities, and outline certain conditions for accepting retained securities.

The Owner, Architect and Contractor should review this procedure and the most current laws, if applicable, prior to the submission of the Contractor's first application for payment

4.7 PAYMENT PROCEDURES

The Architect should consult with the Owner to establish procedures for payment prior to issuing bidding documents, and the procedures so established should be included in the Contract documents.

It is further recommended that Article 9 of AIA A201 be modified in supplementary conditions as follows:

- If the date payments are to be made is known prior to issue of the Contract Documents, refer to AIA 201, subparagraph 9.6.1 and add the following supplementary condition:

9.6.1.1 The date for each progress payment to be established in the Owner-Contractor Agreement will be the _____ of each month.

-or-

- If the date payments are to be made is not known prior to issuing the Contract Documents, refer to AIA 201, subparagraph 9.6.1 and add the following supplementary condition:

9.6.1.1 The date for each progress payment will be established by mutual consent at the preconstruction conference or the first progress meeting after award of Contract.

-and-

- Regardless of the manner the progress payment date is established refer to AIA 201 subparagraph 9.6.2 and add the following supplementary condition:

9.6.2.1 It is the sole responsibility of the Contractor to notify subcontractors and vendors of the required date for their application to provide for timely submittal of Contractor's Application for Payment.