

OFFICE OF GOVERNMENT INTEGRITY

REPORT ON DESIGN PROFESSIONAL CONTRACTS IN USE BY NEW JERSEY SCHOOL DISTRICTS



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Department of Law & Public Safety

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INTRODUCTION

The Educational Facilities Construction and Financing Act¹ (the “Act”) was enacted by the Legislature in response to the Supreme Court’s decision in Abbott v. Burke, 153 N.J. 480 (1998), to support, *inter alia*, “a comprehensive program for the design, renovation, repair and new construction of primary and secondary schools for all local and regional school districts, county special services school districts, county vocational school districts, and State-operated school districts, in order to provide the funding mechanism to fulfill the State’s constitutional obligation to ensure safe and adequate educational facilities in public school districts throughout the State.”²

The Unit of Fiscal Integrity in School Construction (“FISC”) was established in the Office of the Attorney General pursuant to the Act to “investigate, examine and inspect the activities of the [New Jersey Economic Development] Authority and districts related to the financing and construction of school facilities and the implementation of the provisions of [the Act].”³ The Attorney General placed this Unit within the Office of Government Integrity.

This is the second in a series of reports⁴ that FISC will issue on the financing and construction of school projects, with the goals of examining the processes used to implement the Act, offering positive suggestions to save taxpayer dollars and recommending other efficiencies in what will be an extensive program to improve school facilities. The selection of areas to examine has been driven, to date, by the progression of activities undertaken by the New Jersey Economic Development Authority (“EDA” or the “Authority”) and the school districts. Initially, the Authority and the districts must engage design professionals to assist in planning these projects, and many of these districts and the Authority⁵ have already obtained financing to pay for design and construction services. This report focuses on legal and contractual matters relating to the engagement of design professionals.

¹ P.L. 2000, c. 72 (codified at N.J.S.A. 18A:7G-1 *et seq.*)

² Official Statement for the \$500,000,000 New Jersey Economic Development Authority School Facilities Construction Bonds, 2001 Series A, dated March 21, 2001, p.6.

³ N.J.S.A. 18A:7G-43

⁴ FISC’s first report compared the costs incurred by EDA in obtaining financing for school construction projects with the costs incurred by school districts in obtaining similar financing. That report, School Construction Bond Financing Review (Jan. 2002), is available on the Department of Law & Public Safety’s web site, www.state.nj.us/lps/publications.htm.

⁵ According to EDA’s website, as of September 1, 2002, EDA had awarded contracts for design services with a value in excess of \$105.5 million.

For most school districts, the first step toward accomplishing a school facilities project, whether new construction or renovation, is the retention of a design professional, or architect.⁶ Where the financing needed to pay for the project must be approved by the district's voters in a referendum, the services of an architect are required first to estimate the cost of the proposed project so that the amount to be financed can be established. Second, the architect is generally called upon to sketch out, in general terms, the design and appearance of a new structure, or an addition to an existing school building, to present to interested voters. These tasks are considered "pre-referendum" work by the architect, and are routinely performed at an agreed-upon fee regardless of the outcome of the referendum.

Once the necessary approvals for the project and its funding have been obtained, all work performed by, and all liability attributable to, the architect is determined by the contract between the architect and the district. FISC surveyed 37 school districts which have recently retained architects in connection with school facilities projects. The districts are listed in Appendix A. This survey revealed that the contracts used by these districts adopted one of three approaches: contracts adhering in all respects to the model promulgated by the American Institute of Architects (AIA); contracts retaining some provisions of that form agreement while substituting for or eliminating others; and contracts which were independently composed without apparent reference to the AIA model.

Generally, these approaches form a continuum of contractual protection for school districts in their dealings with architects, the first being least protective and the third being most protective. Considered in this third category is the School Facilities Projects Design Consultant Agreement, drafted for and utilized by the Economic Development Authority for those projects undertaken by EDA. FISC judges this contract the most protective of the Authority and school districts and the most demanding of architects, and it will serve as a benchmark throughout this report. One executed AIA form contract is attached as Appendix B.⁷ The EDA contract is available on the Internet.

⁶ Under the Act, the Authority "shall construct and finance the school facilities projects of the Abbott districts, level II districts, and districts with a district aid percentage equal to or greater than 55%." N.J.S.A. 18A:7G-5a. Abbott districts are 30 urban districts with the strongest characteristics of poverty and need as determined by the Department of Education ("DOE"). The term "Abbott district" is derived from the New Jersey Supreme Court's rulings in the Abbott v. Burke series of cases, which address the right of children in financially needy urban communities to a "thorough and efficient" education as required by the State Constitution. Level II districts are districts that have been determined to have produced unsuccessful results under the Public School Education Act, N.J.S.A. 18A:7A-14, and which are monitored by the DOE. District aid percentage refers to the amount of state aid a district receives under the Comprehensive Education Improvement and Financing Act of 1996. N.J.S.A. 18A:17F-1 *et seq.* The Authority hires the design professionals for these projects. In all other districts, the district would generally hire the design professionals, or in some cases, use in-house staff with appropriate expertise. This report focuses on contracts used by districts to hire outside professionals as design consultants.

⁷ Note that the form used in this instance was AIA Document B141 (1987). Although the AIA published a revised version of this contract in 1997, most of the districts in FISC's survey

(www.njedaschools.com/consultants/resources.asp).

Appendix A lists the 37 school districts whose contracts were examined for this survey. Appendix A provides comparisons among those contracts on 16 contracting issues that can lead to conflict between a school district and its architect. Most significant are: 1) Allocation of payments and deadlines for completion of phases of work; 2) Services beyond basic services; 3) Add-ons to architect's out-of-pocket expenses; 4) Frequency and extent of site visits; 5) Professional liability insurance; 6) Methods of dispute resolution; 7) Governing law; 8) Ownership of, and right to use, architect's work product; and 9) Waiver of consequential damages.

This report discusses each of these potential problem areas, and provides guidance for school administrators, boards of education, and their attorneys in drafting contract provisions to provide greater protection for the interests of the school districts. In addition to these issues, Appendix A also sets forth the various ways the contracts for these 37 districts and EDA have addressed seven other issues: responsibility for cost overruns, termination or suspension of contract, definitions of terms used in the agreement, responsibility for drafting bidding documents, the conduct of bidding, responsibility for governmental filings, and the provision of surveys and geotechnical reports.

EXECUTIVE SUMMARY

Findings

- Of the 37 school districts whose district-architect contracts were examined in this survey, 33 had executed contracts which were either entirely based on the AIA model or which were, to varying degrees, modified versions thereof.

- AIA form contracts, such as AIA Document B141, are drafted, and sold for use, by the American Institute of Architects. Some of its provisions assign responsibility for performing tasks, or liability for errors or omissions, decidedly in favor of the architect.

- Districts rely on the professionals they hire for services and advice. For some districts, hiring an architect is a business transaction with a greater potential for disputes than most because they do it infrequently and because they may lack institutional knowledge of industry practices. Clear, specific contract terms reduce the likelihood of disputes and, should disputes arise, lead to a quicker resolution.

Recommendation

- Districts and their attorneys should study the Economic Development Authority's design

which used this form, in whole or in part, used the 1987 version. All subsequent references to AIA Document B141 shall be to the 1987 form, unless otherwise noted.

consultant agreement, and should seek to include in their own contracts those provisions from it which would be beneficial to the district. The following provisions from EDA's contract merit particular consideration:

1. All of the responsibilities and tasks assigned to the architect by the contract are basic services; *i.e.*, no additional fee can be charged for any work included in the contract or in the architect's technical proposal.
2. The architect is required to identify, prior to commencing work, the key personnel who will participate in the school facilities project, with no substitutions without the Authority's consent.
3. Fixed deadlines are established for performance of services.
4. The architect is required to maintain payroll, overhead, and cost records throughout the project and for three years thereafter.
5. The architect is required to obtain all necessary permits and licenses (except those available solely to the Authority).
6. The architect must visit the site and meet with contractors at least once a week.
7. Payments to the architect may be withheld where the work is unsatisfactory or incomplete.
8. Insurance for professional liability, property damage, general liability, automobile liability and worker's compensation is mandatory.
9. The architect agrees to indemnify the Authority from any claims, lawsuits, etc. arising from his negligent acts or omissions or from his violation of federal, state or local law.
10. The Authority may terminate the contract for any reason and pay only for services performed to that date; if termination is for cause, the Authority may pursue recovery of fees already paid.

METHODOLOGY

In July 2001, FISC mailed requests to 49 school district business administrators throughout the

State seeking a copy of each district's recent or pending contract with an architect retained in connection with a school facilities project. The districts were selected from a Dodge Report⁸ database organized by school district and indicating that an architect had been retained by the district within the past three years. The total number of school districts listed on the Dodge Report was 107. Of that number, FISC contacted all 49 districts which the Dodge Report indicated had undertaken a project which cost, or was estimated to cost, \$500,000 or more.

The contracts obtained from these 49 districts were analyzed and segregated into three categories:

1. Contracts which utilized the American Institute of Architects (AIA) form verbatim (5 districts)⁹;
2. Contracts which, to a greater or lesser degree, utilized a modified version of the AIA form (28 districts);
3. Contracts which were drafted without apparent reference to an AIA form, including EDA's Design Consultant Agreement (4 districts plus EDA).

Of the remainder, two districts retained architects by means of a purchase order, three by letter agreement, four contracted with architects to perform solely construction management, and three had no recent dealings with architects, having been included in the Dodge Report erroneously.

ISSUES

I. THE NEED FOR SPECIFICITY IN AGREEMENTS

No drafter of legal documents can anticipate, and make provision for, every possible circumstance which may arise in the course of the design and construction of a school facilities project. Nor does every such project, depending on its scope, require the same level of detail in a formal agreement. In one instance in OIG's survey, however, a school district retained an architect to perform \$175,000 worth of design work and construction oversight via a single-page purchase order. Should a dispute arise concerning cost overruns, timeliness, ownership of drawings, or any other aspect of the project, the district has no clear agreement with which to hold the architect accountable. Such an approach constitutes an invitation to litigation, the last thing either party desires. For this reason, the school district should invest the time, and the legal cost, to create a comprehensive form of agreement,

⁸ This report is published by F.W. Dodge, a division of McGraw-Hill, and provides project news, plans and specifications, and analysis services for construction professionals.

⁹ One such contract is attached as an example of AIA Document B141. See Appendix B.

sufficient to protect its interests and the taxpayers' money, considering the scope and cost of the project. It may consider entering a master agreement with its architect, setting forth general terms which would govern any number of projects performed under it.

Even the most comprehensive architect's contract does not, in itself, insure a successful outcome of the project. For each project, the school district may enter several contracts: with an architect, with a construction manager and with a contractor who may, in turn, have various subcontractors. These contracts should dovetail, clearly delineating the respective responsibilities of the parties. Since a construction manager performs many of the functions historically performed by the architect in the construction phase (site visits, meetings with contractors, change order approvals), contracts with each such professional must be scrutinized to prevent overlap of duties and consequent confusion among the participants in the project concerning who bears ultimate responsibility for any element of the project. Conversely, the contracts must be scrutinized to ensure that no important element of responsibility goes unassigned.

II. THE TENSION BETWEEN THE ARCHITECT AND THE SCHOOL DISTRICT IN APPORTIONING LIABILITY

The public has, over the past several decades, become acutely aware of the issue of professional malpractice in the fields of medicine and law. The fear of litigation extends to many other professional areas, including architecture. "Over the past two decades, liability insurance providers succeeded in intimidating architects with premium increases and exclusions of services deemed uninsurable." Architectural Record, Vol. 184, No. 2, P.32 (Feb. 1996). For this reason, the professional society to which many American architects belong, the American Institute of Architects, has devoted considerable time and effort in drafting, and subsequently refining, a series of standard form contracts for architects to use in connection with projects requiring design work and, in many cases, oversight of contractors performing construction. The form most frequently used for this purpose is AIA Document B141, "Standard Form of Contract Between Owner and Architect."¹⁰

This form agreement assigns responsibility for performing stated tasks, and liability for error in or failure to perform such tasks, decidedly in favor of the architect. For example, control over the progress of the architect's labors is denied to the school district in the standard B141 agreement. Since there are no deadlines provided in this contract, the architect cannot be penalized for slow performance. The district may cure this defect, however, by including specific deadlines in the contract. Document B141, at par. 1.1.2, allows the district to obtain from the architect a schedule of performance which cannot, "except for reasonable cause," be exceeded by the architect.

¹⁰ Two school districts in this survey, Bernards Township and Westville, executed an abbreviated version of the standard form designated AIA Document B151. The major differences between the two are that Document B151 compresses the five phases of the architect's work into three and omits detailed listings of additional services.

Also of interest to school districts contemplating substantial school facilities projects is the failure of the AIA contract to impose liability on an architect who underestimates the construction cost of the project. AIA Document B141 provides that, where all of the bids received from responsible bidders for the construction contract exceed the architect's detailed estimate and no fixed cost ceiling has been agreed upon, the school district has no remedy. If the parties have agreed to a fixed limit of construction costs, however, and all bona fide bids exceed that limit, the district may increase the limit, rebid the construction project, abandon the project, or require the architect, at no additional charge, to modify his design to reduce construction costs to the agreed-upon limit. This provision is of great concern to a school district which, if its funding derives from a referendum, must contain costs within the amount approved by the voters. Thus, it is vital that the district explicitly state, in the body of the contract, the maximum amount to be spent on each school facilities project.

The 1997 version of AIA Document B141 addresses some of the above problems. For instance, part one on the new contract, "Standard Form of Agreement Between Owner and Architect" requires the owner to set forth "Project Parameters" such as time limits and budget restrictions. As to responsibility for construction costs, the 1997 agreement automatically adopts the architect's cost estimate as a "fixed limit of construction costs", such that he must undertake a redesign, at no additional fee, should the lowest responsible bid for construction exceed that estimate.

As the examples above demonstrate, specificity is key to reaching a fair, enforceable agreement which will greatly lessen the chances of costly, time-consuming disputes over what the parties "thought" was in the agreement.

III. NINE CONTRACT ITEMS WHICH WARRANT PARTICULAR ATTENTION

1. ALLOCATION OF PAYMENTS AND DEADLINES FOR COMPLETION OF PHASES OF WORK

Most of the architect contracts reviewed for this report provide a system of payments to the architect which allocates a percentage of the total contract amount to each of five phases: schematic design, design development, construction documents, bidding/negotiation, and construction administration. (EDA provides an optional "program phase," in which district representatives and the architect work out preliminary project parameters.) The schematic design phase entails the creation of drawings and other documents illustrating the scale and relationship of the project's components, together with a preliminary construction cost estimate. In the design development phase, the architect, working with schematic design documents, establishes the size and character of the school facilities project (architectural, structural, mechanical and electrical systems) and its projected cost, and, if contracted to do so, obtains all necessary government agency permits. Next, in the construction documents phase, the architect produces detailed drawings and specifications which serve as the basis

for bidding the project.¹¹

The bidding and contract award phase, as the name describes, involves the architect in advertising for contractors' bids, attending the bid opening, and advising the district in reviewing the bids submitted. This may involve reviewing alternative bids to provide maximum cost-savings and benefits to the district. (Award of a contract, under the Public School Contracts Law, is made to the lowest responsible bidder.) Once the contracts have been awarded, the project enters its fifth and final phase, construction administration. Here, the architect observes the work of the contractor(s) to ensure that it adheres to the plans and specifications upon which the bids were based.

The actual percentage of payment assigned to each phase varies greatly from one architect to another, and often bears little relation to the amount of work required. For example, Bernards Township, one of the districts utilizing the straight AIA form contract, accepted the following allocation:

Schematic Design Phase:	0%
Design Development Phase:	50%
Construction Documents Phase	25%
Bidding/Negotiation Phase:	10%
Construction Phase:	15%

This allocation is not tied to the time and labor required by the respective phases. Schematic design, while admittedly a less demanding task than the construction document phase, surely constitutes some portion of the overall project. On average, architects who are parties to the contracts reviewed assigned a value of 15% to this initial phase. Design development is usually more work than schematic design, but it is unlikely that this phase would realistically involve 50% of the architect's overall effort. Among other reasons, this allocation is suspect because it is the third phase, for drafting construction documents, which usually demands the most work. As opposed to the preliminary nature of the documents produced in the initial two phases, construction documents provide exact detail to the contractor and/or construction manager on dimensions, materials, and other aspects of the project. Because payments are made as each phase progresses, the above allocation appears to be "front-loaded"; i.e., it ensures that the architect is paid far in advance of the time he may actually perform the bulk of the work required by the agreement.

The most surprising fact determined from the OIG's review of these 37 architect contracts is that none of them provide fixed deadlines for completion. Given the peculiar time constraints affecting

¹¹ The 1997 version of Document B141 replaces these five phases with groupings of services; i.e., Project Administration Services, Evaluation and Planning Services, Design Services, Construction Procurement Services, Contract Administration Services, and Facility Operation Services. It remains to be seen what practical effect this change will have for actual school facilities projects.

public school construction (*i.e.*, districts often desire to have buildings completely ready to occupy each September), it is difficult to understand this common omission. Only EDA's model contract addresses this issue, providing fixed periods for design and construction, with monetary penalties for late deliveries. In the initial contract negotiations between a school district and an architect, the district should insist on fixed dates for completion of each phase of the architect's work, tie payments to deliverables, and impose penalties for late completion if the fault lies with the architect.

2. SERVICES BEYOND BASIC SERVICES

It is vital that school administrators and school board members understand the scope of services included in an architect's offer to design (and, frequently, to oversee construction of) a school facilities project. Nonetheless, despite the repeated references in this report to "standard form" contracts, in the area of basic versus additional services, there is no standard. It is therefore crucial that the contract clearly articulate the agreement between the district and the architect on how much work will be performed for the fee stated in the contract (either by fixed sum or percentage of construction cost) and which tasks are considered "additional" and at extra cost.

AIA Document B141 distinguishes between "basic services," "additional services," "contingent additional services," and "optional additional services." (For an example of these varied services, see Appendix B, Article 3.) As these demarcations suggest, far more tasks are denominated "additional" than are included in the "basic" category. Under these contracts, the architect agrees to perform, for the contract sum alone, the creation of those drawings, specifications and related documents necessary to bid the project out and to direct the successful bidder(s) in its construction. He also agrees to act as agent for and advisor to the district as to construction costs, dealing with contractors and inspecting their work. If the district desires closer scrutiny of the work than merely "at appropriate intervals" it may have it, but at an additional cost. The same applies should the district seek the architect's input in areas such as surveys (geophysical or environmental), cost analyses, interior furnishings, and changes initiated by the district or its contractor(s).

These additional costs can be eliminated in the contract by defining them as part of the basic services. In such a case, however, the architect can raise his fee for basic services to a degree that may cost the district more than had they been labeled "additional." In reviewing any contract, form or original, it is best to evaluate each item defined as an "additional cost" and determine the likelihood that the service or activity will be needed. For smaller, simpler projects, it may be advantageous to the district to leave these items as additional services; for the larger, more complex projects in which change orders and extensive surveys are likely, it may be best to include all anticipated architectural services as basic services.

EDA defines all architectural services as basic services in its model agreement.

3. ADD-ONS TO ARCHITECT'S OUT-OF-POCKET EXPENSES

The AIA form contracts allow the architect to pass on to his clients certain normal business

expenses and to add a substantial mark-up to costs incurred in the following areas: transportation, electronic communications, documents (reproduction and shipping costs), authorized overtime, renderings, models and mock-ups, additional professional liability premiums necessitated by the project, computer-aided design work, and “similar project-related expenditures.” The first question posed by this provision is “Why should a customer be charged extra for normal overhead (commuting expenses, phone calls and faxes)?” Even assuming such additional charges could be justified, moreover, what excuses the imposition of a multiple on top of the architect’s actual cost, in some cases allowing the architect to charge the district as much as 150% of his actual expenses?

Most of the AIA-based contracts reviewed, and two of four original agreements, retained the concept of add-ons for enumerated expenditures, but they vary in the percentage of mark-up allowed (from 1.05 to 1.5) and in the items subject to it. For example, a few of the modified agreements limited reimbursable expenses to non-commuting out-of-state travel or other specified expenditures. EDA, of course, makes no provision for the architect’s out-of-pocket expenditures, limiting reimbursement to payments for services rendered, so that the architect pays his business expenses out of the money he makes by performing the contract.

4. FREQUENCY AND EXTENT OF SITE VISITS

Under all of the contracts reviewed, the architect is required, during the construction phase, to visit the school facilities project site(s) in order to “become generally familiar with and to keep the [school district] informed about the progress and quality of the portion of the Work completed . . . to endeavor to guard the [school district] against defects and deficiencies in the Work . . . and to determine in general if the work is being performed in a manner indicating that [it] . . . will be in accordance with the Contract Documents.” (AIA Document B141 (1987)).

Under the standard AIA form contract, however, the frequency of these site visits is left to the vague standard of “intervals appropriate to the stage of the Contractor’s operations.” Such an elastic standard was found wanting by a substantial number of districts which chose to demand their own terms on this point, either through a modified AIA agreement or through an original agreement. Of the 32 districts which used modified AIA agreements or original agreements, 10 required a fixed schedule of site visits and construction meetings (that is, architect conferences with contractor(s) and/or construction manager during the construction phase), usually weekly or semi-monthly. The remainder require only the AIA standard of site visits “at intervals appropriate to the stage of the Contractor’s operations.” EDA’s agreement provides, during construction, weekly progress meetings between architect and contractor(s) and site visits at least weekly, and perhaps more often if appropriate to the stage of construction.

5. PROFESSIONAL LIABILITY INSURANCE

The need for an architect to maintain professional liability insurance would seem obvious, particularly where he contracts to design a multi-million-dollar school facilities project. Several of the projects already approved by EDA exceed \$ 10 million in estimated construction costs. Many architectural firms, especially the smaller ones, may not be sufficiently funded to pay a large judgment should they be found negligent in performing work for a school district. Yet, the standard AIA form agreement nowhere mentions insurance; the issue is only addressed when the district affirmatively adds provisions to the contract requiring that various insurance policies be maintained.

Twenty-five districts in the survey did not contractually require the architect to maintain insurance coverage. Among the 12 districts which required that the architect be insured, the following coverages and amounts were most common:

Professional Liability -	\$1,000,000
Property Damage -	\$1,000,000
General Liability -	\$1,000,000
Automobile -	\$ 500,000
Workmen's Comp -	Legal limits

EDA went further, requiring that the architect not only maintain the above coverages throughout the project (and for five years thereafter for the professional liability coverage), but also that the architect indemnify and defend (to the extent permitted by law) the Authority from any damages arising out of the architect's negligent acts or omissions or out of his violation of federal, state or local laws. A single school district may or may not be able to negotiate similar requirements in its contract with an architect. Each district should, however, insist that the architect maintain the insurance coverage it deems adequate to protect itself, at least through completion of the project, and that the school district be named as an additional insured on the general liability and auto policies.

6. METHODS OF DISPUTE RESOLUTION

The standard AIA Document B141 provides a two-step, mandatory process for resolution of disputes between the architect and the school district in areas such as non-payment, divergence from plans, etc.: mediation as a prerequisite to binding arbitration. Both proceedings are placed under the jurisdiction of the American Arbitration Association, under its Construction Industry Arbitration Rules. In several of the modified AIA contracts, this requirement is replaced with a provision directing all such disputes to the New Jersey Superior Court, most often in the county in which the project is to be built.

EDA chose neither of these alternatives, instead creating an internal "Claims Adjustment Committee" to resolve contract disputes. An architect may reserve the right to sue should he be dissatisfied by the committee's resolution.

Whether a given district should elect mediation, arbitration, litigation or some combination of

two or all, cannot be answered in a general way. Mediation, by definition, is not binding, and may therefore entail expenditure of time and money which, failing a voluntary settlement, leaves the parties where they started. Nonetheless, where the dispute is not complex and involves a relatively small amount of money, mediation should certainly be considered, if for no other reason than that the matter would likely be sent to forced mediation even if the court option were selected.

Arbitration, which may be, but is not always, binding, results in a more final disposition of the dispute. Where time is of the essence, arbitration will generally be preferred over litigation, since arbitration panels generally commence within months of the filing of notice (Telephone interview with Ryan Boyle, American Arbitration Association), while State and federal courts in New Jersey may take years to reach a civil complaint. As to cost savings, however, the conventional wisdom holding that arbitration is the least expensive route may be wrong, JAMES ACRET, CALIFORNIA CONSTRUCTION LAW MANUAL, § 3.10 (2001), because the State and federal trial courts provide a forum for litigants' disputes that, as an institution, is virtually free.

7. GOVERNING LAW

This is the simplest of issues to arise from the comparison of the AIA form contracts, modified AIA contracts and original contracts, and is best addressed by two words: New Jersey. There is no justifiable reason for a New Jersey school district to assent to a contractual designation of the law of a foreign state to govern any litigation arising out of its contract with an architect. The standard AIA Document B141 provides that the law governing any litigation arising out of contract disputes be that of the principal place of business of the architect, as did 13 of the 28 modified AIA agreements. Should a school district contract with an architectural firm with its principal place of business in Pennsylvania or New York or, in the case of a national firm, California, it will be at a distinct disadvantage should any legal conflicts arise, since either its local counsel must expend extra effort learning the foreign state's law or the district will be forced to retain out-of-state counsel at additional cost. None of the original contracts allowed the possibility of foreign law applying. Simply put, each district should insist that the governing law for every contract be New Jersey law, and that venue be in the county in which the district is located, wholly reasonable demands that cost the architect nothing.

8. OWNERSHIP OF, AND RIGHT TO USE, ARCHITECT'S WORK PRODUCT

Once an architect has been retained by a school district to design a new building, an addition, or renovations to an existing structure(s), he contracts to produce all of the drawings, schematics, specifications and related documentation which will enable a contractor to construct the project at hand. Assuming that all goes well, the architect completes his task, the contractor builds according to the plans and specifications provided, and the district enjoys the intended result. Where, however, things do not flow smoothly, due to a conflict between architect and district which leads to the termination of the contract, or an unexpected shortfall in funding on the district's part, the issue arises as to the district's right, if any, to retain the architect's drawings and other documents to complete the

project at a later time. AIA Document B141 severely limits the district's right to retain and use those architectural documents for which it has, presumably, paid for at the point of termination. Under this contract, an architect provides the district with only a limited license to use his work product, which license expires upon termination of their contract. Only if the architect defaults can the district use the drawings and specifications to complete the project with another architect and/or construction manager. Even if the project is completed successfully, the district can not use the documents for future additions or alterations, unless it first obtains written permission from the architect.

EDA's form of contract, on the other hand, allows the Authority to retain copies of all work product for use in future alterations/additions to the school facilities project or, in the event of termination for cause, to complete the project.

9. WAIVER OF CONSEQUENTIAL DAMAGES

A new provision, introduced in the 1997 version of AIA Document B141, requires both the architect and the school district to waive their respective right to sue for "consequential damages." Consequential damages constitute those expenses or losses which result indirectly from one party's breach of the agreement. For example, were the architect to abandon a school facilities project without cause, resulting in the school district's inability to have its school building open for the fall term, the consequential damages would include all expenditures made by the district to secure alternative space for the students (rental of buildings, trailers, utility costs for the unused as well as the rented space, etc.) If, on the other hand, the school district wrongly terminates the agreement, the architect may claim that he has suffered the loss of business opportunities which, but for the breached agreement, would have yielded him a profit. In that case, the architect's lost profits, if proven, would constitute consequential damages.

EDA's contract contains no waiver of consequential damages, and provides that, upon termination, the architect receives only those fees commensurate with work satisfactorily performed.

School districts should consider whether to strike any proposed waiver of consequential damages from any agreement in which it appears. The district should consider whether it is more likely that the district will sustain substantial, provable damages from delays in the architect's performance than it is that the district would inexcusably breach its contract and cause provable damages to the architect. If the architect insists that his exposure to liability for consequential damages be limited, a liquidated damages provision could be added in an amount large enough to cover the district's estimated costs arising from delay or termination by the architect. (A liquidated damages provision establishes a fixed, maximum amount for which either party can be held liable in an action for consequential damages.)

NJEDA MODEL AGREEMENT

The EDA has been authorized to finance, plan and construct school facilities projects for all Abbott school districts, Level II school districts, and those districts which receive 55% or more of their budgets in State aid. See N.J.S.A. 18A:7G-5(a). Because this statute approved the expenditure of \$6,000,000,000 for the Abbott districts, plus an additional \$2,500,000,000 for the remaining New Jersey school districts, the EDA has considerable bargaining power in dealing with architects, engineers, and contractors. An individual school district, even a large, urban one, is likely to have less bargaining power. Nevertheless, it behooves each school business administrator, school board attorney and school board member, in their initial dealings and in subsequent contract negotiations, to study the EDA design professional contract and seek to include in each school facilities project agreement as many of the EDA provisions as would be advantageous to the district.

As more design professionals contract with the EDA on school projects, they and their attorneys will become familiar with the provisions of the EDA design consultant agreement. This fact should reduce objections to EDA language being inserted in non-Abbott districts' contracts.

Among the EDA contract provisions which may prove most favorable to the contracting school district are:

- S **All of the responsibilities and tasks assigned to the architect by this contract are basic services; *i.e.*, no additional fee can be charged for any work included in the contract or in the architect's technical proposal.**
- S **The architect is required to identify, prior to commencing work, the key personnel who will participate in the school facilities project, with no substitutions absent the Authority's consent. This provides continuity and a single design concept, and ensures the owner receives the level of competency it bargained for in awarding the contract.**
- S **Fixed deadlines are established for performance of services.**
- S **The architect is required to maintain payroll, overhead, and cost records throughout the project and for three years thereafter.**
- S **The architect is required to obtain all necessary permits and licenses (except those available solely to the Authority).**
- S **Site visits and meetings with contractors must take place at least once a week, and written reports are submitted to the Authority.**
- S **Payments to the architect may be withheld where the work is unsatisfactory or incomplete.**

- S **Insurance for professional liability, property damage, general liability, automobile liability and workman's compensation is mandatory.**
- S **The architect agrees to indemnify the Authority from any claims, lawsuits, etc. arising from his negligent acts or omissions or from his violation of federal, state or local law.**
- S **The Authority may terminate the contract for any reason and pay only for services performed to that date; if termination is for cause, the Authority may pursue recovery of fees already paid.**

While a single school district may or may not be able to bargain for all of the above contract provisions, each one adopted improves the allocation of risk in the district's favor. The EDA contract and EDA's manual for its design consultants are available at EDA's website at www.njedaschools.com/consultants/resources.asp