AIA C401-2017 Architect / Consultant – Suggested Revisions:

Standard of Care:

Article 2.1:   In the last line, delete "the Prime" and replace with "this". At the end of the provision, add "The Consultant makes no other representations or warranties, whether expressed or implied, with respect to the services rendered hereunder."

Insurance Requirements:

Article 2.8:   At the end of this provision, add "If any of the requirements set forth below exceed the types and limits the Consultant normally maintains, the Architect shall reimburse the Consultant for any additional costs."

Scope of Consultant's Services

Article 3.1:   In line 2, after "The Consultant shall" insert "exercise usual and customary professional care in its efforts to"; delete ", and subject to the same standards and provisions that the Architect is required to meet under the Prime Agreement, unless otherwise described below."

Site Visits:

Article 3.1.1:   At the end of this provision, add "Consultant shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Consultant shall neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents."

Information Reliance:

Article 5.8:   In line 1, delete "Architect" and replace with "Consultant". In line 2, delete both references to "Consultant" and replace with "Architect". In line 2, delete both references to "Architect" and replace with "Consultant".

Architect's Duty Regarding Obtaining Information from Owner:

Article 5.9:   At the end of this provision, add "Consultant shall be entitled to suspend services, without liability for damages, including incidental, consequential and/or indirect damages, if Architect does not provide the requested information within 30 days of Consultant's request."

Copyrights and Licenses:

Article 7.1:   At the end of this provision, add document indemnity language, as follows: "In the event the Architect uses the Instruments of Service (including without limitation any future additions or alterations to the Project) without retaining and maintaining the retention of the author of the Instruments of Service, the Architect releases the Consultant and Consultant's consultant(s) from all claims and causes of action from such uses. The Architect, to the extent permitted by law, further agrees to defend, indemnify and hold harmless the Consultant and its consultants from all costs and expenses, including the cost of defense, related to claims and causes of action asserted by any third party or

entity to the extent such costs and expenses arise from the Architect's use of the Instruments of Service."

Dispute Resolution:

Article 8.3: We generally recommend avoiding the inclusion of any provisions relating to arbitration in agreements of this kind. There are numerous drawbacks to arbitration, such as the fact that the joinder of additional parties is generally not permitted, discovery proceedings are generally not allowed, rules of evidence are not followed and the application of legal principles is not required.

Note: if the Architect insists on arbitration as the "binding dispute resolution" mechanism, we recommend requiring limited discovery and adherence to the rules of evidence and limiting the scope of arbitration and providing that claims submitted to arbitration must not exceed $100,000, inclusive of interest and attorney's fees.

Consolidation or Joinder:

The consolidation and joinder revisions are necessary only if arbitration is selected as the "binding dispute resolution" mechanism.

Article 8.3.4.1: At the beginning of this provision, insert "Provided both the Architect and Consultant agree to the consolidation,". In line 1, delete "at its sole discretion".

Article 8.3.4.2: At the beginning of this provision, insert "Provided both the Architect and Consultant agree to the joinder,". In line 1, delete "at its sole discretion".

Article 8.3.4.3: At the end of this provision, add "Accordingly, any future consolidation and/or joinder proposed by a person or entity made a party to an arbitration is contingent upon both Consultant and Architect consent to such consolidation and/or joinder."

Hazardous Materials:

Article 10.5: At the end of this provision, add "In the event that the Consultant or any other party encounters asbestos or hazardous or toxic materials at the job site, or should it become known in any way that certain materials may be present at the job site or any adjacent areas that may affect the performance of the Consultant's services, the Consultant may, at its option and without liability for consequential or any other damages, suspend performance of service on the Project until the Owner retains appropriate specialist consultant's or contractor's to identify, abate and/or remove the asbestos or hazardous or toxic material, and warrant that the job site is in full compliance with applicable laws and regulations."

Confidentiality:

Article 10.6.1: In line 4, after "defend itself in any dispute" insert "or if the information in whatever form comes into the public domain".

Mutual Waiver of Consequential Damages:

New

Article 10.8:   Add a mutual waiver of consequential damages provision, as follows: "Neither the Architect nor the Consultant shall be liable to the other or shall make any claim for any incidental, indirect or consequential damages arising out of, or connected in any way to the Project or this Agreement. This mutual waiver includes, but is not limited to, damages related to loss of use, loss of profits, loss of income, loss of reputation, unrealized savings or diminution of property value and shall apply to any cause of action including negligence, strict liability, breach of contract and breach of warranty. Nothing herein shall preclude the Architect from seeking damages from the Consultant in the event the Architect is liable or alleged to be liable for damages, including but not limited to incidental, indirect or consequential damages, to any other party in connection with the Project."