



Architect's Guide to Domestic Project Appointment Agreement

Signature of a written Agreement is compulsory even for Minor Works. It is a professional obligation for the Architect, but it is also a tool that enables him/her to perform services in full knowledge and to assure his/her Appointment both for the Scope of Services and the Payment of Fees.

Accordingly, the Appointment Agreement is a stage not to be neglected.

The Standard Agreement proposed by the *Conseil National de l'Ordre des Architectes (CNOA)* can be used when a Client wishes to confide a full service.

Nota:

When the Client finances its project by contracting a loan, the Architect's Appointment Agreement is concluded on the condition of the loan being obtained. In practice, this means that if the loan application is refused, the Architect should refund the fees to the Client that have been already paid to him/her.

Therefore, it is seriously recommended to commence the Appointment by signing with the Client an Outline Proposal Appointment Agreement.

- This enables the Architect to commence work on the project on the basis of a fixed lump sum fee that can be financed by the Client without waiting to obtain its loan.

- It also enables to obtain the approval of the Client for the Outline Proposals.

- And, it especially enables the Client to seek a loan because the Architect has assessed the project with regard to the initial Client Construction Budget.

The aim of this Guide is to explain certain clauses of the Architect's Appointment Agreement for the construction of a domestic project drafted by the *Conseil National de l'Ordre des Architectes* that require special attention and to recall some important advice in order to avoid difficult situations.

The Guide comprises 3 components:

Part 1 - Watchpoints during the Appointment (Stage by Stage)

Part 2 - Watchpoints on the Agreement and contractual liabilities

Part 3 - "More information" Sheets

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PART 1 - Watchpoints during the Appointment (Work Stage by Work Stage)

Preliminary and indispensable stages prior to a fair agreement

Initial meetings

Development of the Design Brief

The Client should provide the Design Brief. The Architect can assist to define the requirements and to record them in writing.

The Client's Design Brief appendix is a preliminary Client contact document. Its very detailed contents comprises two parts:

- information relative to the Client (family composition, site data, total construction budget, construction work to be undertaken and/or supplies to be provided by the Client)
- project objectives and requirements of the Client (an integral part of the Agreement).

This document, which is not exhaustive, enables the Client to determine with precision its requirements and expectations. It records the indispensable objectives of the Client and the Scope of Services to enable the Architect to identify the Client's requirements.

Nota:

Do not forget to have the Client stipulate if it requires, in particular:

- minimum areas;
- specific construction techniques;
- specific materials or procedures; and
- thermal performance certification, etc.

Client Construction Budget

Which amount is available and for which construction work: It is important to explain to the Client that the budget includes all the expenses related to the Project (except site acquisition): service connections, external works, construction contract sum, Architect's fees, other consultants, consulting engineers, soil survey, thermal performance studies, etc.

The Architect should assess the project with the Client's budget from the outset.

Nota:

Never underestimate to please his/her Client and in order to obtain the commission.

If the Client Construction Budget is insufficient: It is imperative to refuse the Client's unrealistic technical or financial requirements.

Nota:

The liability of the Architect could be questioned if he/she allows the Client believe that its budget is sufficient when, on receipt of tenders, the project is no longer feasible.

Indeed, the Architect has an ethical obligation to notify his/her Client of any discrepancy between its budget and the Design Brief. By precaution, it is recommended to give written notification.

Construction work to be undertaken or items to be supplied by the Client

For budgetary reasons, the Client may want to undertake a certain amount of the construction work. It is advisable to accurately record them in the information data sheet.

Depending upon the extent of this construction work, at the time of signing the Appointment Agreement, it is necessary to negotiate with the Client the impact of this construction work, both on the fees of the Architect and their respective liability.

Project financed by bank loan

If the project is financed by a loan contracted by the Client, the provisions of the Scrivener Act apply to the Architect's Appointment Agreement that is concluded under the suspensive condition of obtaining the loan (as this Act is common law, there are no exclusions). If the loan application is refused, the Architect is obliged to refund the fees received. This is the reason why clause 14.2 of the Agreement stipulates that the Client has the obligation to contact different financial institutions to obtain several loan proposals within one month that commences on the day of signature of the Agreement. Accordingly, if possible **do not begin work** before the Client has obtained approval of its loan application.

If the Client can finance the Outline Proposals without applying for a loan, it is recommended to initially conclude an Outline Proposals Agreement which enables the Architect to start his/her design without being under the jurisdiction of the Scrivener Act.

| **More information:** Refer Sheet N° 1: Scrivener Act - Protection of mortgage holders

Signature of Design Brief

Once the Design Brief and the requirements are well defined, the Architect **should have it signed by the Client.**

Nota: The Design Brief is a contractual document.

Documents the Client should provide

These documents, defined in the Agreement, are all the legal and technical data in the Client's possession: title deeds, easements, town planning certificate, boundary limits, co-ownership regulations, subdivision terms and conditions, previous proposals (if any), surveyor drawings, site boundary plan, soil survey results and analysis, climatic and seismic constraints, natural or technological risks plan, photographic documents or any other that enable to integrate the project into the site.

Specific point on the Construction Notice of construction located near underground, aerial or underwater services or near conduits

As of 1st July 2012, every Client who envisages construction work should verify beforehand if there exists, within or in proximity to the construction work, underground, aerial or underwater services or conduits.

During the design development stage, the Client should consult the local council to obtain the list and contact details of the public authority for each of these Works as well as detailed plans of public utilities in service.

The Client then sends notification of intended construction work to each of the public utility authorities whose service implantation is affected by the location of the construction work.

| **More information:** Refer Sheet N° 2: Notification of intended construction work located in proximity to underground, aerial or underwater services or conduits

Conclusion

A good formulation of the Design Brief by the Client, of its requirements and expectations, as well as the Scope of Services that he/she expects, is indeed essential. Lack of information about the Scope of Service can lead to important budget over-runs.

Signature of the Agreement

Explanation of Agreement provisions

Before signature of the Agreement, the Architect should explain its provisions to his/her Client. In particular, he/she will take care to clearly explain his/her services, his/her role, obligations, fees, etc. but also to remind the Client of its obligations. This should enable the Client to understand the role and the added value of the Architect in the development of its project. Consequently, the Architect will take care to not to send by post the Agreement to his/her Client without beforehand making this presentation.

Contracting parties

The Architect will take care to verify the status and legal capacity of the Client or its representative. He/She should record the name of the Client. Indeed, for natural persons take care to indicate the name and first names of each of the contracting parties.

For companies, the Architect can verify the existence of the company online at www.société.com or www.infogreffe.fr

Nota: For companies in the course of constitution (such as Property Companies, in particular), it is advisable to indicate clearly "Company in the course of registration, represented by Mr/Mrs/Ms in person".

Nota: If the Client is a property company, recourse to an Architect is compulsory from the outset.

Contract Sum

On no account should the Architect commit him/herself to a fixed construction cost. If he/she does, the Agreement could be considered as a house building contract with specific obligations, in particular, in terms of guarantees.

More information: Refer Sheet N° 3: Risk of mutation of an Architect's Appointment Agreement into house building contract - traps to avoid!

Fee amounts

The Architect's fees should be clearly defined. The sum excluding VAT, the rate of VAT applicable as well as the sum including VAT, should be clearly indicated.

Retainer fee

A retainer can be requested when signing the Agreement even if the Architect has not commenced his/her Services. Contractors and house builders often use his practice (deposit limited to 5%).

For architects, the retainer sum is not regulated by law but the amount should be coherent with the fees for the Work Stages commissioned.

Timetable

The Architect can only be committed to the Timetable that is of his/her resort namely, those of the design phase.

Obviously, he/she can not be liable for the planning application instruction period (which depends on the local authority), the construction timetable nor the practical completion of the Works (which depends on contractors) and, in general, the periods which imply outside intervention (in particular, such as technical studies, electricity connections, land surveyor, etc.). If he/she does, the Agreement could be muted into a housing building contract.

Nota: Late penalties imposed on the Architect can only apply to the design studies and on no account to the construction phase.

More information: Refer Sheet N° 3: Risk of mutation from Architect's Appointment Agreement to a house building contract - traps to avoid!

Place of signature of the Agreement

Avoid signing the Agreement at the place of residence of the client: It is fairly frequent that signature of the Architect's Appointment Agreement is carried out informally over a drink in the home of the Client. In this case, few architects know that the Agreement is then subject to the very binding rules of door-to-door selling (article L 121-21 and thereafter of the Consumer Code). Indeed, the Client benefits from a right of retraction, i.e. the possibility of withdrawing from the Agreement during a 7 day period. During this period, the Architect can not claim any fees.

Nota: Rules protecting door-to-door selling also apply when the Agreement is signed at the workplace of the Client and, even if the purpose of the visit was only to confirm a commitment already made during previous negotiations and the Architect comes at the invitation of his/her Client.

When the Agreement is concluded at the residence of the Client, it is necessary to have the Client sign an [appendix that stipulates the terms in order to exercise the right of renunciation by the Client](#) and to attach to the Architect's Appointment Agreement, a [detachable Retraction Form](#).

Nota: Sending the Agreement by post to the Client does not enter within the legal provisions of door-to-door selling because the Client then takes time to "quietly" read the Conditions before returning it signed to the Architect, fully informed.

Conclusion

The signature of the Agreement is essential in the performance of the Appointment. The Conditions of agreement, explained and signed, will enable to limit disputes in best interest. The Architect can prove that he/she gave full advice. Moreover, do not forget that the signature of the Agreement is an ethical obligation. It is forbidden for the Architect to produce the slightest sketch or to give advice without an Agreement signed beforehand with the Client.

Outline Proposals Work Stage

Statutory and technical context

Town planning documents: The Architect should inquire, not only about town planning regulations applicable to the project, construction codes and the other seismic constraints but also the existence of any co-ownership or subdivision regulations, private and public easements, local constraints, etc.

The Client should supply this data to the Architect but if it does not, the Architect should obtain it. Moreover, the Architect should determine that the documents are current and confirm the zoning.

The Town Planning Certificate is useful for this purpose but the information it contains does not guarantee the constructability of the site. The only guarantee is Planning Permission subsequent to third party appeal.

Nota: A meeting on site can be useful to evaluate the situation and the geographical technical data.

Obviously, comply with all regulations! The Architect should inquire about any changes or revisions of the current Town Planning Regulations or those yet to come. Planning Permission is delivered with

respect to the Regulations applicable at that date (and not the Application date). Revision of planning regulations during instruction of the application can be very detrimental to all parties.

Nota: If the house is intended for rent, specific regulations apply: handicapped person access, health and safety, etc.

Existing and adjoining Works: Have recorded by a bailiff, the state of existing premises belonging to neighbours if the future construction work is likely to have an impact.

Nota: In case of common boundary ownership, the agreement of the neighbour is compulsory for any intervention on a party wall, even a simple support.

Soil Survey: The Architect should advise the Client to commission a soil survey.

If the Client refuses, the Architect should take note and issue written notification of the possible consequences upon the structure of the house, possible additional cost, the impossibility to subscribe construction insurance, etc.

Seismic Regulations: These Regulations should be taken into account from the outset. The Architect can engage his/her liability, even in the absence of a seismic.

Nota: New seismic regulations are applicable since 1st May 2011. The website <http://www.planseisme.fr/> gives useful information on these regulations (in particular, zone map).

Energy performance: Clause 5.2 of the Agreement stipulates the Architect deploys within the scope of his/her obligations to apply architectural and technical solutions to obtain thermal performances imposed by the regulations.

Taking into account the impact of the lifestyle of Clients on the results in terms of energy consumption, on no account can the Architect be liable for energy consumption results and thus can not be responsible for results on energy matters.

Nota: The Thermal Regulation, RT2012 is applicable to all Planning Applications for houses since 1st January 2013.
If the Client needs the house designed to respect a more binding regulation or specific requirements (i.e. thermal performance certification), this should be recorded in clause 17 of the Agreement (Specific provisions).

Cost estimate

The Architect **should** prepare an initial Construction Cost estimate using ratios and review the Design Brief with the Construction Cost Budget. The estimate should be dated, and identified with the proposal it refers, areas, specific processes, etc. In case of discrepancy, the Architect should inform his/her Client in writing.

Nota: For each ratio, it is advisable to stipulate what is included.

Approval of proposals by the Client

It is seriously advised to have the Client sign the Outline Proposals. These proposals will influence the ensuing project. Accordingly, they should be the subject to written approval by the Client (as for each Work Stage and document submitted).

Concept and Design Development Work Stages

Technical studies

The Architect should request the technical input necessary to design the project. At the expense of the Client, these studies are either confided directly to an engineering consultancy or to the Architect who can sub-contract them if he/she does not have the necessary technical competence within his/her practice. In the meantime, the services performed by the Architect will bear the mention "Subject to the results of technical studies".

Nota: If the Client refuses, the Architect should record the refusal and inform the Client in writing of the potential consequences due to the lack of technical studies.

Planning Permission

Signature of the Planning Application File

It is advisable to have the Client sign all the file documents.

Nota: The Architect will note on drawings a statement, such as: "*These drawings are not production drawings and are not to be used to carry out construction work*".

As the "applicant", the Client should submit the Planning Application to the local authority. Of course, the Architect can make submission but this is an **additional** service.

Posting the Planning Permission Notice

When obtained, the Planning Permission Notice should be posted on site. It is an obligation of the Client. He should use the statutory panel.

The Architect can advise the Client to have a bailiff record this posting on three occasions: on the day of posting, a month later and then two months later (at the end of the of third party appeal period). This facilitates confirmation of Planning Permission by avoiding a last minute appeal by a local resident, for example. Obviously, the posting should be maintained throughout construction.

Nota: Do not commence construction before obtaining Planning Permission and after third-party appeal (two months as from the posting of the Planning Permission Notice on site). Indeed, if the Planning Permission is cancelled, the Client and the Architect risk legal proceedings for breach of Town Planning Regulations (construction without Planning Permission). The court can even impose the demolition of the Works.

Amended Planning Permission

For minor revisions to the project, an amended Planning Application should be obtained **before** carrying out the alterations. The amended Planning Permission Notice should be posted on site under the same conditions as the initial Planning Permission.

| **More information:** Refer Sheet N° 4: Amended Planning Permission - conditions

Cost Estimates

Concept Work Stage

The Architect prepares the Construction Cost Estimate to take into account all the construction work necessary for the completion of the Works less the cost of construction work to be undertaken by the Client.

If the provisions of clause 7.2 of the Architect's Appointment Agreement stipulate that building materials, construction processes and internal fixtures & fittings are to be selected by the Client at the latest on commencement of the Design Development Stage, this estimate is made on the average cost basis.

Design Development Work Stage

The Architect prepares a Construction Cost Estimate, for each trade, which should comply with the estimate provided at the Concept Design Work Stage, within the limits of the tolerance rate set contractually. In practice, the rate generally varies between 5 and 10%. It should be discussed with the Client then stipulated in the Agreement (clause 7.5).

The two estimates will be compared at "present day value". The present day value is the constant purchasing power over time. Its theoretical value is calculated for a given year, less the impact of cost variation due to inflation or deflation in the consumer price index.

To facilitate comparison between the two estimates that of the Concept Design Work should be "corrected" by application of the consumer price index at the date of the Design Development estimate (www.insee.fr).

Nota: The Client can undertake certain construction work. In this case, it should be recorded in writing and prepare an estimate that takes into account the trades undertaken by the Client.

Health & Safety Co-ordination

Co-ordination for safety and health protection (CDM Co-ordination) consists in setting up measures necessary to ensure the safety and health protection of persons who work on building or civil engineering construction sites in order to limit the number and the seriousness of personal accidents to workers. This co-ordination should be organized when several independent tradesmen or contractors including Sub-contractors intervene (notion of "co-activity").

When a private individual undertakes a construction project for his/her personal use, that of his/her spouse, partner related by civil agreement, common law husband/wife or ascendants or descendants, co-ordination is assigned to the Architect during the design phase, the design and documentation of the project, and to whoever undertakes the construction site management, i.e. in practice, either the Prime Contractor or the Contractor which undertakes the "shell and core" or the "prime contract" during the construction phase of the Works.

Nota: Accordingly, the Architect is appointed by default as CDM Co-ordinator on the construction sites of private individuals during the design phase.

The co-ordination service assigned to the Architect terminates when the Client has signed the building contracts.

| **More information:** Refer Sheet N° 5: CDM Co-ordination

Tender Action Work Stage

Building contracts

Tender Action documents are:

- the building contract, comprising either a Memorandum and Conditions of Contract or a single contractual document
- the drawings and written documents prepared by the Architect and Consultants including, in particular, the Construction Specification
- the initial Construction Timetable prepared by the Architect.

Nota: The Building Contract can make reference to AFNOR Standard NFP 03-001 (Conditions of contract applicable to construction work in the private sector). In this case, the Standard binds the Parties in its totality except if the building contract stipulates exclusions.

Construction Specifications for Tender Action: The drafting of Construction Specifications for the Tender Action should be very accurate to avoid estimation errors by Contractors and additional cost.

Nota: Have the Client sign building contracts and do not to make do with signing a Contractor's Tender.

Retention Sum: The Building Contract can make provision for a Retention Sum to ensure the execution of the construction work necessary to make good the reservations recorded during Construction Handover. The Retention Sum is limited to 5% of the Contract Sum. This Sum should be considered as a retainer. Within the scope of his/her duty to advise, the Architect should recommend it to the Client.

Nota: The Retention Sum can not be applied if the Contractor provides, for an equivalent sum, a joint and several guarantee from a financial institution.

Contractor selection

Do not resort to a General Contractor: It is necessary to work in separate trades or with a consortium of Contractors (on the condition that the consortium does not undertake the shell and core, water tightness, and air tightness).

Indeed, recourse to a General Contractor could have as consequence the mutation of the Architect's Appointment Agreement into a house building contract, a highly regulated sector (legislation of 31st December 1990). The Architect would then be obliged to provide the same guarantees as house builders (in particular, firm commitments on cost and timetable, perfect completion warranty).

More information: Refer Sheet N° 3: Risk of mutation from Architect's Appointment Agreement to house building contract - traps to avoid!

Consult several contractors for each trade and keep records of this Tender Action in case of unsatisfactory tenders. If the Client asks for a single estimate per trade, this should be confirmed in writing.

Nota: It is compulsory to have the Client sign the Building Contracts. Do not make do with a Contractor's tender simply signed and accepted by the Client.

Tenders Analysis should be undertaken with seriousness. It is strongly recommended to verify:
- the legal existence of Contractors (www.société.com www.infogreffe.fr)

- their qualifications and references (their size with respect to the construction work, financial solvency)
- their insurance cover, in particular the sphere of activity, the validity period.

The Client selects the Contractors to award contracts. The Architect only suggests a list of Contractors to be retained after evaluation of their Tender.

Nota: If a Contractor tendering seems unreliable, the Architect should notify the Client in writing and inform about the risks incurred if entering into contract.

Beware of the lowest tender! The Architect should inform his/her Client of the risks taken by always seeking the lowest tender - on the quality, the timetable, etc.

Construction Timetable

A very important document, the Architect prepares the Construction Timetable with Contractors and has them validate it. The Timetable binds the Contractors only if they sign it. Accordingly, take care to have all the Contractors sign (e.g. during a "Timetable" meeting that assembles all the participants); the same goes for revised Timetables.

Nota: All revisions to the Timetable should be issued to Contractors and the Client. It can be an amendment to the provisions of clause 10 of the Agreement should additional construction work ensue.

Only Contractors are committed to the Timetable. The Architect can not guarantee the Construction Timetable (the reason why he/she can not incur penalties during this phase). Each Contractor is responsible for its own timetable and delays.

Nota: Architect's Appointment Agreement provides for a single Commencement Notice of construction work on site. This Notice is issued to all Contractors at the commencement of construction.

Contractor deposits

Down payments for Contractors, at the signature of the Building Contract, are regulated and can not exceed 5% of the total Contract Sum (legislation of 16th July 1971). The Architect should take particular care and not accept down payments in excess of 30%, for example.

Revision of the list of construction work undertaken or supplies provided by the Client

If, during the performance of the Appointment, the Client revises the list of construction work the Client undertakes (either more or less), this is considered as a revision to the Design Brief which results in an amendment in compliance with clause 7.2 of the Agreement if this revision occurs during the Concept Design Work Stage, otherwise clause 10 if this revision occurs at a later stage.

Revision of the list of construction work undertaken by the Client during the performance of the Appointment does not change the fee amount due to the Architect for Work Stages already completed.

Under no circumstances should the list of construction work to be undertaken by the Client be revised subsequent to the commencement of construction.

Construction Work Stage

The Architect monitors construction work; he/she does not supervise the construction site.

Instruction to commence construction

Clause 7.7 of the Agreement stipulates that the Architect issues the instruction to commence construction to the Contractors. He/She signs this instruction and has it countersigned by the Client before issuing to Contractors.

Contractor Interim Payments

The Architect takes care to inform the Client not to settle **invoices directly to Contractors**. Indeed, in compliance with the performance of the Contract Administration Service, the Architect should review beforehand all Contractor interim payment claims.

Obviously, the Architect should approve claims only if they are in accordance with the actual state of advancement of construction work.

Sub-contracting

The Architect should take care that the Prime Contractor declares Sub-Contractors to the Client otherwise he/she should notify the situation in writing to the Client. Payment of Sub-Contractors should be agreed.

Nota: It is the Prime Contractor's responsibility to inform the Client of the identity of each Sub-contractor and to obtain the Client's approval. This notification can be undertaken at any time but, in the interest of each Party, it should be done prior to commencement of construction work.

Site meetings and visits

Distinction: The Architect's Appointment Agreement distinguishes between site meetings and visits to the construction site.

- Site Meetings are in the presence of interested Parties. The Architect should convene the Contractors (which attend or not the meeting but who nevertheless should be duly convened). Minutes are issued subsequent to each Site Meeting.
- Site Inspection Visits are not scheduled. The Architect can undertake them alone, unexpectedly, in order to inspect the quality and compliance of construction work at key stages of construction. Site Visit Reports are not automatically written nor issued to Contractors unless required.

Nota: The frequency of the meetings should be stipulated in clause 7.7 of the Agreement. If the Architect organizes weekly Site Meetings, it is imperative to prepare and issue the minutes. Furthermore, it is possible to adapt the frequency of Site Meetings, not only in respect to holidays and bad weather, but also the advancement of construction work. Indeed, the frequency can be different at the commencement of construction (i.e. at the foundation stage) or during final painting or tiling. It is advisable to inform both the Client and the Contractors.

Contents of Site Meeting minutes: They should record the list of Contractors convened and those present. They should also list any contention, whether it concerns the timetable or performance.

Nota: The Site Meeting minutes is not a contractual document. It only serves to record, on the day "x", the progress of construction in the general Timetable. For example, if it records a specific and additional requirement from the Client not stipulated in the initial Building Contract, this would not suffice. The signature of an amendment will still be required.

Construction waste management

The Architect should remind Contractors of their obligation to manage construction waste (collect, sort and evacuate waste not to destroy them on site, in particular, by burning).

The Architect who intervenes in the management of construction waste on site encroaches upon the role of the Contractor. This intervention could serve to implicate the Architect in the management of the construction works.

Nota: The Architect's insurance only covers specific professional acts.

| **More information:** Refer Sheet N° 6: Management of construction waste

Additional construction work

If additional construction work is required or requested by the Client during construction, it is advisable to have amendments signed in the corresponding Building Contracts. Moreover, the Client should approve them in writing.

Nota: If additional construction work increases the Architect's Scope of Services, an amendment to the Architect's Appointment Agreement will also have to be signed.

Late penalties applied to Contractors

In case of delays by Contractors recorded in the Site Meeting minutes, the Architect should recommend to the Client that late penalties be applied. The Client decides whether or not to apply them.

Nota: In order to apply penalties, they should be stipulated in the Building Contracts and be really attributable to the Contractor (in particular, the delay should not be due to inclement weather nor to revisions requested by the Client).

| **More information:** Refer Sheet N° 7: Inclement weather

Additional fees when construction work exceeds the Construction Timetable due to the Contractor

It is possible to provide such a clause. In that case, several precautions should be taken:

- Contractors should be advised of this provision;
- there should be a specific clause in the Building Contract; and
- the Architect should keep an accurate account of construction progress and strict management of delays by each Contractor.

| **More information:** Refer Sheet N° 8: Additional fees when construction exceeds Construction Timetable due to the Contractor

Is the Architect responsible for theft on the construction site?

No. The Contractor, including Sub-Contractors, is responsible for the protection of work-in-progress. As such, the Contractor should bear the risks of theft (article 1788 of the Civil Code). Protection of the Works is transferred to the Client only after the Construction Handover of the premises.

Nota: Clause 13 of the AFNOR Standard NFP 03-001 stipulates that the Contractor should protect its building materials and Works against the risks of theft, hijacking and the risk of deterioration (the AFNOR Standard only applies when both Parties agree to make reference in the Building Contract).

What to do if a Contractor defaults during construction?

First, it is up to the Client to give the defaulting Contractor written notification to complete or to continue construction work. Failing which, the Client can issue a termination notice to the Contractor for non-compliance with the Building Contract. He can also seek a court order (obligatorily) for construction work to be completed at the defaulting Contractor's expense and detriment.

| **More information:** refer Sheet N° 9: Manage the default of a Contractor

What to do when the Client interferes

Contractors can only receive instructions from the Architect and on no account from the Client. As a rule, architects and contractors are liable even if they were following instructions from the Client. They can be entirely or partly exempted from their liability if the Client is unmistakably competent in construction, if it effectively and really intervened in the construction and if it committed a fault.

| **More information:** Refer Sheet N° 10: Client interference

Practical Completion Work Stage

Practical/Final Completion of construction work

Construction Handover can be considered only when construction work is completed and, in particular, that which concerns the safety of persons.

Guard rails: The Architect should not assist his/her Client with Construction Handover in the absence of guard rails nor with non-complying guard rails.

If the Client insists that he/she handovers without this obligatory safety requirement, the Architect should refuse. This refusal could imply the termination of the Agreement. A Client instruction for the Architect to act illegally is sufficient reason to break the Agreement on the initiative of the Architect.

Accordingly, the Architect notifies the Client in writing that guard rails are to ensure the safety of persons and their absence constitutes a breach of the law; that a building without guard rails or with guard rails that do not comply can not be considered as complete and thus can not be handed over; that as a consequence, the assistance of the Architect during Handover is not possible; and that duly warned, the Client will have to bear the liability for any consequent accident.

Nota:

Disclaimers of responsibility given by the Client in writing have no value and do not exempt the Architect of his/her liabilities.

Suspension of construction: If construction is suspended, a report is prepared of construction work that remains to be completed and any defects in the Works already carried out. This report is considered to be Handover with reservations if all interested Parties undertake it jointly. This Construction Handover procedure is recognized when the Contractor, as well as the Client, has been duly convened, ideally by written notification with recorded delivery.

| **More information:** Refer Sheet N° 9: Dealing with the defaults of Contractors

Taking possession before Construction Handover:

Construction Handover initiates the payment of outstanding fees and especially the commencement date of warranties. It is extremely important to respect the procedure of this stage and to prepare a written report to avoid any contention.

Especially, and if possible, avoid that the Client takes possession of the premises before Handover. However, if there is no other choice than to take possession before Handover is carried out, undertake partial Handover of sub-contracts or trade packages whenever possible. However, this situation should remain the exception because partial trade-by-trade Handover has as a consequence to spread out the commencement date and term of each guarantee period (perfect completion, biennale, ten-year warranty).

Construction Handover procedures

The Architect should convene the Client and Contractors including any defaulting Contractors.

Nota:

The Architect assists the Client for the Handover of only trades that he/she has monitored. The Architect should not undertake Handover of construction work undertaken by the Client.

Construction Handover Report: Have the Client and Contractors sign the Handover Report. If a Contractor is absent, and if properly convened, or if present but refuses to sign the Report, the Handover is nevertheless enacted (by the signature of the Client).

Construction Handover with reservations

If Construction Handover is carried out with reservations, the Architect issues a formal request to Contractors to undertake the construction work necessary within the period stipulated in the Handover Report. In compliance with article 1792-6 of the Civil Code, non-fulfilment of these works within the period, another Contractor at the expense and detriment of the defaulting Contractor can carry out the construction work.

Final Completion Certificate: The Final Completion should be recorded in a report or a statement **signed by the Client**. It is not sufficient to monitor that the construction work has been completed. It should be recorded in writing. Indeed, this document enables to complete, without ambiguity, the Appointment of the Architect and to initiate, if need be, the Final Payment of fees.

Construction Handover refusal

The Architect should inform in writing the Client who refuses to handover construction of the importance of Handover. Indeed, Construction Handover is the legal act that constitutes the commencement date of the guarantee of perfect completion owed by Contractors, the guarantee of good function and the ten-year warranty period due by Contractors and the Architect. Also, it constitutes the commencement of the compulsory construction insurance that covers the ten-year warranty period of Contractors and the Architect.

Moreover, if the Client refuses to handover the Works, the Contractors can request the Handover, by court order if required.

| **More information:** Refer Sheet N° 11: Handover of construction work

Administrative controls and penalties

The administration has a legal right of access to the Works and receipt of the technical documents, either during construction work or during a three year period after completion (article L 151-1 of the Construction and Housing Code).

Infractions of building practice which concern the stability of the Works or the safety of persons (seismic construction regulations, accessibility, fire security, guard rails...) can be subject to reports prepared by authorized civil servants and submitted for prosecution (article L152-1 of the Construction and Housing Code).

Legal sanctions are incurred in case of disregard of these regulations (fines up to 45,000€ and six months detention in case of subsequent offences). They concern Clients and Developers (article L 152-4 of the Construction and Housing Code).

PART 2 - Watchpoints on the Agreement and contractual liability

Compliance with the Agreement and Conditions

For the Architect, in particular, it means **complying with the Appointment: no more, no less**. Accordingly, the Architect should refuse to visit the construction site, for whatever reason, if his/her Appointment terminated at the Design Phase.

Compliance with Building Regulations

The Architect should imperatively comply with the Building Regulations, in particular those related to the safety of persons. He/She incurs fines even if exempted by the Client that has no legal value (e.g. lack of guard rails or guard rails not in compliance with Standards).

Services approvals

The Client should imperatively confirm in writing approval of all documents submitted.

Systematically, the Architect should have the Client sign:

- drawings: dated - request the Client to note any observations,
- written documents, in particular estimates: have them signed and approved progressively,
- written notification or advice.

Nota: The signature can be preceded by the mention "*Seen by the Client, on...(date)*".

Respect the Client's Construction Budget

The Client's Construction Budget should be respected throughout the Appointment.

Each time a revision is requested, the Architect confirms in writing (by e-mail, at least) to his/her Client that the required revision will entail additional cost.

The Design Brief and estimates are updated on each request from the Client. It is imperative to notify the Client of the financial impact of its requirements **and to obtain written agreement of all additional expenditure**.

Nota: All revisions should be the subject of an amendment. All suspensions should be confirmed in writing.

Architect's fees

Clause 8 of the Agreement stipulates "The fee amount of the Architect for the full service is ...% of the Final Contract Sum excluding VAT that results from the Final Accounts excluding construction work undertaken by the Client".

However, when the house is constructed for a private individual building for itself, an area less than 170m² floor area or the footprint of the construction that results from the floor area, the Agreement provides that fees for the design phase up to and including Planning Permission are fixed lump sums in compliance with the last paragraph of clause 47 of the Architects' Code of Professional Conduct.

Nota: If the Parties opt for another basis of fee calculation, e.g. a fixed lump sum fee for full services, it is advisable to stipulate the basis in clause 17 of the Agreement concerning Specific provisions:
"In dispensation from the 2nd paragraph of clause 8 of the present Agreement (or

the 4th paragraph if the Client, a natural person, builds below the 170m² threshold), the Architect's fee is determined as follows..."

Fee Payment Schedule

Payment of each Work Stage of the Appointment is due on delivery of the service to the Client. Accordingly, the fee attributed to the preparation of the Planning Application is due on delivery of the Application File to the Client (and not the submission of the Application or on obtaining Planning Permission).

Penalties

Clause 9 of the Agreement provides penalties in case of non-compliance with the service performance periods by the Architect. These penalties are applicable only on the Design Stage, the timetable of the construction phase depends not the Architect but upon the Contractors.

These penalties are **mutually exclusive**: This means the Client can not take legal action against the Architect based on this delay to demand damages in addition to the contractual penalties.

Amendments to the Agreement

During its course, the Agreement can be subject to different revisions: timetable, fees, services, etc. These revisions should be the subject of an agreement between the parties in the form of an Amendment, a contractual document that modifies an initial Agreement in one or several of its provisions.

Concluding an Amendment

Just as the initial Agreement, a copy for each Party is prepared and should be initialled and signed by each of the Parties.

Additional fees

Clause 10 of the Agreement makes provision for additional fees for all revisions to the Design Brief or Services. The Client should confirm these fees by signing an Amendment to the Agreement.

Nota:

The Architect should request the signature of an Amendment: **do not accept a percentage fee based on the Final Contract Sum**, thinking that whatever the additional services, they will be paid for by the application of the percentage fee rate to the Final Contract Sum. Firstly, because this calculation will not necessarily cover the cost of the Additional Services. Further, because the Amendment confirms the existence of the Additional Services and their fees.

During the design phase, the Agreement stipulates a maximum of two Outline Proposals (clause 7.1). If several proposals are required, the Architect will propose concluding an Amendment to agree a fee in consequence.

Project suspension

During the Agreement, the project can be suspended for different reasons. In this case, the Parties can agree to the **suspension of the Appointment** in accordance with the provisions in clause 12 of the Agreement. On resumption, if the suspension of the Appointment has increased its complexity, the Architect proposes to conclude an Amendment to his/her Agreement. He/She then adjusts his/her fees in consequence.

Intellectual property

Clause 11 of the Architect's Appointment Agreement can be developed with reference to the clause in the Standard Architect's Appointment Agreement for New Build.

| **More information:** Refer Sheet N° 12: Intellectual property

Completion of Architect's Appointment Agreement

The Agreement is normally completed when each Party has fulfilled its obligations. In practical terms, the Architect has completed his/her services and the Client has settled payment of outstanding fees.

Clause 7.8 of the Agreement makes provision for several situations. The Architect's Appointment is completed either at Construction Handover without reservations or on completion of the reservations recorded during Handover. In any case, his/her Appointment is completed a year after Handover.

Termination of the Agreement: The Agreement can be terminated prematurely, i.e. **termination** on the initiative of the Client or the Architect. However, termination of an Agreement by the Architect constitutes professional misconduct except when for "just and reasonable motives" (clause 38 of the Code of Professional Conduct), in particular, such as loss of confidence shown by his/her Client or the non payment of outstanding fees.

In all cases, the termination clause 15 of the Agreement should be scrupulously respected (motives for termination, periods, procedure and, if need be, the 20% indemnity).

| **More information:** Refer Sheet N° 13: Completion of the Architect's Appointment

Dispute resolution

In case of a dispute between the Architect and the Client, particularly in the settlement of fees, the *Conseil Regional de l'Ordre des Architectes* can be consulted in an attempt to resolve the dispute through negotiation (clause 16 of the Agreement).

Referral to the Conseil de l'Ordre: The Architect writes to the Regional Council President to request him/her to intervene for the payment of his/her fees or for any other difficulty relating to the application of the Agreement. To support this request, he/she imperatively joins a copy of the Agreement, fee accounts, reminder letters and other correspondence with the Client, the services for which payment is due, as well as of any documents likely to inform the *Conseil de l'Ordre* on the claim (all documents classified in chronological order).

The *Conseil de l'Ordre* then contacts the Client to know its position then delivers an opinion on the point of contention or, as the case may be, organizes a reconciliation meeting between the Parties. The majority of the disputes for which the Ordre is consulted end in negotiation. In case of failure, the Parties can have recourse to the courts, if they so desire.

PART 3 - "More information" Sheets

Sheet N°1: Protection of mortgage holders - Scrivener Act

The provisions of the 13th July 1979, Scrivener Act relative to the information and protection of mortgage holders, in articles L 312 and thereafter in the Consumer Code apply to the construction, repair, improvement and maintenance costs of a building for residential or professional with residential use.

Principle:

When the Architect's Appointment Agreement is with a private individual who has recourse to one or several loans to finance the project, the Agreement is obligatorily concluded under the condition of obtaining one or several loans.

If the private individual does not obtain one or several of the loans necessary to finance the project, any sum paid beforehand by the Client to the Architect is immediately, and in its totality, refundable without retention or penalty for whatever reason.

This condition can not be exempted. On the other hand, it can be limited in time. For this reason, clause 14 of the Agreement stipulates that the suspensive condition commences on the day of the signature of the Agreement with duration of validity of one month.

Regulations in force since 1st May 2011:

1) Architect's Appointment Agreement is subject to the suspensive condition of obtaining of the loan, irrespective of the amount, when it has for object to finance:

- projects related to construction work, in particular, the construction of a house

or

- construction work on existing premises (repair, improvements or maintenance) undertaken subsequent to the purchase of a property financed by the same loan: i.e. where the Client buys property to renovate.

| **NB:** Previously, these regulations applied to over 21,500€ of expenditure

2) The Architect's Appointment Agreement is subject to the suspensive condition of obtaining the loan when it finances the repair work, improvement or maintenance of a building already belonging to the Client and when the Construction cost exceeds 75,000€.

Sheet N° 2: Construction Notification when work is located in proximity to underground, aerial or underwater services or conduits

Since 1st July 2012, every Client who envisages construction verifies beforehand if there exists within or near the construction work one or several public utilities as follows:

- conduits and underground galleries containing liquid or liquefied hydrocarbons, liquid or gas chemicals, combustible gases
- conduits and distribution pipes of steam, surheated water, hot water, chilled water or any other coolant or refrigerant
- electrical cables, public lighting systems
- conduits of waste by pneumatic device under pressure or by aspiration
- electronic communication installations
- supply and distribution conduits of water intended for human consumption, for industrial use or protection against fire, under pressure or free flowing including ancillary underground water tanks
- drainage conduits containing domestic or industrial waste water or rain water (article R 554-2 of the Environment Code).

Nota:

The following construction work are not concerned:

1) Construction work that does not affect underground services:

- construction comprising neither excavation nor sinking, drilling of the ground or making the ground undergo neither compacting nor excessive loads, nor vibrations susceptible to affect underground services.
- underground construction work consisting only of adding, removing or modifying existing underground elements within tubes, conduits, galleries provided that this construction work does not affect the external integrity or the layout of the infrastructures.
- installation more than 1 metre below ground of anything such as nails, pegs, fixation screws less than 10cms in length and 2cms in diameter.
- replacement more than 1 metre below ground of identical pits, without digging beyond the initial excavation in depth and in width and provided that the digging does not exceed 40cm in depth.

2) Construction work sufficiently distant from all aerial services

Construction work whose implantation:

- a) does not approach within at least 5 metres of the service, in horizontal projection, if construction work is not subject to Planning Permission;
- b) is located in its totality outside of the implantation of the service if construction is subject to Planning Permission.

3) Agricultural and horticultural work for the superficial preparation of soil not exceeding a depth of 40cm and seasonal agricultural works of an itinerant nature, such as irrigation and harvest.

4) And, under very strict conditions for urgent work stipulated in article [R 554-32](#) of the Environmental Act.

During the development of the project, the Client consults the local authority to obtain the list and the contact details of the public utility authority for each of these services as well as detailed drawings of the facilities in use.

The Client then issues a Construction Notice to each public utility authority whose service implantation is affected by the construction work.

The application is made on CERFA form N° 14434*01 available on www.reseaux-et-canalisations.gouv.fr.

Nota:

Until 30th June 2012, it was suitable to use forms DR/DICT stipulated in application of Decree N° 91-1147 of 14/10/1991 and its Application Order of 16/09/1994 (except in 2 experimental reform regions, namely Orleans and Perpignan, where the new forms can be used in compliance with the Order of 21st April 2011).

Sheet N° 3: Risk of mutation of Architects' Appointment Agreement into House Building Contract - traps to avoid!

Do not confuse the Architect's Appointment Agreement with the construction of a house and the House Building Contract (HBC) that residential developers should use governed by the 19th December 1990 Act and enacted in articles L 231-1 and R 231-1 and thereafter of the Construction and Housing Code.

A House Building Contract has the following objective:

- either the supply of drawings (i.e. the design) and carrying out part of the construction (HBC with drawings)
- or carrying out both the shell and core construction, water and airtight (HBC without drawings).

The difference between an Appointment Agreement and a House Building Contract is that the Appointment Agreement makes no provision to carry out actual construction work to be undertaken by Contractors selected and approved by the Client with whom it enters into contract. On the contrary, the builder will have construction carried out, for example, by Sub-Contractors.

When the builder provides one of the two types of services described above, a HBC should be signed. It is a standard contract that should include certain clauses to protect the consumer with the risk of legal sanctions for the builder, in particular, the means of payment in accordance with the advancement of construction work, the warranty certificate to guarantee delivery at an agreed cost and timetable, subscribed with a financial institution or an insurance agent, interim payments in accordance with the advancement of construction, etc.

The form that Parties give to their contractual relation never binds the courts. In a dispute, if a contract is wrongly entitled "Architect" or a "Building Contract" with the essential characteristics of a House Building Contract, the court will mutate the Agreement which risks to be problematic in regard to the legal action which can be engaged, i.e. the provisions of article L 241-8 of the Construction and Housing Act for the lack of written confirmation or guarantee of delivery.

For that reason, the Architect should avoid proposing certain Services in order to protect him/herself from a mutation from Architect's Appointment Agreement to House Building Contract with all the consequences that entails.

As a consequence, the Architect:

- can not have legal links with Contractors and sub-contract the construction work to them. He/She should only advise the Client who then remains free to select the Contractors. Indeed, the Architect who systematically refers the Client to the same Contractors, and especially to a General Contractor, demonstrates there was no essential competitive tendering by Contractors that could imply collusion between the Architect and the Contractors.
- can not be committed at the outset to the Construction Cost. His/Her only obligation consists in respecting the Construction Budget that the Client provided him/her.
- can not undertake to deliver a house within a fixed and definite period.

Indeed, these commitments could imply that the Architect intends to carry out him/herself the construction work, that he/she is the real responsible, which constitutes the object of a House Building Contract.

Sheet N°4: Revised Planning Application - Conditions

Preparation of a revised Planning Application lies within the provisions of clause 10 of the Agreement. An Amendment stipulates the corresponding additional fees.

After obtaining Planning Permission, the Client can submit one or more revised Planning Applications whilst upholding the approval acquired in the initial Planning Permission that are not the subject of one or more revisions.

However, revisions should be limited and should not question the nature of the project. Otherwise, it would be advisable to submit a new Planning Application.

Accordingly, if the revision envisaged does not affect the implantation, volume or height of the construction work and does not change the general nature of the project, it is possible to submit a revision. On the other hand, depending on the jurisdiction, it is advisable to submit a new Planning Application when it concerns demolition, the relocation of a building, reduction or important increases in area, reducing the number of floors, etc.

The initial Planning Permission should not be obsolete nor have been cancelled by a tribunal.

The granting of revised Planning Permission is possible only if the contents of the initial Permission are not completely redundant. The Building Inspector can not deliver an amendment when the construction work in the initial Planning Permission have been already carried out, even without a Construction Notice. The issue of a Certificate of Compliance is also an obstruction to submitting a revised Planning Application.

Nota: Moreover, in principle, the revised Planning Application should be submitted **BEFORE** the revised construction work is carried out!

When the construction work is already executed without Permission or in violation of Planning Permission already obtained, the only solution consists in submitting a "compliance" Planning Application.

The Planning Permission should comply with current provisions at the date when it is delivered.

The Application to revise a valid Planning Permission should be prepared in accordance with the CERFA form 13411*02.

Instruction of the Planning Application will only consider the revisions to the project.

The local authority should apply current regulations on the date of decision and not those that existed during the initial Planning Application.

Sheet N° 5: CMD Co-ordination

Health and Safety Co-ordination comprises setting up the measures necessary to assure the safety and to protect the health of persons who work on building or civil engineering construction sites and to reduce the number and gravity of personal accidents of these workers. Co-ordination is organized as soon as several independent workers or contractors intervene, including Sub-Contractors (notion of "joint-activity").

When projects are undertaken by a private individual for his personal use, that of his/her spouse, partner related by civil pact, common law husband/wife or its ascendants or descendants, co-ordination is assured:

1° When a project is subject to Planning Permission, **by the person assigned the design phase, i.e. the architect**, the design and documentation of the project, and by the person who effectively manages the construction site during the construction phase of the Works, i.e. the Prime Contractor:

2° When the Project is not subject to a Planning Permission, by one of the contractors on site during construction work.

This Appointed is not subject to written confirmation and the Co-ordinator by default requires no specific training.

Nota:

The Architect is thus appointed by default as CDM Co-ordinator on private projects during the design phase. In case of a safety issue on the construction site, his/her liability could be engaged. The Contractor and the Client should be notified imperatively in writing as soon as the Architect notices any danger to workers.

In projects other than the construction of a house for personal use by a private individual, e.g. rental accommodation, the Co-ordinator appointed by the Client should justify at least 3 years professional experience in the following fields: architecture, engineering, construction together with specific training.

The Co-ordinator's Scope of Services confided automatically to the Architect during the design phase

The Co-ordination Service attributed the Architect in this context, beyond the design and the management of joint-activity, is to draft a **simplified** General Health and Safety Co-ordination Plan since construction activity engenders a risk situation.

These risk situations are listed in article 1 of the 25th February 2003 Order: construction work with exposure to chemical substances, a risk of drowning, etc.

This simplified Plan only considers appropriate measures to prevent the risks ensuing from the interference of construction work with the other activities of different operators on the construction site or from the succession of their activities when, after completion, an intervention creates a specific risk.

The technical files that collate data relative to the search and identification of materials containing asbestos are attached to the simplified General Co-ordination Plan.

The Co-ordination Plan is completed and implemented in accordance with the progress of construction work and the actual duration spent on the different types of construction work or construction phases.

More generally, the safety obligations that are the responsibility of the Architect will be adapted to reality and should remain practical. For example, during the Tender Action Work Stage, it is sufficient that Tenders be informed that the future construction site is subject to Co-ordination and to appoint the CDM Co-ordinator, i.e. the construction phase co-ordination in compliance with the regulations.

The preventive measures adopted will then be implemented by Contractors as simply as possible based on the preliminary analysis of the risks.

Sheet N° 6: Construction waste management

Construction waste management is undertaken on the construction site as well as off site: collection, sorting, removal and stocking or recycling.

On the construction site implies the direct supervision of Contractors and a permanent presence, i.e. a presence that goes beyond periodic visits during construction management. Waste management is the role of Contractor. The Architect who agrees to carry out waste management on the construction site encroaches on the role of Contractor.

To undertake, during the performance of an Architect's Appointment, services carried out by the Contractor would conflict with the 20th March 1980 Decree of the Code of Professional Conduct (confusion of roles, clause 8), and the 12th July 1985 Act known as the Public Procurement Act (article 7, paragraph 2).

Damages attributed to construction waste management relate to civil liability under common law rather than the ten-year liability of builders.

The responsibilities incumbent to waste management (collection, sorting, removal and stocking, recycling) bind those who undertake waste management or on those who stock waste, i.e. depending on the circumstances the owner, the Contractor, the transporter or the disposal operator. These responsibilities are not directly related to waste ownership. Involvement of the Architect in construction waste management could well implicate him/her in the construction management. For Architects who accept such Services, the danger would be systematically liable along with the Contractors and often with uninsured, insolvent or absent Contractors.

Whence the importance for the Architect to refuse to intervene in waste management that is the responsibility of Contractors.

Of course, this does not mean that the Architect should not be interested in the construction waste issue. When he/she selects for the project design construction materials or equipment, the Architect should evaluate them not only in terms of safety and health as well as the environment, but also take into account that they will be or can be later removed. Furthermore, no later than during the Tender Action, the Architect should inform the Client of the need to consider the different constraints applicable to the construction project in regard to construction waste management and their incidence on the Cost and Timetable. If necessary, the Architect should take care that the means of waste removal, with the associated cost, figures distinctly in the Contractor's Tender.

Sheet N° 7: Inclement weather

In private building contracts, respect of the contract Construction Timetable constitutes one of the primary obligations of Contractor towards the Client. Any delay in the Construction Timetable engages the responsibility of the Contractor. However, this responsibility is not upheld if it is established that the delay results from a force majeure. Indeed, certain circumstances can legally prolong the projected construction period, the most frequent being inclement weather. Days of inclement weather are among the causes outside the Parties that can justify the suspension of construction site (article L 5424-6 of the Labour Code). Extension of time for construction work that subsequently follows can not be the Contractor's responsibility.

The NF P 03-001 Standard is the Conditions of contract applicable to private building contracts. It deals with inclement weather in article 10.3.1 dedicated to extensions of time for causes not attributable to the Parties. In terms of this provision, the Construction Timetable is extended by the number days of inclement weather. Penalties can not be imposed on Contractors for this extension of time.

What is a "day of inclement weather"?

- On one hand, are considered "days of inclement weather" those qualified as such by the Labour Code. According to article L 5424-8 of the Code, constitutes inclement weather "atmospheric conditions and flood situations when they effectively render dangerous or impossible to carry out the work in consideration either the health or safety of workers, or the nature or technique of the construction work to be carried out". Accordingly, it can include rain, snow, frost, ice, floods, strong wind... when they render construction work impossible or dangerous. Suspension of construction work is then decided by the Contractor or by its representative on the construction site after consultation with labour representatives.
- On the other hand, to be added are days for which the Architect acknowledged a technical impossibility to pursue the construction site. Therefore, poor weather conditions that seriously interrupt the advancement of the construction are required for inclement weather to justify suspension of construction work.

Nota:

For private contracts not subject to the NF P 03-001 Standard, take care that a similar clause is inserted into the Building Contract.

Sheet N° 8: Additional fees for construction delays due to Contractor

Application of penalty clause for construction delays

The financial consequences of delays on the construction site, not attributed to the Architect, can be serious. To limit them, a new provision has been inserted into Architect's Appointment Agreement.

Accordingly, an Architect's Appointment Agreement makes provision for the payment to the Client by the Contractor of a penalty that enable the Client to pay the Architect for additional services that arise from an extension of the Construction Timetable.

This clause expresses a principle which, to be effective, should:

- 1** - be drawn to the attention of Contractors during Tender Action to enable them to take it into account in their Tender.
- 2** - be the provision of a specific clause in the Building Contract Conditions that will render it applicable to Contractors. For example:

"The Contractor engages on the construction period, excluding intemperate weather, stipulated in the Conditions. In case of unjustified delays, the penalty due by the Contractor enables the Client to pay additional fees to the Architect in order to prolong his/her Appointment under the same conditions as those in the initial Appointment Agreement. This penalty is calculated weekly on the basis of ...euro excluding VAT per week".

- 3** - be subject to close monitoring of construction progress and the systematic management of the delays of each Contractor.

How to organize the monitoring and management

- 1)** Prepare an accurate and realistic Construction Timetable including regular benchmarks (a priori, monthly) that enable to check, with the same regularity, the respect of the intervening periods by each Contractor.
- 2)** At each of these checks, prepare a report that identifies one or several Contractors responsible for delays in construction. The calculation is to record the number of (calendar) days per task or set of related tasks (this enables a continual check on delays).
- 3)** At the Completion date of the initial Construction Timetable, issue to Contractors responsible for the recorded delays the monthly count to notify that the provisions of the penalty clause stipulated in the Building Contract Conditions will to be applied for each coming week of construction work. A copy should be issued to the Client. This notification is recorded in the Site Meeting minutes to avoid concluding an Amendment.
- 4)** There upon, and at the end of each month, the Architect invoices an additional Contract Administration fee account (issued to the Client) which corresponds to the additional services effectively performed. The Architect informs the Client and the Contractors concerned of the share of penalties for each Contractor.

Sheet N° 9: Dealing with defaulting Contractors

Dealing with a defaulting Contractor by the Architect is within the provisions of clause 10 of the Agreement. An amendment records the corresponding additional fees.

The default of a Contractor can be identified in several terms: the abandon of the construction site, bankruptcy, breach of building contract conditions, etc.

When to intervene

- So as not to be at fault in regard to the duty of advice and to be able to engage a certain number of actions in a private capacity, it is recommended that the Architect initiates the following procedure:

Meet and/or telephone the Contractor in order to ascertain the extent of its difficulties. If due to non-payment by the Client, organize a meeting between the Client and the Contractor.

▪ Inquire into the Contractor's real situation www.infogreffe.fr (Kbis, state of pledges and preferential rights).

Nota: If the Contractor is insolvent, the Architect should inform and advise the Client to retain a lawyer who will advise the Client in order to protect its rights. If in receivership, the administrator should decide upon the pursuit or not of the Building Contract. The Contract is terminated by law subsequent to written notification issued to the administrator if it remains unheeded more than a month.

- Issue to the defaulting Contractor a written instruction (with recorded delivery) to resume construction work within 24 hours (with copy to the Client). This instruction should also be sent by facsimile, the acknowledgment of receipt should imperatively be kept.

- If this written instruction is unheeded at the conclusion of this period, the Client should issue a new written instruction (with recorded delivery) to the Contractor.

This instruction should respect the Building Contract Conditions. In default of a Building Contract in due form, the Client should instruct the Contractor to resume construction work within 7 days at the risk of termination of the Building Contract, the making good of poor workmanship and non-complying work and, the pursuit of construction work by another Contractor at the expense and detriment of the defaulting Contractor. This letter should also be sent by facsimile and the acknowledgment of receipt should imperatively be kept.

When a Contractor experiences financial difficulty, there are a certain number of symptoms or "warning lights" which should be taken into account in order to advise the Client of a possible need to replace the Contractor. It is time to look for a suitable Contractor to resume the project.

- On the expiration of this new period, the Client will take the initiative to issue the Contractor a notice of termination of the Building Contract for the fault of non-fulfilment. The Architect should inform the Client that unilateral termination of the Building Contract risks being contested in court but this risk is reduced since the court can but record the impossibility to pursue the construction work.

This notice should also summon the Contractor to a joint inspection visit of the completed Works on the construction site in the presence of the Client, the Architect and a bailiff.

The report prepared by the bailiff, assisted by the Architect, should include a photographic survey.

Nota: When the defaulting Contractor is in receivership or liquidation, it is advisable to summon the appointed receiver for the purposes of the joint inspection.

- At this time, advise the Client to make a claim to its construction insurance against defective work, when the written notification to the Contractor remains unheeded.

Architect's Appointment continues on resumption of construction work

Prepare a priced bill of quantities of outstanding construction work to be completed (Conditions of contract) and any making good of the Works to prepare Tender Action.

Consult at least two contractors and involve the Client in the selection of the replacement Contractor and Tender negotiations.

The Client should be clearly informed about consequent additional cost. It should also formally sign the Building Contract with the replacement Contractor having beforehand verified its insurances and solvency.

Once the Tender of the replacement Contractor is known, prepare a termination Final Account. Integrate into this account, in debit to the defaulting Contractor, the cost of making good defective and non-complying construction work so that the Client can issue it to the Contractor or the appointed receiver.

- For the replacement Contractor, issue the instruction to recommence the construction work. This instruction should imperatively be countersigned by the Client before any intervention of the new Contractor. It will record the aforementioned Building Contract and the revised construction period that corresponds to the new Construction Timetable that should be approved beforehand by the Client.

Sheet N° 10: Client interference

It is advisable to explain to Clients that Contractors can only receive instructions from the Architect.

In principle, the liability of architects and contractors is engaged even if they are only following client instructions, except if the Client:

① Is recognized competent in construction

It is advisable to provide evidence of its technical competence and its interference in the construction work. But the liability of the Client can be engaged without it being recognized competent when it is not required to have the knowledge of a professional in order to anticipate the risk incurred.

Recognized competence can not be deduced from the continual intervention of the Client to give instructions. Also, the Client that has its house implanted on poor ground can not be condemned to share part of the damages if it turns out that the Client is not a construction professional (indeed, the Contractor confided the construction work should assess the state of the ground and to draw the attention of the Client to the unsuitability of the site selected).

② **Has effectively and really intervened in the construction work:** What will determine the Client's part of liability in this case is the extent to which it interfered in the construction work.

③ **Has intervened at fault:** It is sometimes difficult to determine to which criteria an intervention is at fault. Often, interferences by the Client aim at making savings by imposing a procedure, less expensive building materials or by carrying out itself part of the construction work.

Some examples considered as Client interference

Client replaces the Architect: The Client who take charge of the project risks to incur part of the liability. If for example, having dismissed the Architect, the Client revised the drawings on its own initiative, undertook the Contract Administration, refuses to carry out construction work recommended by the Architect, not respecting his/her drawings, etc.

Unfair savings imposed by the Client: For example, the Client refuses preventive action in regard to neighbouring premises, existing condition surveys for construction work on existing buildings, soil surveys or construction work to reduce future maintenance or operation costs.

The Client refuses to take into account advice from the Architect/risk-taking by the Client: For example, although informed of site conditions and the need for special foundations, not undertaken for reasons of economy, the Client took a deliberated risk for which it should bear the consequences. When the duty of advice is correctly performed, the occasional Client takes risks with full knowledge of the facts and should be considered as a participant in the act to build.

Building materials imposed by the Client: The Client can be liable for construction defects when, for reasons of economy, it imposed a procedure or a technique that proves to be defective.

Evidence of the acceptance of risk by the Client

Very often, the Client will only be partly responsible when disorders appear. Its liability will be reduced or even excluded, in particular, if architects, engineering consultancies or contractors who did not comment on the dangers of the imposed method.

Sheet N° 11: Construction Handover

The Architect should assist the Client during the Handover of construction work.

Construction Handover constitutes for the Client, and the various trades that intervened on the construction site, a very important event. It marks the commencement date of the biennale and ten-year warranties.

It is the act by which the Client acknowledges that the construction work was carried out in accordance with the Building Contracts, that their execution complies with good practice and is fit for purpose.

Construction Handover of the Works should be a written report signed by the Client and the Contractors:

- if the Works are deemed to be in compliance, the Construction Handover is recorded without reservation
- if defects or imperfections are revealed (visible defects), the Client can either refuse the Handover or accept with reservations recorded in the Handover Report issued to the respective Contractor.

In either case, within the scope of its obligations, the Contractor should make good within the period stipulated in the Handover Report.

After the Handover, the Architect checks the Interim Accounts of each Contractor that has intervened on the construction site and settles the outstanding amounts.

The total Construction Cost should correspond to the sum stipulated in the Building Contracts.

The Architect makes the following deductions when provided for in the Building Contract:

- deductions or late penalties, as required
- 5% retention sum (except when the Contractor supplied a joint and several guarantee from a financial institution. Whether the Handover was carried out with or without reservations, the 5% retention will be refunded to the Contractor a year after the Handover date except, of course, if the Contractor did not fulfil its obligations. Where upon, the Architect should give written notification with recorded delivery of his/her opposition.

The Architect undertakes the adjustments stipulated in the contract:

- for approved additional construction work
- if required, to take into account the evolution of the consumer price index reference recorded in the contract.

Sheet N° 12: Intellectual property

To develop further this clause, the proposal here below for a more complete version can be inserted into Architect's Appointment Agreement.

CLAUSE 11 - INTELLECTUAL PROPERTY

The property rights of the Architect over his/her Works are founded in articles L 111-1 and thereafter of the Intellectual Property Code. Protected by virtue of their creation are drawings, sketches, models and Works designed by the architect, whether or not they were the subject to an Agreement.

11.1 – Architect's moral rights

The Architect holds, as author, the rights to respect for his/her name, professional title and the Works. This right is attached to his/her person. It is perpetual, inalienable and imprescriptible. On the death of the author, it is passed on to his/her heirs.

In particular, the Architect has the right:

- to inscribe his/her name on the Works, whether design sketches and drawings or the building and to demand that his/her name is kept
- to see his/her name and professional title be given in the event of publication of drawings or photos of the building
- to take care of the respect for his/her authorship
- to refuse alterations to his/her Works should it be denatured.

11.2 – Architect's heritage rights

The Architect holds throughout his/her life the exclusivity to promote his/her Work in whatever form so ever and to draw any financial profit. On his/her death, this right persists to benefit his/her legal heritors during the calendar year of death and during the 70 years that follow.

These attributes of inheritance are freely transmitted under the following conditions:

- the succession of the future Works is forbidden
- each of the ceded rights are the subject of a distinct mention in the succession act and the domain of exploitation of the ceded rights is limited as for its extent in place and in time
- the succession contains the means of payment for reproduction rights, e.g. in form of a percentage of receipts that result from sale or exploitation.

11.3 – Client's rights

Unless otherwise stipulated in the Conditions of Agreement, the Client holds the right to build the project, in a single example, object of the Agreement.

Later, the Client can undertake any construction work of transformation or alteration of the Works, subject to informing the Architect beforehand and to not denature the Works.

When the Client undertakes, without the services of the Architect (the author of the Works), the construction of the project, subject of the Agreement, the Client respects the Architect's moral right and give him/her the means to assure that the Works has been respected ".

Sheet N° 13: Completion of Architect's Services

When does the Architect's Full Services Appointment end?

The Architect's Appointment for Full Services ends at Construction Handover without reservations or on completion of the reservations recorded during Handover.

Any recommendation or monitoring of construction work by the Architect, after completion of Construction Handover, constitutes a new Appointment that should be a prior written Agreement (either an Amendment or new Agreement) that should have insurance cover.

For Handover procedure details, refer article G3-8 of the Conditions of agreement of the 1st July 2011 CNOA Standard Agreement, (in French).

What should the Architect do when consulted by the Client during the defects liability period?

The defects liability period only binds Contractors during a period **of 12 months** as from the Construction Handover date. It concerns all disorders either recorded during Construction Handover (in case of Handover with reservations) or revealed during this 12 month period.

If need be, during the 12 month defects liability period, the Architect should:

- **monitor** progress of making good the reservations recorded during Handover and **notify** the acceptance of these reservations in the presence of the Client and Contractors concerned (completion of Architect's Appointment)
- **evaluate** disorders indicated by the Client and revealed after Handover during the 12 month defects liability period. In practice, this evaluation distinguishes minor disorders from those covered by the ten-year warranty that should be an insurance claim.

For making good disorders, the Architect requests the Client to bring in one or several Contractors concerned and the insurance companies, when these disorders are covered by the ten-year warranty (damages or ten-year liability).

In any case, the Architect should, within the scope of his/her evaluation, **refrain** from any recommendation or monitoring of construction work that would imply a new Appointment.

Even if the regulations stipulate such an evaluation for Public Works only (29th November 1993, Application Order of the Public Procurement Act, in practice the Architect can but act in a similar way on private construction work.