Standard Form of Agreement Between Owner and Contractor where the basis of payment is the Cost of the Work Plus a Fee without a Guaranteed Maximum Price

GENERAL INFORMATION

Purpose. AIA Document A103™–2007 is intended for use on construction projects where the basis of payment is the Cost of the Work Plus a Fee, and the Cost is not fully known at the commencement of the construction. A103–2007 is not intended for use in competitive bidding.

Related Documents. This document has been prepared for use in conjunction with the AIA Document A201™–2007, General Conditions of the Contract for Construction, which is adopted into A103–2007 by specific reference.

The A103–2007 document is used as one part of the Contract Documents which memorialize the Contract for Construction between the Owner and the Contractor. The other Contract Documents are:

- General Conditions (i.e., A201–2007)
- Supplementary Conditions
- Drawings
- Specifications
- Modifications

Although the AIA does not produce standard documents for Supplementary Conditions, Drawings or Specifications, a variety of model and guide documents are available, including AIA’s MASTERSPEC and AIA Document A503™–2007, Guide for Supplementary Conditions.

AIA Document A103–2007 is published in conjunction with the following related documents:

- A201™–2007, General Conditions of the Contract for Construction
- A401™–2007, Agreement Between Contractor and Subcontractor
- A503™–2007, Guide for Supplementary Conditions
- B101™–2007, Agreement Between Owner and Architect
- C401™–2007, Agreement Between Architect and Consultant
- E201™–2007, Digital Data Protocol Exhibit

Dispute Resolution—Mediation and Arbitration. Through its adoption by reference of AIA Document A201–2007, this document provides for mediation and arbitration of claims and disputes. Mediation is a non-binding process, but is mandatory under the terms of this agreement. Arbitration may be mandatory under the terms of this agreement. Arbitration is binding in most states and under the Federal Arbitration Act. In a minority of states, arbitration provisions relating to future disputes are not enforceable but the parties may agree to arbitrate after the dispute arises. Even in those states, under certain circumstances (for example, in a transaction involving interstate commerce), arbitration provisions may be enforceable under the Federal Arbitration Act.

The AIA does not administer dispute resolution processes. To submit disputes to mediation or arbitration or to obtain copies of the applicable mediation or arbitration rules, write to the American Arbitration Association or call (800) 778-7879. The American Arbitration Association may also be contacted at www.adr.org.

Why Use AIA Contract Documents. AIA Contract Documents are the product of a consensus-building process aimed at balancing the interests of all parties on the construction project. The documents reflect actual industry practices, not theory. They are state-of-the-art legal documents, regularly revised to keep up with changes in law and the industry—yet they are written, as far as possible, in everyday language. Finally, AIA contract documents are flexible: they are intended to be modified to fit individual projects, but in such a way that modifications are easily distinguished from the original, printed language.

Use of Non-AIA Forms. If a combination of AIA documents and non-AIA documents is to be used, particular care must be taken to achieve consistency of language and intent among documents.
Letter Forms of Agreement. Letter Forms of Agreement are generally discouraged by the AIA, as is the performance of a part of the whole of the Work on the basis of oral agreements or understandings. The standard AIA agreement forms have been developed through more than 100 years of experience and have been tested repeatedly in the court. In addition, the standard forms have been carefully coordinated with other AIA documents.

Standard Forms. Most AIA Contract Documents published since 1906 have contained in their titles the words “Standard Form.” The term “Standard” is not meant to imply that a uniform set of contractual requirements is mandatory for AIA members or others in the construction industry. Rather, the AIA standard documents are intended to be used as fair and balanced baselines from which parties can negotiate their bargains. As such, the documents have won general acceptance within the construction industry and have been uniformly interpreted by the courts. Within an industry spanning 50 states—each free to adopt different, and perhaps contradictory, laws affecting that industry—AIA documents form the basis for a generally consistent body of construction law.

Use of Current AIA Documents. Prior to using any AIA Contract Document, users should consult www.aia.org or a local AIA component to verify the most recent edition.

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CHANGES FROM THE PREVIOUS EDITION
A103–2007 revises the AIA Document A114™–2001 to reflect changes made in AIA Document A201–2007. It incorporates alterations proposed by architects, contractors, owners and professional consultants. The following are some of the significant changes made to the contents from the A114–2001.

Throughout. References in A103–2007 to the General Conditions refer specifically to A201–2007.

Article 5. This article now contains a separate entry for method of adjustment of the Contractor’s Fee for changes in the Work. This article also requires the parties to identify any limitations on a Subcontractor’s overhead and profit for increases in the cost of its portion of the Work. In Section 5.1.4, the parties must identify the rental rate limits for Contractor-owned equipment. In Section 5.1.5, the parties may state Unit Price limitations. Section 5.2 now requires that the Contractor submit the Control Estimate within 14 days of executing the Agreement, and update and submit it with each application for payment.

Article 6. A new Article 6, Changes in the Work, has been added to allow the Owner to make changes in the Work and to adjust the Contract time and Contractor’s Fee accordingly. The article also requires the Contractor to provide notice of anticipated changes in the Work.

Article 7. Requires that where a cost is subject to the Owner’s prior approval, the Contractor obtain that approval in writing prior to incurring the cost. Certain costs are now reimbursable, including, bonuses and other incentive compensation or discretionary payments paid to anyone hired by the Contractor. Section 7.5 provides that certain costs, such as machinery and tools, if not fully consumed, be based on the cost of the item at the time first used on the Project site, less the value of the item when no longer used. In Section 7.6, Miscellaneous Costs now includes self-insurance for coverage required by the Contract Documents. A new Section 7.6.6 includes costs for electronic equipment and software,
instead of “data processing costs.” New Section 7.6.10 includes the costs of travel incurred by the Contractor’s supervisory or administrative personnel. Lastly, a new Section 7.8, Related Party Transactions, has been added to require disclosure of certain “related party” transactions. A related party is defined in Section 7.8.1.

Article 10. If a subcontract is awarded on a cost-plus basis, the Contractor must provide in the subcontract for the Owner to receive the same audit rights from the Subcontractor as it receives from the Contractor.

Article 11. The term “accountant” has been replaced by “auditor.” The Owner’s access rights are limited to regular business hours and upon reasonable notice. Lastly, the term “Contractor’s records” has been augmented to include documentation supporting accounting entries and Subcontractors’ proposals.

Article 12. The Contractor must now submit the cost control information required in Section 5.2.5 with each Application for Payment. Section 12.1.6 adds a new item to the computation for progress payments to subtract retainage for any portion of the Work that the Contractor self-performs. Prior to final payment, the Contractor must submit a final accounting for the Cost of the Work.

Article 13. The Agreement now includes a new Article 13, Dispute Resolution. New Section 13.1 provides a fill point where the Owner and Contractor may identify a neutral third-party Initial Decision Maker (IDM). If they do not appoint a third-party IDM, then the Architect will act as the IDM, as in AIA Document A201™–1997. Also, as in A201–1997, an initial decision is a condition precedent to mediation, and mediation is a condition precedent to any binding form of dispute resolution. However, arbitration is not mandatory under A201–2007 so the parties must select the binding method of dispute resolution from three choices: arbitration, litigation or another method that the parties must identify. New Section 13.2 provides a checkbox for selecting, or stating, the method of binding dispute resolution to be followed for any dispute not settled through mediation.

Article 16. A201–2007 encourages the Owner and Contractor to establish protocols governing the transmission of digital data on the project. For that reason, A103–2007 includes a new Section 16.1.7.1 that enumerates AIA Document E201–2007 Digital Data Protocol Exhibit as part of the Contract Documents. If the parties to not complete AIA Document E201–2007, Section 16.1.7.1 provides a fill point for inserting the title of another document.

Article 17. A new Article 17 is added for stating bonding requirements, if any, and limits of liability for insurance, as required in Article 11 of AIA Document A201–2007.

USING A103–2007

Modifications. Particularly with respect to professional or contractor licensing laws, building codes, taxes, monetary and interest charges, arbitration, indemnification, format and font size, AIA Contract Documents may require modification to comply with state or local laws. Users are encouraged to consult an attorney before completing or modifying a document. In a purchased paper AIA Contract Document, necessary modifications may be accomplished by writing or typing the appropriate terms in the blank spaces provided on the document, or by attaching Supplementary Conditions, special conditions or referenced amendments. Modifications directly to purchased paper AIA Contract Documents may also be achieved by striking out language. However, care must be taken in making these kinds of deletions.

Under NO circumstances should standard language be struck out to render it illegible. For example, users should not apply blocking tape, correction fluid or Xs that would completely obscure text. Such practices may raise suspicion of fraudulent concealment, or suggest that the completed and signed document has been tampered with. Both parties should initial handwritten changes.

Using AIA software, modifications to insert information and revise the standard AIA text may be made as the software permits.

By reviewing properly made modifications to a standard AIA Contract Document, parties familiar with that document can quickly understand the essence of the proposed relationship. Commercial exchanges are greatly simplified and expedited, good faith dealing is encouraged, and otherwise latent clauses are exposed for scrutiny.

AIA Contract Documents may not be retyped or electronically scanned. Retyping can introduce typographic errors and cloud legal interpretation given to a standard clause. Furthermore, retyping and electronic scanning are not permitted under the user’s limited license for use of the document, constitute the creation of a derivative work and violate the AIA’s copyright.
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Date. The date represents the date the Agreement becomes effective. It may be the date an original oral agreement was reached, the date the Agreement originally was submitted to the Owner, the date authorizing action was taken, or the date of the actual execution of the Agreement. The date selected will be the date from which the Contract Time is measured unless a different date is inserted under Section 4.1.

Parties. Parties to this Agreement should be identified using the full address and legal name under which the Agreement is to be executed, including a designation of the legal status of both parties (sole proprietorship, partnership, joint venture, unincorporated association, limited partnership or corporation [general, closed or professional], etc.). Where appropriate, a copy of the resolution authorizing the individual to act on behalf of the firm or entity should be attached. Other information may be added, such as telephone numbers and electronic addresses.

Project. The proposed Project should be described in sufficient detail to identify (1) the official name or title of the facility; (2) the location of the site; and (3) a brief description of the Project, including the proposed building usage, size, and capacity or scope of the Project.

Architect. As in other AIA Contract Documents, the Architect’s full legal or corporate title should be used.

Article 2 The Work of This Contract
If portions of the Work are to be performed by persons or entities other than the Contractor, these should be indicated in the Supplementary Conditions.

Article 4 Date of Commencement and Substantial Completion
The following items should be included as appropriate:

§ 4.1 The date of commencement of the Work should be inserted if it is different from the date of the Agreement. It should not be earlier than the date of execution (signing) of the Agreement. When time of performance is to be strictly enforced, the statement of starting time should be carefully weighed.

If the Owner requires additional time to file security interests before commencement of the Work, this should be indicated here. Care should be taken to coordinate these requirements with the date of commencement of the Work.

§ 4.3 The time within which Substantial Completion of the Work is to be achieved may be expressed as a number of days (preferably calendar days) or as a specified date. If a specified date is used and the date of commencement is to be given in a notice to proceed, these dates must be carefully coordinated to allow sufficient time for completion of Work.

Any requirements for earlier Substantial Completion of portions of the Work should be entered here if not specified elsewhere in the Contract Documents.

Optionally, insert any provisions for liquidated damages relating to failure to complete on time or for bonus payments for early completion. Liquidated damages are not a penalty to be inflicted on the Contractor, but must bear an actual and reasonably estimable relationship to the Owner’s loss if construction is not completed on time. There is little or no legal precedent to support the proposition of linking a bonus with a penalty. If liquidated damages are to be assessed because delayed construction will result in actual loss to the Owner, the amount of damages due for each day lost should be entered in the Supplementary Conditions of the Agreement. Factors such as confidentiality or the need to inform Subcontractors about the amount of liquidated damages will help determine the placement of such language. If a provision for liquidated damages is included, the Owner’s attorney should carefully draft it. Such a provision may be based on the following sample language:

“The Contractor and the Contractor’s surety, if any, shall be liable for and shall pay the Owner the sums hereinafter stipulated as liquidated damages for each calendar day of delay until the Work is substantially complete: _________ Dollars ($_________ ).”


Article 5 Basis for Payment
§ 5.1.1 Enter the method used for determining the Contractor’s Fee (lump sum, percentage of Cost of the Work or other method).
§ 5.1.2 Explain how the Contractor’s Fee will be adjusted for changes in the Work.

§ 5.1.3 If there will be a limitation placed on Subcontractors’ overhead and profit, enter the amount or explain how the limitation will be calculated.

§ 5.1.4 Enter the percentage cap that will be used to determine the rental rates for Contractor-owned equipment.

§ 5.1.5 Identify unit prices and state quantity limitations, if any, to which the unit price will be applicable.

§ 5.2 The Contractor has 14 days, from the date this Agreement is executed, to submit a Control Estimate, which must be updated with each Application for Payment to show any changes in the Work.

Article 12  Payments
§ 12.1.2 Insert the time period covered by each Application for Payment if it differs from the one given.

§ 12.1.3 Insert the time schedule for presenting Applications for Payment, and indicate due dates for making progress payments.

The last day upon which Work may be included in an Application normally should be no less than 14 days prior to the payment date, in consideration of the seven days required for the Architect’s evaluation of an Application and issuance of a Certificate for Payment and the time subsequently accorded the Owner to make Payment in Article 9 of A201–2007, General Conditions of the Contract for Construction.

§ 12.1.6.3 Insert the percent to be retained from Work the Contractor self-performs.

§ 12.2.4 Insert the date by which the Owner shall make final payment, if it differs from the one stated.

Article 13  Dispute Resolution
§ 13.1 In this section, the Owner and Contractor may identify an Initial Decision Maker to render initial decisions on claims arising between them. If the parties do not identify an Initial Decision Maker, then the Architect will provide initial decisions.

§ 13.2 Select from three choices of binding dispute resolution: (1) arbitration, (2) litigation or (3) another method that the parties must identify. Other types of dispute resolution include a dispute resolution board or a mini-trial. For additional information about other methods of dispute resolution, refer to The Construction Industry’s Guide to Dispute Avoidance and Resolution, free online at www.adr.org.

Article 14  Termination
Terminations under A103–2007 are treated similarly to terminations under a stipulated sum agreement and so follow the provisions of AIA Document A201–2007, except that Section 14.2 provides detailed instructions for calculating the amount due to the Contractor in the event the Owner terminates the contract for cause or the Owner terminates the contract for convenience. Note that in either case the amount of the Contractor’s Fee is calculated on a pro-rata basis. If the Contractor terminates for cause, A201–2007 provisions govern. Section 14.3 provides (1) for the Owner to pay the Contractor fair compensation for any Contractor-owned equipment that the Owner chooses to use in completing the Work that is not included in the Cost of the Work, and (2) for the Contractor to facilitate assignment of subcontracts and other contracts to the Owner, should the Owner elect to assume the rights and responsibilities associated with those contracts.

Article 15  Miscellaneous Provisions
§ 15.2 Enter any agreed-upon interest rate for overdue payments.

§ 15.3 Identify the Owner’s representative and indicate how that person may be contacted.

§ 15.4 Identify the Contractor’s representative and indicate how that person may be contacted.

§ 15.6 Insert other contract provisions here.

Article 16  Enumeration of Contract Documents
A detailed enumeration of all Contract Documents must be made in this article. List additional documents in Section 16.1.7 that will form part of the Contract Documents.

EXECUTING THE AGREEMENT

The persons executing the Agreement should indicate the capacity in which they are acting (i.e., president, secretary, partner, etc.) and the authority under which they are executing the Agreement. Where appropriate, a copy of the resolution authorizing the individual to act on behalf of the firm or entity should be attached.