



AIA[®]

Document A134[™] – 2009 Instructions

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

GENERAL INFORMATION

Purpose. AIA Document A134[™]–2009 is a standard form of agreement between Owner and Construction Manager and may be used on construction management projects where the basis of payment is the Cost of the Work Plus a Fee without a Guaranteed Maximum Price, and the Cost is not fully known at the commencement of construction.

A134–2009 is not intended for use in competitive bidding. This document is intended for use on construction projects where a Construction Manager, in addition to acting as an advisor to the Owner during the design period, assumes responsibility for the construction of the Project, but does not provide a guarantee of cost. Do not use this document if the Construction Manager will be providing a guarantee of cost (use AIA Document A133[™]–2009 instead). The Construction Manager's services under this document are divided into two phases: the Preconstruction Phase and the Construction Phase, portions of which may proceed concurrently.

Related Documents. AIA Document A134–2009 is intended for use in conjunction with the following documents:

AIA Document A201[™]–2007, General Conditions of the Contract for Construction. NOTE: As stated in Section 1.3 of this document, A201–2007 is adopted only to a limited extent for Preconstruction Phase services, whereas during Construction Phase services, A201–2007 is generally incorporated into this document, unless specific exceptions are made in this document or by amendment to this Agreement.

AIA Document B103[™]–2007, Standard Form of Agreement Between Owner and Architect for a Large or Complex Project. NOTE: Modifications to B103–2007 may be required to coordinate with this document; model provisions for such modifications may be found in AIA Document B503[™]–2007, Guide for Amendments to AIA Owner-Architect Agreements.

Before transmitting Instruments of Service or other information in digital form, parties should establish protocols for that transmission and may use AIA Documents E201[™]–2007, Digital Data Protocol Exhibit, and E202[™]–2008, Building Information Modeling Protocol Exhibit, for that purpose.

Dispute Resolution—Mediation and Arbitration. This document contains provisions 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, call the American Arbitration Association at (800) 778-7879, or visit their Web site 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 or the whole of professional services based on oral agreements or understandings. The AIA’s agreement forms have been developed through more than 100 years of experience and have been tested repeatedly in the courts. In addition, the standard forms have been carefully coordinated with other AIA documents.

Standard Forms. Most AIA 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 the 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 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

A134 is a new numeric designation for this document. AIA Document A134–2009 revises AIA Document A131™CMc–2003 to reflect changes made in AIA documents in 2007, 2008 and 2009, including A201–2007.

Cover Page. There are new fill points for the parties to appoint a Designated Representative.

Throughout. References in A134–2009 to the General Conditions refer specifically to A201–2007.

Article 2. If a subcontract is awarded on a cost-plus basis, the Construction Manager must provide in the subcontract for the Owner to receive the same audit rights from the Subcontractor as it receives from the Construction Manager.

Article 5. This Article now contains a separate entry for the method of adjustment of the Construction Manager’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 Construction Manager-owned equipment within the fill points. In Section 5.1.5, the parties may state unit price limitations.

Article 6. The Agreement reflects language added to the Cost of the Work provisions of the 2007 AIA Documents, including AIA Document A201–2007 and AIA Document A103™–2007, 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. The Cost of the Work now requires that where a cost is subject to the Owner’s prior approval, the Construction Manager obtain that approval prior to incurring the cost. Several costs, now reimbursable, fall into that category,

including bonuses and other incentive compensation or discretionary payments paid to anyone hired by the Construction Manager. Section 6.5 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 6.6, “Miscellaneous Costs,” now includes self-insurance for coverage required by the Contract Documents, with the Owner’s prior approval. A new Section 6.6.6 includes costs for electronic equipment and software. Lastly, a new Section 6.10, “Related Party Transactions,” has been added to require disclosure of certain “related party” transactions. A related party is defined in Section 6.10.1.

Article 7. Section 7.1.6.3 adds a new item to the computation for progress payments to subtract retainage for any portion of the Work that the Construction Manager self-performs. Prior to final payment, the Construction Manager must submit a final accounting for the Cost of the Work.

Article 9. The Agreement now includes new language for Dispute Resolution. For claims arising from or relating to the Construction Manager’s Construction Phase Services, Section 9.3 provides a fill point where the Owner and Construction Manager may identify a neutral third-party Initial Decision Maker (IDM). If they do not appoint a third-party IDM, then the Architect will provide the initial decision. For claims arising from or relating to the Construction Manager’s Preconstruction Phase Services, no decision by the Initial Decision Maker shall be required as a condition precedent to mediation or binding dispute resolution. For claims arising from or relating to the Construction Manager’s Construction Phase Services however, an initial decision remains a condition precedent to mediation. For claims arising from or relating to the Construction Manager’s Preconstruction or Construction Phase Services mediation is a condition precedent to any binding form of dispute resolution. Arbitration is no longer mandatory under A201–2007; the parties must select the binding method of dispute resolution from three choices: arbitration, litigation or another method that the parties must identify, with the default as litigation if the parties do not select a method. Section 9.2 provides a checkbox for selecting, or stating, the method of binding dispute resolution to be followed for any dispute not settled through mediation.

Article 11. New Article 11 contains the miscellaneous provisions from the 2003 editions and additionally, it includes a new section and fill point for “Other Provisions,” where parties may insert additional terms to the agreement.

Article 12. A201–2007 encourages the Owner and Construction Manager to establish protocols governing the transmission of digital data on the project. For that reason, A134–2009 includes a new Section 12.2 that enumerates AIA Document E201–2007, Digital Data Protocol Exhibit, and AIA Document E202–2008, Building Information Modeling Protocol Exhibit, if completed, as part of the Contract Documents. If the parties do not complete AIA Document E201–2007 and AIA Document E202–2008, Section 12.2.3 and Section 12.2.4, respectively, provide fill points for inserting the title of other documents.

USING A134–2009

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 that an oral agreement was reached, the date the Agreement was originally submitted to the other party, the date authorizing action was taken or the date of actual execution.

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, limited liability, 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, if known; (3) the proposed building usage; and (4) the size, capacity or scope of the Project, if known.

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

Article 4 Compensation and Payments for Preconstruction Phase Services

§ 4.1.2 Sample language is provided below for describing three methods of computing compensation.

Stipulated Sum:

Compensation shall be the stipulated sum of _____ (\$___), plus the following reimbursable cost items:

Multiple of Direct Personnel Expense:

Compensation shall be based on a multiple of _____ (___) times Direct Personnel Expense (as defined in Section 4.1.4) of Construction Manager's personnel, plus the following reimbursable cost items:

Actual Cost:

Compensation shall be based on actual costs incurred in the performance of the Preconstruction Phase services. (A maximum cost may be established.)

§ 4.1.3 Insert the number of months beyond which the Construction Manager's compensation shall be adjusted.

§ 4.2.2 Insert the number of days within which payment is due after the receipt of the Construction Manager's invoice by the Owner. If the rate of interest on late payments is to be different from the legal rate, insert the agreed upon rate of interest.

Article 5 Compensation for Construction Phase Services

The Construction Phase commences upon the Owner's approval of the Construction Manager's Control Estimate or when the Owner issues a Notice to Proceed (whichever occurs earlier), and the Construction Manager will be compensated for its actual costs, as defined in Section 6.1.1, plus the Construction Manager's Fee.

§ 5.1.1 Enter the method used for determining the Construction Manager's Fee (lump sum, percentage of Cost of the Work or other method).

§ 5.1.2 Explain how the Construction Manager'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 Construction Manager-owned equipment.

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

Article 7 Payments for Construction Phase Services

§ 7.1.2 Insert the time period covered by each Application for Payment if it differs from the one given.

§ 7.1.3 Insert the time schedule for presenting Applications for Payment, and indicate due dates for making progress payments. Insert the day of the month on which progress payments are due, indicating whether such day is to be in the same or the following month after receipt by the Architect of the relevant Application for Payment. (The amount of time should be not less than ten days, as provided in Article 9 of A201–2007, to allow sufficient time to process the payment applications.)

The last day upon which Work may be included in an Application should normally 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. The Construction Manager may prefer a few additional days to prepare the Application.

Due dates for payment should be acceptable to both the Owner and Construction Manager. They should allow sufficient time for the Construction Manager to prepare an Application for Payment, for the Architect to certify payment, and for the Owner to make payment. They should also be in accordance with time limits established by this Article and Article 9 of A201–2007.

§ 7.1.6.2 Indicate the percent retainage, if any, to be withheld when computing the amount of each progress payment.

The Owner frequently pays the Construction Manager the bulk of the earned sum when payments fall due, retaining a percentage to ensure faithful performance. These percentages may vary with circumstances and localities. The AIA endorses the practice of reducing retainage as rapidly as possible, consistent with the continued protection of all affected parties. See AIA Document A503–2007, Guide for Supplementary Conditions, for a complete discussion.

§ 7.1.6.3 Insert the percent to be retained from Work the Construction Manager self-performs.

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

Article 9 Dispute Resolution

§ 9.2 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.

§ 9.3 In this section, the Owner and Construction Manager may identify an Initial Decision Maker to render initial decisions on claims arising from or relating to the Construction Manager’s Construction Phase services. If the parties do not identify an Initial Decision Maker, then the Architect will provide initial decisions. For claims arising from or relating to the Construction Manager’s Preconstruction Phase services, no decision by the Initial Decision Maker shall be required as a condition precedent to mediation and binding dispute resolution.

Article 11 Miscellaneous Provisions

§ 11.5 Insert other contract provisions here.

Article 12 Scope of the Agreement

A detailed enumeration of all Contract Documents must be made in this article. List additional documents in Section 12.2.5 that will form part of the Agreement.

EXECUTING THE AGREEMENT

The persons executing AIA Document A134–2009 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.