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New Maintenance Contracts from

AIA Contract Documents

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**Contract Fundamentals,
Special Considerations, and Best Practices**

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introduction



Facilities are an important part of your success. Aside from your staff, they represent the most important business investment you will ever make. To get maximum value, facilities must be maintained. It stands to reason that you will want a foundation in place that protects your facility during every stage of the maintenance process. This foundation includes contracts that assign responsibility, define relationship parameters, and protect your interests.

This eBook serves as an introduction to the latest product offerings from AIA Contract Documents focused on building and facility maintenance.

Purpose of this eBook

This eBook is written as a companion to the following AIA Contract Documents:

F101™-2023, Master Maintenance Agreement

F201™-2023, Work Order for As Needed Maintenance Work

F202™-2023, Work Order for Ongoing Maintenance Work

F102™-2023, Maintenance Agreement for As Needed Maintenance Work

F103™-2023, Maintenance Agreement for Ongoing Maintenance Work

F701™-2023, Amendment for Maintenance Work

F702™-2023, Invoice for Maintenance Work

F703™-2023, Request for Certificate of Insurance

F704™-2023, Status Report for Maintenance Work

While this eBook is a primer on common issues and risks associated with maintenance contracts, it is not an exhaustive list of all aspects, issues, and risks.

Information in this eBook is not offered, and should not be construed, as legal advice. Laws regarding the use and enforceability of information in this eBook may vary among jurisdictions. Users of this eBook are encouraged to familiarize themselves with laws and regulations applicable to the jurisdiction in which their project is located and engage counsel experienced with those laws and regulations to review their contract and assist with risk assessment.



explaining the AIA's maintenance agreements & forms

The documents described below are designed to address the business conditions and legal environment of building and facility maintenance. The documents are intended to be used when a client hires a contractor to perform any building repair, maintenance, or improvement.

1. Maintenance Work Types

The documents involve two distinct types of maintenance work:

a) as-needed services; b) and ongoing services.

a. As-Needed Services. Agreements for as-needed services will generally include work associated with discrete building repair or simple building improvements (e.g., roof repairs, façade painting, parking lot striping, HVAC repairs, etc.).

b. Ongoing Services. Agreements for ongoing services will generally include work associated with repetitive maintenance needs regularly performed as part of a building's upkeep (e.g., HVAC maintenance, cleaning services, lawn care, and snow removal).

Importantly, the anticipated services contemplated by the maintenance documents are simple and designed to accommodate smaller projects. Because the forms are abbreviated, users should evaluate the size and complexity of their project to ensure that the maintenance documents meet their needs. To the extent a project is complex and requires a more traditional contracting approach, other families of AIA Contract Documents may be appropriate.

2. Contracting Methods

The maintenance documents include two different contracting methods: a) a master agreement; and b) a stand-alone agreement.

a. Master Agreement Method. The F101-2023, Master Maintenance Agreement is intended for use when the scope of the maintenance work will subsequently be defined through one or more work orders. This contracting method allows for multiple scopes of maintenance work to be issued quickly to a contractor without renegotiating the underlying terms and conditions of the master agreement. Master agreements may be used where a contractor performs services on several different properties, or where a contractor's services will be phased according to location or completion schedule.

The F101 provides common terms and conditions that will be applicable to each work order. The common terms include the general roles and responsibilities of the parties, how payments will be made, general insurance terms, and termination.

i. Work Orders. The F101 is coordinated for use with either the F201-2023, Work Order for As Needed Maintenance Work or the F202-2023, Work Order for Ongoing Maintenance Work. Each work order will provide information about the scope of work, schedule, compensation, and any special considerations associated with the work (e.g., payment terms or insurance requirements that are different from the master agreement).

Use of the F101 and a work order creates a work order contract. The work order contract includes the terms and scope of the maintenance work and requires the contractor to perform the maintenance work.

b.Stand-Alone Agreement Method. The maintenance documents include two stand-alone agreements: 1) the F102-2023, Maintenance Agreement for As Needed Maintenance Work; and 2) the AIA Document F103-2023, Maintenance Agreement for Ongoing Maintenance Work. These stand-alone agreements include the terms and scope of the Maintenance Work in one form. Unlike the F101 mentioned above, a separate work order is not needed in order to form a complete contract. Stand-alone agreements are used when the contractor will not have reoccurring work with the client.

3. Supporting Documents

The maintenance documents are accompanied by a set of supporting documents, which are compatible with both types of contracting methods.

a.F701-2023, Amendment for Maintenance Work. This document is used for implementing changes to the parties' agreement or scope of work. By executing the F701, the parties agree upon all terms of the change, including any modifications to the contractor's compensation and schedule. This form allows for a description of the change and for the signatures of the client and contractor.

b.F702-2023, Invoice for Maintenance Work. This document allows the contractor to: identify the maintenance agreement or work order contract under which it is requesting payment; describe portions of maintenance work for which it is requesting payment and the corresponding amounts; insert detailed instructions for payment, such as wiring instructions, the check payee name, or the address where payment should be sent; and the contractor can also identify supporting documents, such as receipts or subcontractor invoices, that accompany the invoice.

c.F703-2023, Request for Certificate of Insurance. This document is used to request a certificate of insurance. This request may be associated with a previously executed agreement or for when requesting a certificate of insurance for bidding purposes. This form is intended for use by either the client (e.g., a client request to contractor) or the contractor (e.g., a contractor request to a subcontractor).

d.F704-2023, Status Report for Maintenance Work. The Contractor uses this document to submit status reports for the maintenance work. Section 6.3 of the F101, F102, and F103 requires the contractor to keep the client reasonably informed of the progress of the maintenance work, including any complaints or incidents related to the maintenance work that may adversely impact the property. The contractor may use F704 help to satisfy this requirement.



02

contract fundamentals

how are maintenance contracts different from construction contracts?

Maintenance contracts and construction contracts have a lot in common. In both, a contractor is performing work over a period of time in furtherance of improving a building or facility. Maintenance contractors and construction contractors can be paid in a similar manner, often a negotiated fee for a predetermined amount of work, and the insurances that they are required to maintain are often the same. Yet, in many respects, this is where the commonalities between maintenance contracts and construction contracts comes to an end. In fact, the differences between these two types of contracts are often so significant that it makes it unworkable for construction contracts to be edited for use in a building maintenance scenario. Below are examples of how maintenance contracts differ from construction contracts.

1. Maintenance contractors do not work towards “substantial completion.”

One key difference between maintenance contracts and construction contracts comes in the way that completion is defined for the contractor’s work. Construction contracts set up a two-step process for completion of the project that the contractor must accomplish. First, the contractor is expected to reach an interim level of completion referred to as “substantial completion.” Here is the definition of substantial completion from the AIA’s A201-2017, General Conditions of the Contract for Construction.

A201-2017, General Conditions of the Contract for Construction

§ 9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.

In a construction contract, substantial completion is a key milestone in the project and acts as the demarcation line for key events. It is usually the moment in the project that (a) triggers the release of retainage amounts to the contractor, (b) starts warranty periods and claims limitations periods, and (c) is the transition of key responsibilities between the contractor and the owner. Once the contractor has achieved substantial completion, the contractor works towards final completion, which is when the project has been completed in accordance with the contract documents. Final completion also has great significance in a construction project, as it is the moment when the contractor is entitled to full and final payment of its compensation and when the contractor is expected to release and waive its lien rights to the property. Yet, while both stages of completion are important, substantial completion is often perceived as the more consequential milestone given all the risk shifting activities that are triggered upon certification of substantial completion.

Maintenance contracts, on the other hand, rarely include such a two-step process for completion of the contractor’s work. Most maintenance contracts do not distinguish between substantial completion and final completion, requiring the contractor to only achieve final completion when they have fully completed their

work. This is due to the comparatively small scale of maintenance work compared to that of traditional construction. The following language, taken from a standard form contract for maintenance work, shows how straightforward the completion terms of a maintenance contract can be.

F201-2023, Work Order for As-Needed Maintenance Work

§ 2.1 The Maintenance Work of this Work Order Contract shall commence on << >> (insert date) and be completed on or by << >> (insert date). These dates are subject to adjustments as provided in the Agreement and Work Order Contract. Time limits stated herein are of the essence of this Work Order Contract.

Other maintenance contracts, by their very nature, have no definition or expectation of completion – at least not in the traditional sense. These maintenance contracts are ongoing in nature and require the maintenance contractor to perform regularly scheduled services on a weekly or monthly basis. These “ongoing” maintenance contracts are often structured as having a term for performance of the work, rather than having a date certain by which completion is to be achieved. The following language is from a standard form contractor maintenance work that is performed on an ongoing or reoccurring basis.

F202-2023, Work Order for Ongoing Maintenance Work

§ 2.1 The Maintenance Work of this Work Order Contract shall commence on << >> (insert date). Unless otherwise set forth below, the Work Order Term shall be one year from this Maintenance Work Commencement. The Work Order Term may be extended by written amendment in accordance with the Agreement. If the Work Order Term is not extended or terminated at the end of the Work Order Term, it shall be automatically extended on a month-to-month basis.

(Insert the Work Order Term if other than one-year from the Maintenance Work Commencement.)

<< >>

2. Maintenance contractors have more interaction with end users of the building.

Construction contractors usually perform their work well before end users ever arrive at the building. Even in tenant improvement projects and renovations of existing buildings, construction crews and end users maintain a significant degree of separation at the jobsite. Maintenance contractors operate in a much different environment. They are expected to work alongside end users, and often directly interact with end users about the issues pertaining to the maintenance work.

Given this, maintenance contracts should include language to enhance the maintenance contractor’s duty to the client and end users while performing their work. The language from the F101-2023, F102-2023, and F103-2023 agreements quoted below requires the maintenance contractor to (a) enforce strict discipline and good order among its crew and (b) make sure its team always maintains a professional appearance and demeanor while at the client’s facility. This language also gives the client a unique, and important, right to compel the contractor to remove from the facilities any worker who the client believes to be in violation of these obligations.

§ 6.4 Labor and Materials

The Contractor shall provide and pay for labor, supplies, materials, equipment, tools, utilities, transportation, and services necessary for proper performance and completion of the Maintenance Work. The Contractor shall enforce strict discipline and good order among the Contractor's employees, agents, subcontractors, and suppliers carrying out the Maintenance Work. The Contractor shall ensure that employees, agents, subcontractors, and suppliers performing the Maintenance Work are competent to perform the tasks assigned to them. The Contractor agrees that each of its employees, agents, subcontractors, and suppliers will maintain a professional appearance and demeanor at all times while at the Facilities. The Contractor, promptly after written request by the Client, shall remove from the Facilities any employee, agent, subcontractor, or supplier the Client determines, in its sole discretion, to be in violation of this Section.

3. Maintenance contractors are usually paid through invoices, not payment applications.

Construction contracts tend to have a regimented and somewhat complicated method by which the contractor gets paid. In most construction contracts, the contractor is required to create a schedule of values before the contractor starts its work. This schedule of values allocates the entire contract sum across various portions of the project. Thereafter, at monthly intervals, the contractor submits to the architect an application for payment that describes the work it has performed during the last month, in a manner that is broken down by the schedule of values allocations. The architect then evaluates whether the contractor's application for payment roughly aligns with what the architect has observed at the site, at which point the architect either approves (in whole or in part) or denies the contractor's application. Assuming the application is approved, the owner then pays the contractor within a predetermined amount of time.

And while payment on construction contracts is complicated, it is complicated for a reason. In a construction project, it is usually difficult for the owner or their lender to understand just by looking at the progress of the work whether they are getting what they are paying for. Thus, the architect acts as a go between to safeguard against the contractor getting too far ahead in payment draws, such that there are insufficient funds at the end of the project to complete the work.

Maintenance contracts, on the other hand, have very few of these complicating factors. Maintenance contracts are typically done through straightforward invoicing, from the maintenance contractor directly to the client, for work that was done in the prior billing cycle. Very rarely is an architect or other design professional brought in to verify or approve the maintenance contractor's invoice or request for payment. Nonetheless, while maintenance contracts are usually simple and straightforward, there are important items for owners to require in their invoicing protocols. For example, every invoice should at least include a description of the work that is being invoiced and the date ranges for when the work was performed. The client should also require that each invoice be supported by data and documentation that substantiates the contractor's right to payment. This could include photographs of the work in place or invoices from subcontractors and suppliers. Similarly, clients should consider insisting on releases and waivers of liens for any work that is covered by the payment being made. The following

is an example of an invoice procedure included in a maintenance contract.

F101-2023, Master Maintenance Agreement

§ 3.1 Unless otherwise agreed in a Work Order Contract, the Contractor shall submit to the Client an itemized invoice for services performed and amounts due on the first business day of each month. The Client shall pay amounts due within 30 days after the receipt of an invoice. Invoices shall be supported by data substantiating the Contractor's right to payment as the Client may reasonably require, such as evidence of payments made to, and releases and waivers of liens from, subcontractors and suppliers. Each invoice shall include (1) the date or date range on which the Maintenance Work was performed, (2) a detailed description of the Maintenance Work performed, and (3) the location where the Maintenance Work was performed. The Contractor shall submit invoices to the Client's representative identified in each Work Order Contract.

4. Maintenance contractors are less likely to be working with a design professional.

One of the main differences between maintenance contracts and construction contracts is the presence of a design professional, typically an architect. On a construction project, the architect has numerous touch points with the contractor. The architect is often responsible for developing a majority of the documents that form the contract for construction between the owner and contractor. This includes the drawings, specifications, and even BIM models. The architect also has significant responsibilities throughout the construction of the project, and often acts as a representative of the owner during construction. As such, the architect is usually responsible for (1) visiting the site to observe construction work in place, (2) reviewing the contractor's submittals for general compliance with the architect's design intent, (3) interpreting and answering questions about the drawings and specifications, (4) reviewing and certifying the contractor's applications for payment, and (5) approving proposed changes in the work, and (6) inspecting the project for substantial and final completion. For example, here is how the A201-2017 describes the architect's role during construction of a project.

A201-2017, General Conditions of the Contract for Construction

§ 4.2.1 The Architect will provide administration of the Contract as described in the Contract Documents and will be an Owner's representative during construction until the date the Architect issues the final Certificate for Payment.

In other words, the architect is an important part of a construction contract, and the obligations of the architect are heavily coalesced with the obligations of the owner and contractor in any such contract. Maintenance contracts, on the other hand, rarely place such detailed responsibility on a design professional. In many instances, a design professional will have no role in a maintenance contract whatsoever. In other instances, the design professional's role may be limited to creating maintenance protocols, or weighing in on rare maintenance issues that require design input. In contracts between a client and maintenance contractor, it is common for the drafting party to need to extract out of a template contract all of the references and obligations of a design professional that would otherwise be necessary in a construction contract.

5. Maintenance contractors typically perform work under a master agreement and work order.

Most construction contracts are one-off affairs. The owner and contractor enter into a contract for construction of a project. The contractor then works to achieve completion of that project and the owner pays the contractor in accordance with the contract terms. If the parties want to work together on another project, they usually sign a completely new contract, often with independently negotiated terms that are specifically tailored for that new project.

Maintenance contractors perform their work in a more routine and regular manner, which often results in a different contractual structure – the master agreement and work order. In this contracting scenario, the owner and maintenance contractor agree to one master agreement that will apply to all subsequent work orders within a designated period of time – usually one or several years. The master agreement includes all the non-project specific business terms, such as insurance requirements, general payment terms, termination provisions, and dispute resolution requirements. Work orders are then subsequently executed between the two parties as the owner's needs arise. These work orders are straightforward and include the price, schedule, and description of the work to be performed by the maintenance contractor. Using a master agreement and work order contract structure allows parties who regularly contract with each other to contract for work more efficiently as it arises. It eliminates the need to renegotiate non-project specific terms on each engagement and focus only on core items for that particular job. The following is an example of master agreement language that describes exactly how work orders are to be issued.

F101-2023, Master Maintenance Agreement

§ 2.3.1 The parties may agree to Maintenance Work through Work Order Contracts. A Work Order Contract consists of an executed Work Order; attachments, exhibits, drawings, and specifications identified in the Work Order; and this Agreement. Each Work Order Contract forms a separate contract and represents the entire and integrated agreement between the parties for performance of the Maintenance Work described in the Work Order Contract and supersedes prior negotiations, representations, or agreements, either written or oral. A Work Order Contract may be amended only by written instrument signed by both the Client and Contractor. A Work Order Contract shall not be construed to create a contractual relationship of any kind between any persons or entities other than the Client and the Contractor. The terms of this Agreement shall apply to all Work Order Contracts agreed to by the parties during the Agreement Term, including any renewals or extensions. In the event of a conflict between terms and conditions of this Agreement and the other documents comprising a specific Work Order Contract, the terms of the other documents specific to the Work Order Contract shall take precedence over this Agreement for the Maintenance Work provided under that Work Order Contract. Nothing in this section shall nullify the operation of section 2.3.4 of this Agreement with respect to a Contractor's proposal.



avoiding conflicts & ambiguities between the contract & proposal

Contract negotiations between a building owner and maintenance contractor often start with the contractor submitting a proposal to the owner for the work they intend to provide. Contractor proposals contain a variety of information and often include a detailed description of the requested maintenance work, the amount compensation the contractor will receive, and a proposed schedule for performing the work. Proposals also tend to come with a variety of other terms and conditions which, not surprisingly, tend to favor the contractor who submitted the proposal. For example, a close review of the maintenance contractor’s proposal might reveal that it requires disputes to be resolved in the state where the maintenance contractor’s home offices are located, far away from the facility where the maintenance work is performed.

In many instances, the building owner may agree with the price, schedule, and scope of work in the contractor’s proposal, but will disagree with the unfavorable (at least from the owner’s perspective) terms and condition. However, if the owner were to sign the contractor’s proposal, the likely result would be that the signed proposal would, in fact, be the legally binding contract between the parties. The owner would be held to the unfavorable terms contained in the proposal.

One common way around this scenario is for the owner to use a standard form agreement to function as the basis of contracts between itself and any maintenance contractor with which it does business. The idea would be that the standard form agreement contains neutral terms and conditions that balance the risk of both parties, then the parties could insert project specific terms like the contractor’s compensation, schedule, and scope of work into the agreement.

While using a standard form agreement can result in an easier negotiation process, it does come with one notable potential pitfall. Significant problems can, and often do, occur when the contractor’s proposal is referenced in, or attached to, the agreement to define the scope of services the contractor will perform. When this occurs, the terms and conditions included

in the proposal are arguably included in the agreement itself. If those terms and conditions conflict with the terms of the agreement, they will create an ambiguity that a court will struggle to reconcile and interpret. Worse yet, if those terms and conditions address risks that are not addressed in the agreement, there is a good argument that those terms and conditions control and are enforceable. A common example of this is when an agreement is silent on the issue whether the maintenance contractor's liability is limited in any way, then a proposal is attached to the agreement that limits the contractor's liability to a set amount. In this scenario, it is possible that a court would interpret the limitation of liability clause in the contractor's proposal as being part of the agreement even though it was not included in the body of the agreement itself.

Here are a few strategies to overcome potential ambiguities between a contractor's proposal and the contract between the parties.

1. Avoid attaching or directly referencing the contractor's proposal in the contract.

One way to avoid conflicting and ambiguous terms between a contractor's proposal and the contract is to not directly reference the contractor's proposal in the contract and to not attach the contractor's proposal to the contract for any purpose. If there is information in the contractor's proposal that the parties wish to include in the contract, simply copy only that information over into the contract. For example, if the contractor's proposal includes a price and payment schedule that the parties agree upon, just copy that information directly into the contract at an appropriate location. If the proposal contains payment terms that conflict with the terms in the contract, make sure to avoid carrying those over into the contract. Similarly, if the contractor's proposal contains a description of the work the contractor will provide that is agreeable to both parties, extract that description from the proposal and insert it into the contract. The key to this method of assembling a contract is to avoid pulling over terms and conditions from the proposal that would conflict or usurp terms of the standard form contract.

2. Strike out all terms and conditions from the contractor's proposal that you do not want to be part of the contract.

If the contractor's proposal is attached to, or referenced in, the agreement make sure to clearly strike out all the terms and conditions in the proposal that you do not want to be part of the contract. This can be done by striking out provisions on a line-by-line basis by hand or by using software to mark up the contractor's proposal.

3. Include an integration clause into your contract.

An integration clause is a provision in a contract that states that the terms of a contract are the complete and final agreement between the parties. Integration clauses are sometimes referred to as a merger clause or an entire agreement clause. In most contract negotiations, there are multiple versions of a contract that get passed between the parties and marked up with various edits and proposed edits. An integration clause, like the one quoted below from the F101-2023, Master Maintenance

Agreement helps to make clear that the final executed agreement between the parties is the document that controls the relationship between the parties.

§ 7.1 This Agreement represents the entire and integrated Agreement between the parties and supersedes prior negotiations, representations, or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both the Client and Contractor.

Not only does this clause make clear that this Agreement supersedes prior negotiations, representations, or agreements, it prescribes how the agreement can be amended. Just as it is important for the parties to clarify which version of document is the actual, controlling agreement, it can be equally important to clarify how that agreement can be amended. This way, the parties are not left to guess as to whether informal conversations, emails, or other communications are part of the contract. Section 7.1 of F101-2013 allows for amendments only if they are done by a written instrument signed by both parties.

4. Include a clause that disclaims terms and conditions from the contractor’s proposal.

One last way to avoid potential ambiguities in between a contractor’s proposal and a contract is to include in a provision that specifically describes why the contractor’s proposal is attached to, or referenced in, the contract. Here is an example of such a provision.

§ 7.11 This Agreement supersedes the Contractor’s proposal for the Maintenance Work and any terms and conditions contained in the proposal. If the Contractor’s proposal is referenced in this Agreement, the parties agree that such reference is intended only to describe the Maintenance Work that the Contractor will perform, and any other terms and conditions contained in the Contractor’s proposal shall not be a part of this Agreement.

The provision above makes clear that the agreement supersedes the contractor’s proposal. This provision also notes that if the contractor’s proposal is referenced in the agreement, the parties agree that such a reference is only intended to describe the maintenance work that the contractor will perform, and that other terms and conditions will not be part of the agreement.



how to get paid on time for maintenance work

As a maintenance contractor, getting paid on time is a critical part of your business. It helps you pay your staff and suppliers on time and keep your books in good order. How then do you ensure that you are getting paid in full and getting paid on time? Here are four tips that may help.

1. Become familiar with prompt payment acts in your state.

Many states have enacted statutes to help ensure that contractors and their subcontractors get paid on time. These statutes often provide timelines for when payments must be made to contractors and their team. They also provide remedies for contractors who are not paid in accordance with these rules. Sometimes, just showing a client that you are familiar with the laws of your state (and the potential remedies you might pursue) is enough to provoke them into making payments on time.

It is important to note that prompt payment acts are state-specific and may vary greatly amongst different states. These laws also tend to treat public and private projects differently and may only apply to certain types of contractors. For example, Florida’s prompt payment act applies to those who are performing “construction services,” which are defined as “all services performed in connection with the construction, alteration, repair, demolition, reconstruction, or any other improvements to real property that requires a license as a construction contractor or electrical or alarm system contractor...” In other words, make sure to research the laws of your state to understand whether a prompt payment act applies to the kind of services or work you provide.

2. Charge interest on late payments – and follow through.

Another way to ensure you get paid on time is to include an “interest on late payments” provision in your maintenance contracts. Charging interest on late payments is often regulated by state-specific usury laws, so it is best to research the laws of your state before inserting an interest rate into a contract. The following is an example of an “interest on late payments” provision that allows the parties to negotiate an interest rate or, if one is not inserted, the statutory rate.

Payments of amounts due and unpaid by the Client shall bear interest from the date payment is due at the rate below, or in the absence thereof, at the legal rate prevailing at the place where the Maintenance Work is performed.
(Insert rate of interest agreed upon, if any.)

Once you have a provision like this in your contract, the next step is to use it when appropriate. If a client delays in paying on time, it is not enough to just have a provision like this in your contract and hope that alone will stoke them into action. You need to sit down and write a letter (or have an attorney write one for you), explaining that you will charge interest on the payment if it is late. Then, follow through and invoice them for the accrued interest until the issue is resolved. If you show a client that you will not tolerate late payments, you are more likely to get paid on time.

3. Don't overcomplicate the payment process.

Construction contracts tend to have a regimented and somewhat complicated method by which the contractor gets paid. Maintenance contracts, on the other hand, have very few of these complicating factors. See Item 3 of Section B.1 of this eBook for further details about how maintenance contracts offer a simple invoice solution that will help you get paid.

4. Don't waive or release lien rights until you have been paid.

As a maintenance contractor, your right to claim a lien on a property where you have performed work is an important way ensure that you get paid. Be wary of any request by a client to waive or release liens prior to receiving payment for your work. Liens are regulated by state laws, so always be sure to consult with a local attorney prior to making decisions regarding lien rights. However, a few general tips can be useful to keep in mind. On private projects, only waive or release your rights to liens to the extent that you have been paid. Also, only execute a final release of liens once you have received payment in full. You may be required to release or waive lien rights on public projects; however, make sure that the client has a payment bond in place to protect you against default or failure to pay. The following is an example of a provision that requires the maintenance contractor to release and waive lien rights after final payment has been made.

Upon receipt of a final invoice for any Work Order Contract, the Client may inspect the Maintenance Work to determine whether the Maintenance Work is complete. When the Client finds the Maintenance Work is complete, the Client shall make final payment of all remaining amounts due for the Work Order Contract. As a condition to final payment under any Work Order Contract, the Client may require the Contractor to submit releases and waivers of liens, and other documentation establishing payment or satisfaction of obligations arising out of the Work Order Contract.



a contractor's standard insurance & special insurance considerations

Insurance is an essential part of a facilities maintenance contract because it provides risk mitigation and financial security to all parties involved in the project. Part 1 of this section reviews the contractor's standard insurance provisions found in your facilities maintenance contracts. Part 2 of this section covers special insurances a contractor may want to procure based on the scope and location of the maintenance work.

Part 1 - Standard insurance provisions

In a facility maintenance contract, a contractor is required to procure standard insurance coverage, including commercial general liability, auto liability, workers' compensation, and employer's liability insurance. A summary of each is provided below.

1. Commercial General Liability. Commercial general liability generally protects a contractor against liability claims for bodily injury and property damage arising out of the work. Depending on the circumstances surrounding the incident that led to a claim, different parties can make a claim against a contractor's commercial general liability policy, including a third party (e.g., a pedestrian injured while walking by the project) and a client (e.g., a client whose facility is damaged from a contractor's faulty plumbing).

2. Automobile Liability. Auto liability generally covers owned and unowned vehicles used by the contractor. Specifically, the auto liability policy includes coverage for any accident, for bodily injury, death of any person, and property damage arising out of the vehicle ownership, maintenance, and use. Similar to commercial general liability coverage, different parties can make a claim against the contractor's auto liability policy, including a third party (e.g., a contractor's vehicle is in an accident and injures a pedestrian or another driver) and a client (e.g., a contractor's vehicle causes damage to the client's property).

3. Workers' Compensation. Workers' compensation insurance generally provides benefits to a contractor's employees who suffer job-related injuries or illnesses. Workers' compensation claims are limited to a contractor's full time, part time, or temporary employees.

4. Employer's Liability. Employer's liability insurance generally provides benefits to a contractor's employees who suffer job-related injuries and illnesses that are not covered by workers' compensation. While the contractor's employees may make a claim against a contractor's employer's liability policy, this insurance may also cover third party claims (e.g., a contractor's employee sues a client for a work-related injury or illness that occurred on the client's property, and, as a result, the client sues the contractor).

Part 2 - Contractor's special insurance considerations

Below are special insurances a contractor may want to procure based on the scope and location of the maintenance work.

1. Pollution Liability. If a contractor's scope of work includes the handling or abatement of hazardous material (e.g., asbestos, lead, polychlorinated biphenyls, etc.), a pollution policy should be considered. This type of policy will generally provide coverage for hazardous material-related claims for bodily injury, property damage and cleanup costs. The pollution liability policy may also provide coverage for claims related to the transportation and disposal of the hazardous materials.

2. Equipment Floater and Inland Marine. If a contractor performs work on multiple sites that require a considerable amount of equipment transport, both an equipment floater and inland marine insurance policy may be appropriate for a contractor to procure. Equipment floater policies typically provide coverage for the contractor's owned or leased equipment in the event of theft, vandalism, or collision. If a contractor wants coverage for a broader range of property (e.g., materials, supplies, or other goods in transport), an inland marine policy may be the right choice. An inland marine policy will generally provide coverage for a broader range of property and damage types (e.g., fire, flood, earthquake, etc.).

3. Riggers Liability Insurance. If a contractor will lift any property or equipment owned by the client (e.g., a roof top unit, roofing material, building signage, etc.), a contractor may want to consider riggers liability insurance. A contractor's commercial general liability policy often excludes coverage for property owned by others while it is under the care, custody, and control of the contractor. So, adding riggers insurance may properly account for a risk associated with the damage to the client's property while it is lifted into place.

4. Railroad Protective Liability. If a contractor performs work on or near a railroad, a contractor may need to enter into an access agreement with the railroad before the work begins. This agreement typically requires the contractor to hold the railroad harmless for any liability arising out of the contractor's work on or near the railroad. If this situation applies to the contractor's work, a contractor may want to consider railroad protective liability insurance, because this type of coverage may be excluded from a contractor's commercial general liability policy.

Each insurance policy may have different limits. Limits can be per accident, per occurrence, or in the aggregate, and each limit may need to be reviewed and adjusted based on the project's scope of work and the associated risk. Additionally, the specific terms and conditions of each insurance policy will determine the parties and the types of claims covered. Consulting with an insurance adviser is recommended.

contractor warranties & the one-year correction period

As a client, you want to be able to rely on the work that you hire your contractor to perform. Warranties help you do that. While there are different types of warranties, this section explains the express warranties found in Section 6.5 of the F101-2023, F102-2023, and F103-2023 agreements and a summary review of the one-year correction period in Section 6.6.

1. Quality of material, supplies, and equipment

Section 6.5(1) of your maintenance contract requires the contractor to warrant that the furnished materials, supplies and equipment “will be new and of good quality unless otherwise required or permitted by the [contract].”

Just because it is a new project, it does not necessarily mean you will always use new materials or equipment. For example, the equipment you need for the project may be an older model that is no longer manufactured. The lead time for new equipment may be significantly longer, and not fit within your completion schedule. Price may also be a factor when considering what kind of equipment your contractor will install. Sometimes, it may even make sense for you to furnish equipment to your contractor for the project. If you negotiate with your contractor to install used, refurbished, or client-furnished items, you should specify that in your contract. You should also consult with an attorney as to whether such a specification may limit this portion of the express warranty your contractor would otherwise be obligated to provide.

Importantly, the contractor’s express warranty for materials, supplies and equipment is different from a manufacturer’s warranty. To the extent that your contractor receives any material or equipment warranties from a manufacturer, Section 6.5 requires that the warranties will commence upon the completion of the work, and the contractor shall ensure the warranties are issued in your name or become transferable to you upon completion of the work. This requirement will allow you to enforce the material or equipment warranties after the work is complete. Warranty coverage will vary depending on the specific terms and conditions outlined in the warranty documents. So, read them carefully.

2. Free from defects

Section 6.5(2) of your maintenance contract requires the contractor to warrant that the maintenance work will be free from defects. This part of the warranty language covers any defects or problems that arise from the contractor’s workmanship, or the quality of the materials used. Section 6.5(2) also includes a caveat that the warranty covers defects that are “not inherent in the quality required or permitted by the [contract].” For example, if the contractor installs wood flooring that contains a dark color variation inherently found in that type of wood, the darker color would not be a defect. Even if you thought the floor should be lighter, there would be no breach of warranty.

3. Compliance with the contract

Section 6.5(3) of your maintenance contract requires the

contractor to warrant that the work will conform with the contract's requirements. It may seem obvious, but this portion of the warranty is only as good as the contract you negotiated with your contractor. It is important for you to consider the elements of your contract that are important to you (e.g., scope, schedule, etc.), and ensure they are included in the final maintenance contract executed between you and your contractor.

One-year correction period

If you discover the non-conforming work within the first year, Section 6.6 of your facilities maintenance contract includes a one-year correction period. Importantly, the one-year correction period should not be referred to as a one-year warranty. Contractors often have legal warranty obligations that extend long after the project's completion. The one-year correction period is a separate and distinct contractual obligation for the contractor.

1. Notice and Timing

Your notice to the contractor is necessary to initiate corrective action. If you fail to notify the contractor or provide written acceptance of the condition, you may waive your rights to have your contractor correct it, or to make a claim against your contractor.

Timing is important when providing notice of non-conforming work. Because of that, Section 6.6 requires prompt notice from you to the contractor after discovery of the condition and requires a prompt response from your contractor. Timely notice allows the contractor an opportunity to investigate the issue, assess the impact, and take corrective action before further complications arise. This process benefits you, because it is likely your contractor will be able to correct the work at a cost that is less than what another contractor would charge for the correction. If the contractor does not make the correction within a reasonable time after your notice, then you may correct it pursuant to Section 5.2 of your contract.

If you discover a condition in the work after the one-year correction period, you may still be entitled to a legal remedy. However, your right to such a remedy varies depending on the jurisdiction and nature of the claim. If you discover a condition in the work to which you believe the either the contractor's warranty or the contractor's one-year correction period may apply, it is best to consult an attorney to evaluate your options.

03

special
considerations

who is the client, and what is the client’s authority?

The client in the facility maintenance agreements may be any person or entity that wants to hire a contractor to repair, maintain, or improve a property. That means the client, as defined in the facility maintenance agreements, could be a property owner, a tenant, or a third-party property manager. If you are tenant or a third-party property manager acting as the client, you will want to be sure that your underlying agreement with the owner (e.g., the tenant lease or the property management agreement) allows you to act with the broad authority found within the facility maintenance agreements. As a reminder, the facility maintenance agreements provide that the client and client’s party representative will have broad authority with respect to all matters pertaining to the agreement or the work order contract. Below is an example of such a provision from the F101-2023, Master Maintenance Agreement.

§ 1.3.1 The Client shall designate in writing a representative who shall have express authority to bind the Client with respect to all matters pertaining to this to this Agreement.

Regardless of whether you are a tenant or a third-party property manager, your underlying agreement with the owner may have a section that restricts the property repairs, maintenance, and improvements you are able make. It may also clarify who will be required to pay for such improvements. The restrictions may: (1) allow work if the cumulative cost is below a specific dollar amount; (2) limit work to emergencies only; or (3) simply require owner approval in advance. If your underlying agreement restricts or is silent about your authority to perform the work, notify the owner, and ask for permission in writing before proceeding with the work. Alternatively, you may be able to negotiate an amendment to the underlying agreement.

assessing potential impacts of hazardous material conditions

As a facility maintenance contractor performing work at an existing facility, you may run into hazardous materials and wastes either on the site or adjacent to the site you will perform work. The facility operations may include printing, drycleaning, on-site soap manufacturing, biotechnology, auto repair, machining or fabrication, transportation, or fueling. The materials used to construct the facility may also contain hazardous materials. A few examples of hazardous materials contained in construction materials include: (i) asbestos found in adhesives, insulation, and roofing materials; (ii) lead found in old pipes, cable and wiring, and paint; and (iii) polychlorinated biphenyls, more commonly known as PCBs, found in paints, rubber, and fireproofing. While some facilities may have obvious signs that you will encounter hazardous material during the performance of your work, others may not. Some facilities may use underground storage tanks to store fuel or other hazardous materials that cannot be seen or known without proper inquiry or inspection.

Improper identification, management and removal of hazardous materials and wastes may lead to fines, business interruptions, or lawsuits for not only the facility owner, but also for any contractor

hazardous
material
and waste
contract terms

who may have mishandled it or caused it to spread further into newly impacted areas. When considering your next facility maintenance project, it is important to consider the potential impacts of hazardous materials and wastes to your scope of work. A couple key considerations are found below.

1. Facility Operations. Ask your client about the operations of the facility to determine whether heavy chemicals, oils, fuels, or even biological material are stored, used, or generated during operations, and if applicable, determine the location of the potentially hazardous condition in relation to the work you will perform. Additionally, ask your client whether the facility itself may contain construction materials that contain hazardous materials that may need to be abated by a specially licensed company in order for you to perform your work.

2. Inspect the Facility. Walk the facility where you will perform your facility maintenance work to determine if there are any visual signs of hazardous materials or wastes. During this site inspection, look at the facility operations, the surrounding area, any possible underground storage locations, and the construction materials used in the building.

If you become aware of any hazardous material or waste, or if you are concerned about its potential impact on your project, communicate your concern with your client, and document it properly. In some cases, you may need to rely on third-party professionals to determine whether a hazardous material or waste is or was present, and whether it will impact your scope of work.

As a contractor, you may not know whether you will encounter hazardous material conditions on your facility maintenance project. Below is a summary of how Section 6.16 of the F101-2023, F102-2023, and F103-2023 agreements minimize your risk if you encounter hazardous material conditions on your next project.

1. You are responsible for your hazardous materials, and the client is responsible for theirs.

Section 6.16 ensures that you are only responsible for the materials, substances, and equipment that you bring to the facility site. Additionally, provided that remediation or handling of hazardous materials and wastes are not included in your scope of work, your client remains responsible for any hazardous material conditions you encounter during the performance of your work. If you do encounter any unknown hazardous material conditions, Section 6.16 includes provisions that address the steps that you and your client will follow, upon discovery of the hazardous condition. Section 6.16 provides, in relevant part:

The Contractor shall be responsible for the proper delivery,



handling, application, storage, removal, and disposal of all materials, substances, and equipment brought to the Facilities for performance of the Maintenance Work. If the Contractor encounters hazardous materials not identified in this Agreement, or materials that it reasonably believes may be hazardous, the Contractor shall promptly provide written notice to the Client before conditions are disturbed and in no event later than 14 days after first observance of the conditions. The Client will promptly investigate such conditions. Unless otherwise agreed in this Agreement, the Contractor shall not be responsible for hazardous materials present at the Facilities that the Contractor did not bring to the Facilities.

2. The client covers costs associated with unknown hazardous material conditions.

In most cases, remediating a hazardous material condition requires special training and licensing. Because of that, it is reasonable to assume that a facility maintenance contractor will not be able to remedy the condition safely and effectively. So, Section 6.16 includes consideration that the client will be responsible not only to pay you for the costs associated with the remediation of the hazardous material condition, but also to equitably adjust your compensation and schedule for the impacts associated with any pause in the performance of your work, including costs related to shutdowns, delays, and start-up after the area is safe to resume work, and an extension of the work schedule. Section 6.16 provides, in relevant part:

If remediation of a hazardous materials condition is required, the Client shall be responsible for the cost of remediation unless otherwise agreed to in this Agreement. If the Contractor must stop performance of the Maintenance Work for remediation of a hazardous materials condition not identified in this Agreement, then the Contractor's compensation and the time for performance shall be equitably adjusted.

Importantly, Section 6.16 is intended when the scope of work is associated with a straight-forward building repair, or relatively simple building improvement. More robust contract provisions related to hazardous materials and substances can also be found in AIA Contract Document A201™-2017 General Conditions for the Contract for Construction and other AIA Contract Documents.

04 best practices

planning to prevent problems on your maintenance project

As a client, working with your maintenance contractor before entering into a contract for your next facility maintenance project may prevent delays, poor work quality, or disruption of your company's business. This article identifies some pre-contract planning considerations that can help prevent problems on your next facilities maintenance project.

1. Supply-Chain Disruption. Ask your maintenance contractor whether the work includes any equipment and/or materials that could be impacted by the supply chain disruptions like those experienced on many construction projects, building improvements, and building maintenance projects throughout the nation. If the work may be impacted by lack of access to equipment and/or materials, consider beginning the project once the critical equipment and/or materials are adequately sourced and delivered.

2. Long-Lead Items. Your project may require special fabrication, specialty equipment, or items that are not commonly stocked. Ask your maintenance contractor if your project includes any long lead items. Have your contractor prepare a plan that mitigates any schedule impacts related to the procurement or fabrication of those items.

3. Maintenance Work Restrictions. Your contractor's maintenance work may impact your daily business needs, or the services provided by the businesses around you. For example, if the maintenance work will disrupt your employees during the day, it may need to be performed before or after work, or on weekends. Alternatively, your building may be governed by a tenant lease agreement, restricting types of work during certain times of the year (e.g., a blackout period limiting exterior construction work during a holiday shopping season). If this is the case, it is important that you disclose these restrictions before finalizing the contract.

4. Special Events. Is the maintenance work closely tied to a certain business event? Will there be a grand opening after your building improvement? Do you plan to begin operations, or have important visitors in the new space after the work is complete? Consider whether it makes sense to communicate with your maintenance contractor about these important milestones, so that you have a schedule that will support completing the project on time and on budget.

After you developed a plan with your maintenance contractor, document plan in your maintenance contract.

use your contract to effectively communicate with your contractor

As an owner or tenant, having the right tools to effectively communicate with your maintenance contractor can help prevent or mitigate delays, poor work quality, or disruption of your company’s business. Below are examples of how a maintenance contract may help you better communicate with your maintenance contractor on your next project.

1. Capturing special considerations in your maintenance contract

Before finalizing your maintenance contract, discuss any special considerations with your contractor, such as work access, work restrictions, or important event dates. Then, make sure you document these important discussions in your maintenance contract.

The language below is from the AIA Contract Documents’ standard facility maintenance work order forms for work that is performed on either an ongoing (F202-2023) or as-needed basis (F201-2023). This language provides a small sample of how the facility maintenance contracts can help you capture special considerations discusses with your contractor.

Section 3.1 Facilities Access
(Identify any requirements for the Contractor to access the Facilities, such as security protocols or background checks.)

Section 3.2 Work Schedule Restrictions
(List any schedule requirements regarding the Contractor’s ability to perform Maintenance Work at the Facilities. For example, indicate if the Contractor is only allowed to perform Maintenance Work during certain hours or on certain days of the week.)

2. Your maintenance contract can help you feel confident about the work performed

The facilities maintenance contracts also provide an avenue to help you feel confident about the contractor’s performance and progress of the work. The following is an example of from the F101-2023, Master Maintenance Agreement that will help you stay up to date regarding the progress of your contractor’s work:

Section 6.3 Quality Control Program
The Contractor shall institute and maintain a quality control program designed to ensure the Maintenance Work is performed in accordance with this Agreement. The Contractor shall keep the Client reasonably informed of the progress of the Maintenance Work and shall promptly report to the Client complaints from third parties and individuals using the Facilities, and incidents related to the Maintenance Work that might adversely impact the Facilities.

3. Consider Providing a Status Report Form to Your

Maintenance Contractor

You may want to consider providing your contractor with the AIA Contract Document F704-2023, Status Report for Maintenance Work. This is a form can facilitate important communication between you and your contractor about the progress of the maintenance work, including any changes to the work scope, cost of the work, or complaints or incidents that may adversely impact the property.

Effectively communicating with your maintenance contractor before executing the contract and continuing that communication through the progress of the work will lead to better performance by your maintenance contractor and, ultimately, the successful completion of the work.



05 conclusion

As you can see, maintenance contracts are multi-faceted with nuances that must be defined before service begins. Knowing which type of contract, what parameters to include, and where to assign responsibility are all part of this journey to protect one of your most valued business assets – your facilities.

Resources

- Learn More: www.aiacontracts.com
- [F101–2023 Master Maintenance Agreement](#)
- o [F201–2023 Work Order for As-Needed Maintenance Work](#)
- o [F202–2023 Work Order for Ongoing Maintenance Work](#)
- [F102–2023 Maintenance Agreement for As-Needed Maintenance Work](#)
- [F103–2023 Maintenance Agreement for Ongoing Maintenance Work](#)
- [F701–2023 Amendment to a Maintenance Agreement or Work Order Contract](#)
- [F702–2023 Invoice for Maintenance Work](#)
- [F703–2023 Request for Certificate of Insurance](#)
- [F704–2023 Status Report for Maintenance Work](#)
- Interested in getting unlimited full-year access to Facility Maintenance Documents? [Click here](#)

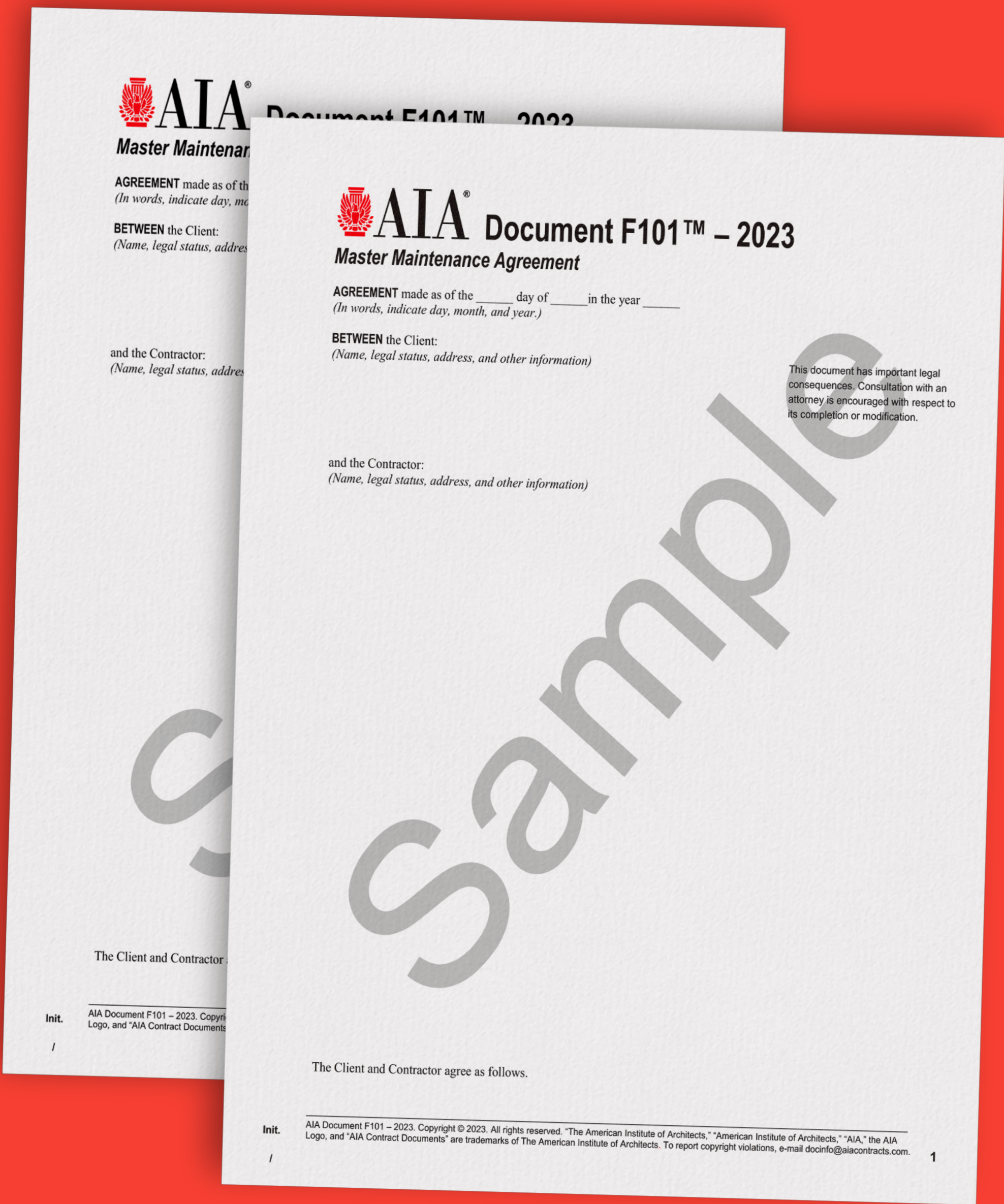


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