

# DRAFT AIA® Document A121™ – 2018

## Exhibit A

### *Determination of the Cost of the Work*

#### ARTICLE A.1 COSTS TO BE REIMBURSED

##### § A.1.1 Cost of the Work

§ A.1.1.1 The term Cost of the Work shall mean the following direct, actual and verifiable costs reasonably and necessarily incurred by the Contractor in the proper performance of the Work, except those costs compensated as general conditions under § A.1.1.3 below.

§ A.1.1.2 Where, pursuant to the Contract Documents, any cost is subject to the Owner's prior written approval, the Contractor shall obtain such approval in writing prior to incurring the cost. Any costs subject to the Owner's prior written approval and not already set forth in this Article A.1 shall be identified in the Work Order to which those costs relate.

**§ A.1.1.3 General Conditions.** All charges, if any, for general conditions (costs to be reimbursed) shall be delineated separately in the Work Order, and may include only the following: on-site Project Manager; on-site Project and Site Superintendents; on-site Assistant Superintendents; minor work that may be included in the general conditions as allowed by Texas Government Code Section 2269.255; office trailer expenses; on-site sanitary facilities; project sign; safety/first aid; on-site technology; temporary water and power; project site office supplies and office equipment; plan reproduction; construction photographs; dumpsters; final clean-up; equipment rental; fuel; small tools; and items described in more detail below.

##### § A.1.2 Labor Costs

§ A.1.2.1 Wages or salaries of construction workers directly employed by the Contractor to perform any portion of the construction of the Work at the site or, with the Owner's prior written approval, at off-site workshops, to the extent allowed by Texas Government Code Sections 2269.255 or 2269.275.

§ A.1.2.2 *[Intentionally deleted.]*

§ A.1.2.2.1 Wages or salaries of the Contractor's supervisory and administrative personnel when performing Work and stationed at a location other than the site, but only for that portion of time required for the Work, and, to the extent same are not compensated under general conditions, are directly attributable to and required for the Work, and are approved by the Owner.

*(Identify the personnel, the type of activity, and, if applicable, any agreed percentage of time to be devoted to the Work.)*

« To be listed in Assumptions & Clarifications Attachment to the Contract »

§ A.1.2.3 Wages or salaries of the Contractor's supervisory or administrative personnel engaged at factories, workshops or while traveling, in expediting the production or transportation of materials or equipment required for the Work, but only for that portion of their time required for the Work and to the extent same are not compensated under general conditions, are directly attributable to and required for the Work, and are approved by the Owner.

#### ADDITIONS AND DELETIONS:

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

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**§ A.1.2.4** Costs paid or incurred by the Contractor, as required by law or collective bargaining agreements, for employment-related taxes, insurance, contributions, assessments and benefits and, for personnel not covered by collective bargaining agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided such costs are based on wages and salaries included in the Cost of the Work under Section A.1.2, to the extent not compensated under general conditions.

**§ A.1.2.5** If agreed rates for labor costs, in lieu of actual costs, are provided in this Agreement, the rates shall remain unchanged throughout the duration of this Agreement, unless the parties execute a Modification.

### **§ A.1.3 Subcontract Costs**

Payments made by the Contractor to Subcontractors in accordance with the requirements of their subcontracts and this Agreement.

### **§ A.1.4 Costs of Materials and Equipment Incorporated in the Completed Construction**

**§ A.1.4.1** Costs, including transportation and Owner-approved storage at the site, of materials and equipment incorporated or to be incorporated in the completed construction.

**§ A.1.4.2** Costs of materials described in the preceding Section A.1.4.1 in excess of those actually installed to allow for reasonable waste and spoilage. Unused excess materials, if any, shall become the Owner's property at the completion of the Work or, at the Owner's option, shall be sold by the Contractor. Any amounts realized from such sales shall be credited to the Owner as a deduction from the Cost of the Work.

### **§ A.1.5 Costs of Other Materials and Equipment, Temporary Facilities and Related Items**

**§ A.1.5.1** Except for items included as general conditions, costs of transportation, installation, dismantling, maintenance, and removal of materials, supplies, temporary facilities, machinery, equipment, and hand tools not customarily owned by construction workers that are provided by the Contractor at the site and fully consumed in the performance of the Work. Costs of materials, supplies, temporary facilities, machinery, equipment, and tools that are not fully consumed shall be based on the cost or value of the item at the time it is first used on the Project site less the value of the item when it is no longer used at the Project site. Costs for items not fully consumed by the Contractor shall mean fair market value.

**§ A.1.5.2** *[Intentionally deleted.]*

**§ A.1.5.3** To the extent not compensated under general conditions, costs of removal of debris from the site of the Work and its proper and legal disposal, other than final clean-up.

**§ A.1.5.4** To the extent not compensated under general conditions, costs of the Contractor's site office, including general office equipment and supplies.

### **§ A.1.6 Miscellaneous Costs**

**§ A.1.6.1** To the extent not compensated under general conditions, premiums for that portion of insurance and bonds required by the Contract Documents that can be directly attributed to the Contract.

**§ A.1.6.1.1** *[Intentionally deleted.]*

**§ A.1.6.1.2** *[Intentionally deleted.]*

**§ A.1.6.2** Sales, use or similar taxes imposed by a governmental authority for materials that are related to the Work, but not incorporated into the Work, and for which the Contractor is liable and Owner is not exempt. Contractor shall be obligated to take reasonable care to obtain all applicable tax exemptions.

**§ A.1.6.3** Fees and assessments for the building permit and for other permits, licenses, and inspections for which the Contractor is required by the Contract Documents to pay.

**§ A.1.6.4** Fees of laboratories for tests required by the Contract Documents, except those related to defective or nonconforming Work for which reimbursement is excluded by Article 17 of the Master Agreement or by other provisions of the Contract Documents and paid by the Contractor.

§ A.1.6.5 Royalties and license fees paid for the use of a particular design, process or product required by the Contract Documents.

§ A.1.6.5.1 *[Intentionally deleted.]*

§ A.1.6.6 *[Intentionally deleted.]*

§ A.1.6.7 *[Intentionally deleted.]*

§ A.1.6.8 Deposits lost for causes directly resulting from the Owner's negligent or wrongful actions or decisions.

§ A.1.6.9 *[Intentionally deleted.]*

§ A.1.6.10 *[Intentionally deleted.]*

§ A.1.6.11 *[Intentionally deleted.]*

#### § A.1.7 Other Costs and Emergencies

§ A.1.7.1 Other costs incurred in the performance of the Work, to the extent same are not compensated under general conditions, are directly attributable to and required for the Work, and are approved by the Owner.

§ A.1.7.2 Costs incurred in taking action to prevent threatened damage, injury or loss in case of an emergency affecting the safety of persons and property.

§ A.1.7.3 *[Intentionally deleted.]*

#### § A.1.8 Related Party Transactions

§ A.1.8.1 For purposes of this Section A.1.8, the term "related party" shall mean (1) a parent, subsidiary, affiliate or other entity having common ownership of, or sharing common management with the Contractor; (2) any entity in which any stockholder in, or management employee of, the Contractor holds any equity interest in excess of ten percent in the aggregate; (3) any entity which has the right to control the business or affairs of the Contractor; or (4) any person, or any member of the immediate family of any person who has the right to control the business or affairs of the Contractor.

§ A.1.8.2 If any of the costs to be reimbursed arise from a transaction between the Contractor and a related party, the Contractor shall notify the Owner in writing of the specific nature of the contemplated transaction, including the identity of the related party and the anticipated cost to be incurred, before any such transaction is consummated or cost incurred. If the Owner, after such notification, authorizes the proposed transaction in writing, then the cost incurred shall be included as a cost to be reimbursed, and the Contractor shall procure the Work, equipment, goods or service from the related party, as a Subcontractor, according to the terms of Article A.4. If the Owner fails or refuses to authorize the transaction in writing, the Contractor shall procure the Work, equipment, goods or service from some person or entity other than a related party according to the terms of Article A.4.

#### ARTICLE A.2 COSTS NOT TO BE REIMBURSED

§ A.2.1 The Cost of the Work shall not include the items listed below:

- .1 Salaries and other compensation of the Contractor's personnel stationed at the Contractor's principal office or offices other than the site office, except as specifically provided in Section A1.2.2;
- .2 *[Intentionally deleted.]*
- .3 Expenses of the Contractor's principal office and offices other than the site office;
- .4 Overhead and general expenses, except as may be expressly included in Article A.1;
- .5 The Contractor's capital expenses, including interest on the Contractor's capital employed for the Work;
- .6 Costs due to the negligence of, or failure to fulfill a specific responsibility of the Contractor by, the Contractor, Subcontractors and suppliers, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable;
- .7 Any cost not specifically and expressly described in Article A.1;

- .8 Where a Guaranteed Maximum Price is part of this Agreement, costs, other than costs included in Change Orders approved by the Owner, that would cause the Guaranteed Maximum Price to be exceeded;
- .9 Delay damages or claims, unless caused by the negligence or wrongful conduct of the Owner;
- .10 Storage costs, unless with prior written Owner approval;
- .11 All costs intentionally excluded in Article A.1 above, including all subsections; and
- .12 All items included in general conditions under either Section A.1.1.3 above or the Construction Manager's Fee (if applicable).

#### **ARTICLE A.3 DISCOUNTS, REBATES AND REFUNDS**

**§ A.3.1** Contractor shall take advantage of all available discounts, rebates, and refunds for supplies, materials, and equipment connected with the Work, and which conform to the Contract Documents, which discounts, rebates, and refunds shall accrue to the benefit of the Owner. Cash Discounts obtained on payments made by the Construction Manager shall accrue to the Owner. Trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue to the Owner, and the Contractor shall make provisions so that they can be obtained.

**§ A.3.2** Amounts that accrue to the Owner in accordance with Section A.3.1 shall be credited to the Owner as a deduction from the Cost of the Work.

#### **ARTICLE A.4 SUBCONTRACTS AND OTHER AGREEMENTS**

**§ A.4.1** Those portions of the Work that the Contractor does not customarily perform with the Contractor's own personnel shall be performed under subcontracts or by other appropriate agreements with the Contractor. The Owner may designate specific persons from whom, or entities from which, the Contractor shall obtain bids. The Contractor shall obtain bids from Subcontractors and from suppliers of materials or equipment fabricated especially for the Work who are qualified to perform that portion of the Work in accordance with the requirements of the Contract Documents. The Contractor shall deliver such bids to the Architect and Owner with an indication as to which bids the Contractor intends to accept. The Owner then has the right to review the Contractor's list of proposed subcontractors and suppliers and, in consultation with the Architect, object to any subcontractor or supplier. Any advice of the Architect, or approval or objection by the Owner, shall not relieve the Contractor of its responsibility to perform the Work in accordance with the Contract Documents. The Contractor shall not be required to contract with anyone to whom the Contractor has reasonable objection.

**§ A.4.2** When the Contractor has provided a Guaranteed Maximum Price, and a specific subcontractor or supplier (1) is recommended to the Owner by the Contractor; (2) is qualified to perform that portion of the Work; and (3) has submitted a bid that conforms to the requirements of the Contract Documents without reservations or exceptions, but the Owner requires that another bid be accepted, then the Contractor may require that a Change Order be issued to adjust the Guaranteed Maximum Price by the difference between the bid of the person or entity recommended to the Owner by the Contractor and the amount of the subcontract or other agreement actually signed with the person or entity designated by the Owner.

**§ A.4.3** Subcontracts or other agreements shall conform to the applicable payment provisions of this Master Agreement, and shall not be awarded on the basis of cost plus a fee without the Owner's prior written approval. If a subcontract is awarded on the basis of cost-plus a fee, the Contractor shall provide in the subcontract for the Owner to receive the same audit rights with regard to the Subcontractor as the Owner receives with regard to the Contractor in Article A.5.

#### **ARTICLE A.5 ACCOUNTING RECORDS**

**§ A.5.1** The Contractor shall keep full and detailed records and accounts related to the cost of the Work and exercise such controls as may be necessary for proper financial management under this Contract and to substantiate all costs incurred. The accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's auditors, and other representatives shall, during regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to audit and copy, the Contractor's records and accounts, including complete documentation supporting accounting entries, books, job cost reports, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor's proposals, Subcontractor's invoices, purchase orders, vouchers, memoranda and other data relating to the Contract. The Contractor shall preserve these records, for a period of ten (10) years

after the date of Final Completion, or for such longer period as may be required by law.

**§ A.5.2** When the Contractor believes that all the Work required by a Work Order has been fully performed, the Contractor shall deliver to the Owner a final accounting of the Cost of the Work.

**§ A.5.3** The Owner's auditors or other representatives will review and report in writing on the Contractor's final accounting within 60 (sixty) days after delivery of the final accounting to the Architect by the Contractor. Based upon such Cost of the Work as the Owner's auditors or other representatives' report to be substantiated by the Contractor's final accounting, and provided the other conditions of Section 3.2.1 of the Master Agreement have been met, the Architect will, within seven days after receipt of the written report of the Owner's auditors or other representatives, either issue to the Owner a final Certificate for Payment with a copy to the Contractor, or notify the Contractor and Owner in writing of the Architect's reasons for withholding a certificate as provided in Section 13.4.3 of the Master Agreement. The Architect is not responsible for verifying the accuracy of the Contractor's final accounting.

**§ A.5.4** If the Owner's auditors' or other representatives' report concludes that the Cost of the Work as substantiated by the Contractor's final accounting to be less than claimed by the Contractor, the Contractor shall be entitled to proceed in accordance with Article 19 in the Master Agreement without a further decision of the Architect. Unless otherwise agreed in the Contract Documents, a demand for mediation or other dispute resolution as provided in the Contract Documents, of the disputed amount shall be made by the Contractor within the timeline established in Article 19 of the Master Agreement, after the Contractor's receipt of a copy of the Architect's final Certificate for Payment. If the Contractor fails to request mediation within this 30-day period, the substantiated amount reported by the Owner's auditors or other representatives shall become binding on the Contractor. Pending a final resolution of the disputed amount, the Owner shall pay the Contractor the amount, if any, determined by the Owner's auditors to be due the Contractor.

**§ A.5.5** The amount of the final payment shall be calculated as follows:

- .1 Begin with the actual Cost of the Work substantiated by the Contractor's final accounting, which includes deductions for all discounts and unused contingencies, and construction savings achieved in the Cost of the Work, if applicable.
- .2 Add the actual expended general conditions substantiated by the Contractor's final accounting, which includes savings to the Owner for unused general conditions.
- .3 Subtract amounts, if any, for which Architect or Owner disputes, refuses or withholds payment, if any.
- .4 If Owner is entitled to deduct liquidated damages or any other damages or amounts provided in the Contract Documents, including clean-up fees, then subtract all such liquidated damages, amounts and fees.
- .5 If Contractor fails or refuses to complete the Work, or has unsettled claims with Owner, then subtract such amounts as the Architect shall determine as the cost for completing incomplete Work and the value of unsettled claims.
- .6 Subtract all previous payments made by the Owner.
- .7 If the aggregate of previous payments made by the Owner exceeds the amount due the Contractor, the Contractor shall reimburse the difference to the Owner, plus interest as allowed by law.

**§ A.5.6** If, subsequent to final payment and at the Owner's prior written request, the Contractor incurs costs in connection with the correction of defective or non-conforming Work that is not the fault of the Contractor or arising from the resolution of a dispute as described in Article A.1, Costs to be Reimbursed, and that are not excluded by Article A.2, Costs Not to be Reimbursed, the Owner shall reimburse the Contractor such costs and the Contractor's Fee applicable thereto on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price, if any. If the Contractor has participated in savings, the amount of such savings

shall be recalculated and appropriate credit given to the Owner in determining the net amount to be paid by the Owner to the Contractor.

