Building Innovation Hub

Developed in partnership with

Module 1a: Pre-Design

Owner-Architect Contract Language and Scope Development

Introduction

Clearly defined scope, responsibilities, and expectations added into contract language lay the foundation for successful project delivery. Negotiating these contract terms also provides an opportunity for design professionals to:

- Communicate with clients about long-term building performance
- Ensure provisions for building performance are integral to the entire design and construction process
- Manage risk while expanding potential opportunities to support larger sustainability goals

The American Institute of Architects (AIA) Document E204-2017, Sustainable Projects Exhibit (E204) was developed to provide a framework for identifying and achieving sustainable objectives on a project. The framework involves the owner, architect, and contractor, as each of these parties and their consultants play key roles in the effort to achieve a sustainable certification or other sustainability goals.

A very similar type of collaboration is required to achieve compliance with building performance standards.

Because the project process for compliance with building energy performance standards is very similar to that for achieving other sustainable objectives that are already set out in the E204, the following recommendations are modifications to the E204 which allow the parties to address building energy performance standards as part of a sustainable objective. Although the modifications are not jurisdictional-specific, this guide is intended to show the applicability of the definitions and process to the requirements of the Clean Energy DC Omnibus Amendment Act (CEDC Act).

More importantly, however, the design process described in the E204 tracks very closely to the energy modeling design process set out in ASHRAE Standard 209-2018 Energy Simulation Aided Design for Buildings Except Low-Rise Residential Buildings (ASHRAE 209). This process, which includes a pre-design charette to identify goals; requirements for achieving those goals ("sustainability workshop"); documentation of those goal and requirements ("sustainability plan"); and allocation of responsibilities for achieving those goals between the owner, architect, and contractor; is the framework around which the E204 was developed. With relatively limited edits, the E204 can serve as an excellent instrument for addressing building performance standards, sustainable certification, and the energy modeling necessary to accomplish both. Below are suggested language adjustments with capitalization that mirrors the existing document.

Disclaimer

Users contemplating the language offered here should consider these very important caveats:

- While the AIA Document E204-2017, Sustainable Projects Exhibit (E204) was drafted to aid teams in achieving a green building certification such as those offered by the US Green Building Council (USGBC) Leadership in Environmental and Energy Design (LEED), compliance with required building performance mandates is not discretionary. These standards apply regardless of whether or not LEED certification is a project requirement. Owners and architects should regularize the processes described in the modified E204 below, rather than limiting use of it to LEED projects.
- This guide was designed to help write language that is specific to projects governed by the Clean Energy DC Omnibus Amendment Act (CEDC Act). However, the language is neutral enough to apply to multiple jurisdictions with a building performance standard (e.g. Washington, DC, Washington State, Montgomery County, New York City, Saint Louis, Boston, etc.).
- This language has not been adopted by the AIA or the AIA Contract Documents Program (which does not yet reference building energy performance standards in a standard contract documents). The modifications are not AIA or AIA Contract

Documents Program approved alternative clauses. **No endorsement by the AIA, the AIA Contract Documents Program, the Building Innovation Hub (Hub), the Institute for Market Transformation (IMT), or HOK is express or implied.**

- The modifications presented here describe a conceptual approach to how parties might address building energy performance standards in the context of a standard form contract. Every project is different. Any contract language presented here should be reviewed and adapted to the specific requirements of your project. The Hub is not providing legal advice by offering these modifications. **Nothing in this guide is intended to be express or implied legal advice and should never be relied on in lieu of consultation with your own legal counsel.** See website Terms of Use for details.

E204 Language Adjustments

Article 1: General Provisions

§ 1.2.1 Sustainable Objective [minor revision]
The purpose of the E204 is to identify the Sustainable Objective and allocate responsibilities between the Owner, Architect, and Contractor for achieving it. Therefore, it is important that achieving Building Performance Compliance (as defined below) is included as part of the Sustainable Objective. Doing this allows other definitions in E204 to remain intact with little or no changes. For example, identifying Sustainable Measures enables achievement of the Sustainable Objective during the sustainability workshop. The definition of this term is flexible enough to allow the parties to identify Sustainable Measures required to achieve Building Performance Compliance as well as Sustainable Measures required to achieve Sustainability Certification.

§ 1.2.1 Sustainable Objective
The Sustainable Objective is the Owner's goal of incorporating Sustainable Measures into the design, construction, maintenance and operations of the Project to achieve a Sustainability Certification, Building Performance Compliance, or other benefit to the environment, to enhance the health and well-being of building occupants, or to improve energy efficiency. The Sustainable Objective is identified in the Sustainability Plan and will include the applicable Building Performance Standard as well as the mutually agreed to Building Performance Target and Compliance Period.

§ 1.2.7 Building Performance Standard [new section]
The Building Performance Standard is defined in the modified E204 as "the baseline level of energy performance required by the authority having jurisdiction over the Project who is responsible for its enforcement." In the context of the CEDC Act, the baseline level of energy performance is the median local ENERGY STAR Score, or local median source energy use intensity (EUI) by the relevant

peer building group, or other metric determined by the authority having jurisdiction, the DC Department of Energy and Environment (DOEE). During the Sustainability Workshop, participants should identify the project's building peer group, the applicable local median ENERGY STAR Score (or median source EUI when ENERGY STAR score is not applicable) for that particular peer group, the start and end date of the applicable Compliance Period, and should designate DOEE as the authority having jurisdiction over Building Performance Compliance.

§ 1.2.7 Building Performance Standard
The Building Performance Standard is the baseline level of energy perfonnance required by the authority having jurisdiction over the Project who is responsible for its enforcement.

§ 1.2.8 Building Performance Target [new section]
The Building Performance Target is defined in the modified E204 as "the level of energy performance targeted to achieve Building Performance Compliance during Compliance Period." The importance of establishing a contractual compliance period is discussed in more detail below. Depending on the duration of the Compliance Period agreed to by the parties in the modified E204, the Building Performance Target is the targeted level of energy performance the project will be modeled and designed to achieve at substantial completion. Given this, it is almost certain that the Building Performance Target will exceed the Building Performance Standard in effect at the time the sustainability services in the E204 are performed. Just how far above this standard will be dependent on several factors, including the number of compliance cycles covered by the Compliance Period, the general trend of the median ENERGY STAR Score for the Project's building peer group, the minimum level energy performance improvement mandated by DOEE, and/or the requirements of compliance pathway established by DOEE. When setting the Building Performance Target, it is important to understand that solely complying with prescriptive energy codes or the requirements of any given LEED certification goal may not be sufficient to achieve compliance with the Building Performance Standard mandated for the Project's peer group for multiple BEPS cycles. Building Performance Standards are not static as they are designed to compel greater energy efficiency and lower energy use over time.

§ 1.2.8 Building Performance Target
The Building Performance Target is the level of energy performance targeted to achieve Building Performance Compliance during Compliance Period. Depending on the duration of the Compliance Period, Building Performance Target may exceed the Building Performance Standard in effect at the time the Sustainability Services in this Exhibit are performed.

§ 1.2.9 Building Performance Reporting [new section]
Building Performance Reporting is defined in the modified E204 as "the periodic reporting of energy use required by the authority having jurisdiction over the Project who is responsible for enforcement of the Building Performance Standard." In the

context of the Clean and Affordable Energy Act of 2008 (CAEA), Owners are required to report to DOEE annual District Benchmarking Results and a Compliance Report for the Project. These obligations are the responsibility of the Owner and should never be designated to the Architect or other Project participant.

§ 1.2.9 Building Performance Reporting
Building Performance Reporting is the periodic reporting of energy use required by the authority having jurisdiction over the Project who is responsible for enforcement of the Building Performance Standard.

§ 1.2.10 Building Performance Compliance [new section]
Building Performance Compliance, as defined in the modified E204, "is achieved through Building Performance Reporting demonstrating energy performance that meets or exceeds the Building Performance Standard during the Compliance Period." In the context of the CEDC Act, Building Performance Compliance is achieved when the Project meets or exceeds the local median ENERGY STAR Score or local median source EUI for the Project's building peer group during a Compliance Cycle (which can be reviewed at the Energy Benchmarking DC website) or otherwise achieves the requirements of a Compliance Pathway established by DOEE. It is, therefore, imperative for Building Performance Compliance that the Owner and Architect review the BEPS for the Project's property type; determine the number of Compliance Cycles the Owner's program, budget, and schedule will support; and set a Building Performance Target that meets or exceed the BEPS for the Project's building property type at the end of the contractual Compliance Period.

§ 1.2.10 Building Performance Compliance
Building Performance Compliance is achieved through Building Performance Reporting demonstrating energy performance that meets or exceeds the Building Performance Standard during the Compliance Period.

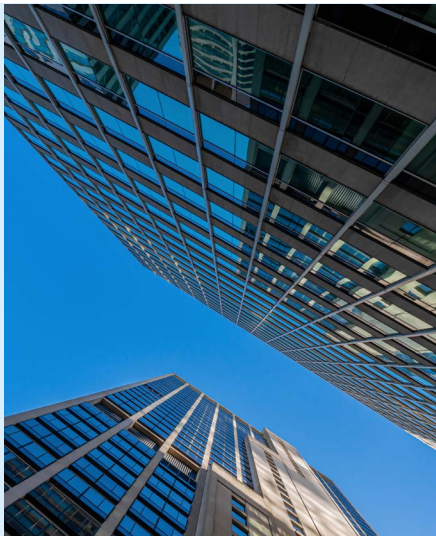
§ 1.2.11 Compliance Period [new section]
The Compliance Period, as defined by the modified E204, "commences on the date of Substantial Completion of the Project and ends [ENTER AGREED TERM] years thereafter. As mentioned above, the Compliance Period is a contractual time period and should not be confused with the Compliance Cycles as defined by DOEE. This contractual time period sets the minimum duration after completion of the Work during which the Project will be designed to achieve compliance with the applicable building performance standard without improvements. The Compliance Period establishes a key design metric if Building Performance Compliance cannot be achieved over the life-span of the Project. According to the *Building Energy Performance Standards Compliance and Enforcement Guidebook* published by DOEE, "All buildings that are issued a New Building Core and Shell Certificate of Occupancy from DCRA after the beginning of a BEPS Period are not subject to that

BEPS cycle. These buildings will be evaluated for the first time at the beginning of the next BEPS Period." At a minimum, the Compliance Period should consist of at least one full Compliance Cycle but may be extended to include as many Compliance Cycles as the Owner's program, budget, and schedule can support. By establishing a contractual Compliance Period in the modified E204, the Owner and Architect are given an opportunity to consider and document the maximum level of energy performance that can be achieved within the Owner's current program, budget, and schedule. If a net-zero or net-positive building is not achievable, the Owner can plan for future improvements that may be necessary to continue to achieve compliance with the applicable Building Performance Standard after the Compliance Period ends. With this knowledge, the Owner makes an informed decision concerning their short-term and long-term capital needs.

§ 1.2.11 Compliance Period
The Compliance Period commences on the date of Substantial Completion of the Project and ends [ENTER AGREED TERM] years thereafter, unless another duration is stated below:

Energy modeling definition

Energy modeling is fundamental to achieving Building Performance Compliance. The modified E204 incorporates several terms that define Energy Model, Energy Modeler, and Energy Modeling. These definitions mirror those set out in ASHRAE 209 which describes a methodology for the application of energy modeling to the design process. (See *Module 2: Energy Modeling. Energy Target Setting and Modeling by Project Phase* for more detail.)



§ 1.2.12 Energy Model [new section]
The Energy Model is defined in the modified E204 as follows:

> "a computer simulation of the Project that provides information on the systems (e.g., HVAC, lighting, occupancy, plug loads, building envelope) that affect energy consumption in a building. The Energy Model serves, along with weather data, as the input data for the energy performance computer simulation program identified below. When run, the Energy Model will simulate the energy use and demand in the Project during the Compliance Period."

This definition tracks closely to that used in ASHRAE 209 with one important qualification. Duration of energy performance modeled is limited to the contractually agreed to Compliance Period. This qualification places a horizon on the obligation of the Architect, Energy Modeler, MEP engineer and others engaged in design of the Project to achieve Building Performance Compliance.

§ 1.2.12 Energy Model

The Energy Model is a computer simulation of the Project that provides information on the systems (e.g., HVAC, lighting, occupancy, plug loads, building envelope) that affect energy consumption in a building. The Energy Model serves, along with weather data, as the input data for the energy performance computer simulation program identified below. When run, the Energy Model will simulate the energy use and demand in the Project during the Compliance Period. The following energy performance computer simulation program will be used to develop the Energy Model:

§ 1.2.13 Energy Modeler [new section]

The Energy Modeler is defined in the modified E204 as "the person or entity retained by the Architect to develop and run the Energy Model and who meets the modeler credentials of ASHRAE Standard 209."

§ 1.2.13 Energy Modeler

The Energy Modeler is the person or entity retained by the Architect to develop and run the Energy Model and who meets the modeler credentials of ASHRAE Standard 209.

§ 1.2.14 Energy Modeling [new section]

Energy Modeling refers to an iterative process of developing, running and analyzing the Energy Model utilizing the latest version of ASHRAE Standard 209 as a framework to define Energy Modeling scope and process.

Energy modeling services

The definitions for Energy Modeler and Energy Modeling mirror those set out in ASHRAE 209. Which party retains the Energy Modeler is a key decision that needs to be made.

- Often energy modeling services are packaged with MEP engineering services, as a consultant to the architect. There are advantages to this: it could simplify the consultant list, the energy modeler has access to key design information as a part of the core design team, and in theory it could facilitate a more integrated design process. There are also disadvantages: in a time-crunch, energy modeling can often lag behind MEP design deliverables, thereby stalling the transfer of useful information. MEP-based modeling services can sometimes focus too narrowly on engineering solutions and miss architectural design solutions, or opportunities for passive load reduction.
- An alternative is to hire an independent modeling consultant. The advantages are that the consultant can work in parallel to all members of the design team, unencumbered by deadlines and other deliverables. They can provide neutral, un-biased feedback about best opportunities to reduce loads and reduce overall energy consumption. This independent modeler could work for the owner or the architect, or even as a sub to the MEP engineer. Disadvantages include the complexities of adding an additional consultant and coordinating the transfer of design details between all disciplines and the independent consultant.
- Another alternative is to couple modeling with commissioning services. Advantages include the same parallel track to the design team, with timely feedback, and there is a synergy with commissioning tasks, such as OPR and BOD alignment, peer reviews of design documents at key intervals, and scheduled meetings to go over comments and clarifications. The DC Energy Code requires MEP commissioning for projects 10,000 square feet and larger, and enclosure commissioning for projects 50,000 square feet and larger. LEED Fundamental and Enhanced Commissioning criteria aligns with MEP and enclosure design as well. These are two key areas that impact building energy performance. Disadvantages may include the timeline of engagement. The Owner usually hires commissioning authorities directly (as required by the DC Energy Code and LEED) and they typically do not come on board until Design Development. Coupling energy modeling with commissioning and thus bringing the consultant on prior to the beginning of design would require some level of client education and change management.

Whatever scenario is selection, Architects and Engineers need to understand the risks arising out of Energy Modeling and include language in their contracts with Owners to address that risk, as more thoroughly discussed in Section 2.5.3 below.

The modified E204 works off the assumption that the Energy Modeler will be selected prior to commencing design and will participate in the Sustainability Workshop. During this workshop, the Energy Modeler should discuss the benefits of each Modeling Cycle and prepare a workplan for conducting Energy Modeling during design and construction of the Project. This workplan should be incorporated into the overall Project schedule as well as the Sustainability Plan, and used to guide the Owner, Architect, and Contractor in making decisions that impact energy performance of the Project.

The Energy Model simulates energy performance characteristics of the building in order to inform design and construction decisions. The intent is to inform those decisions with information about the impact of choices on anticipated performance outcomes. But the selection of one window over another, or fan motor over another, isn't the only determining factor in building performance. Occupant behavior and plug loads can account for 30% or more of building energy use; lax O&M practices can steer performance off track, while good O&M practices can often bring building performance back in line with expectations. Variations in weather will also affect energy performance with extreme weather events often substantially increasing energy usage and demand. As with any model, the Energy Model normalizes unknown or variable factors (weather conditions, occupant behavior, plug loads, O&M practices, etc.). By communicating transparently with the Owner, Architect, and Contractor about assumptions made, the Energy Modeler makes it clear that actual performance outcomes are likely to deviate from assumed design conditions and these deviations will affect overall energy performance. The Energy Modeler should also keep these parties informed on the indeterminate design parameters that are being modeled with assumed or normalized values.

§ 1.2.14 Energy Modeler
The Energy Modeler is the person or entity retained by the Architect to develop and run the Energy Model and who meets the modeler credentials of ASHRAE Standard 209.

Article 2: Architect

§ 2.3 Sustainability Workshop [significant revision]

The Sustainability Workshop serves as the primary meeting of stakeholders to discuss sustainability and energy performance goals and design strategies. With respect to Building Performance Compliance, the Energy Modeler plays an important role during this process. During this workshop the Energy Modeler will facilitate conversations regarding:

- the Owner's program requirements and energy goal(s)
- applicable Building Performance Standards
- benchmarks for energy use of buildings in the same peer group as the Project

- necessary baselines
- performance metrics and project energy goals
- energy efficient measures that will be documented in the Sustainability Plan along with other Sustainable Measures
- the desired Building Performance Target
- the Compliance Period

In addition to establishing the Energy Modeling criteria, the Architect, Mechanical, Engineering, and Plumbing Engineer, and the Owner's commissioning agent should facilitate conversations around modifications to specifications and other Contract Documents concerning:

- substitutions
- mechanical and electrical installations, and commissioning of the Project
- conflicts between Sustainability Certifications and Building Performance Compliance
- impacts of Building Performance Compliance on the Owner's program, budget, and the Project schedule

It is best if the Sustainability Workshop occurs prior to commencement of design, but in no case later than completion of Schematic Design. Decisions and strategies made during the Sustainability Workshop, including an Energy Modeling Workplan based on ASHRAE 209, should be memorialized in a written Sustainability Plan that serves as the guide for Building Performance Compliance throughout design and construction of the Project.

§ 2.3 Sustainability Workshop

§ 2.3.1 ~~As soon as practicable, but not later than the conclusion of the~~Prior to commencement of Schematic Design Phase Services, the Architect shall conduct a Sustainability Workshop with the Owner, the Owner's consultants (including Owner's commissioning agent), and the Architect's consultants, during which the participants will: review publicly available energy benchmarking information for buildings with the same principal activities in the same climate as the Project; review and discuss potential Sustainability Certifications; review applicable Building Performance Standard; review the requirements for Building Performance Compliance; establish the Sustainable Objective; establish the Compliance Period; establish the Owner's project requirements and energy performance goals; discuss the potential Building Performance Target; discuss potential Sustainable Measures; review and discuss modifications to specifications governing general requirements, substitutions, commissioning, mechanical and electrical installations, and other energy performance requirements; examine strategies for implementation of the Sustainable Measures including strategies for achievement of the Building Performance Target during the Compliance Period; reconcile conflicts between the Sustainability Certifications and the requirements for Building Performance Compliance; and discuss the potential impact of the Sustainable Measures, the Building Performance Target, Energy Modeling, and commissioning of the Project on the Project schedule, the Owner's program, and the Owner's budget for the Cost of the Work.

§ 2.3.2 *Sustainability Workshop, Continued* [new section]

§ 2.3.2 During the Sustainability Workshop, the Energy Modeler will work with the Owner, the Owner's consultants, the Architect, and the Architect's consultant to develop the Energy Modeling requirements utilizing the latest version of ASHRAE Standard 209 including input data; output data; and schedule for performing energy modeling cycles, data analysis, and addressing resulting impacts to the Project.

§ 2.4 Sustainability Plan Services [minor revision]

This section describes a service that the Architect may provide developing an overarching Sustainability Plan for the project that synthesizes regulatory requirements and voluntary goals for sustainability. The plan may include elements such as:

- LEED or Green Communities certification for compliance with the DC Green Building Act
- DC Green Code compliance measures for multifamily or projects <50,000 sq. ft.
- Green Area Ratio compliance
- BEPS compliance
- Above-code performance (alternative compliance paths to DC Energy Code)
- Voluntary resiliency, health, wellbeing and equity design measures

This section incorporates language describing the integration of Energy Modeling requirements into the Sustainability Plan, in coordination with the Architect. This type of plan is typically drafted after the Sustainability Workshop and circulated for comment and revision. The plan is usually refined and finalized for approval no later than the end of Schematic Design.

§ 2.4 Sustainability Plan Services

§ 2.4.1 Following the Sustainability Workshop, the Architect shall prepare a Sustainability Plan based on the Sustainable Objective and targeted Sustainable Measures. The Energy Modeler will coordinate with the Architect to incorporate the Energy Modeler requirements developed in Section 2.3.2 into the Sustainability Plan.

§ 2.5 Design Phases [minor revision]

This section is intended to set expectations with the Owner, that the Energy Model is a key component of the design process and that it is intended to validate project decisions and changes to the project.

§ 2.5 Design Phases

§ 2.5.1 The Architect shall prepare Schematic Design Documents, Design Development Documents and Construction Documents that incorporate the Sustainable Measures identified in the Sustainability Plan, as appropriate. Throughout the design of the Project, the Energy Model will be used to validate achievement of the Sustainable Objective at key milestone dates identified in the Sustainability Plan as well as changes to the Project occurring at any time during design that may impact a Sustainable Measure or Sustainable Objective.

§ 2.5.3 Reliance on the Energy Model [new section]

British statistician George E. P. Box famously stated, "Essentially all models are wrong, but some are useful." This aphorism is as applicable to the Energy Model as it is to the statistical models to which Box was referring. It is a recognition that the complexities of reality are impossible to model accurately. Models still can be of use, but it is important to understand risks and limitations.

The primary risk that the Architect, Energy Modeler, or MEP engineer face when communicating Energy Model data is over representing the degree to which model outputs can be relied upon. The modified E204 expressly disclaims any representation or reliance on the projections, estimates, or other outputs of the Energy Model. As discussed above, the Energy Model relies on assumed design conditions, including:

- Normalized (average) weather conditions
- Normalized operations (hours/day, days of week/year)
- Normalized occupant behavior
- Assumed plug loads
- Proper operation of equipment
- Proper maintenance of building and its systems
- Completion of Work in accordance with CDs
- Use of building and its spaces consistent with design intent

While Energy Models are useful in making decisions regarding equipment, components, materials, or other aspect of the Work that lead to more energy efficient outcomes, they are not predictive of the actual performance of the Project and should never be represented as such. Because there are many variable factors that impact actual building performance, reliance on modeled projections of energy use, cost, and savings are typically disclaimed. The Energy Modeler should continually remind the Project participants what simulation and models can do, are intended to do, and what they cannot do.

§ 2.5.3 The Owner acknowledges that the Energy Model relies assumed design conditions including average climatic variations, assumed demands and uses of the Project, proper operation and maintenance of equipment, proper installation of equipment, completion of the Work in accordance with the Contract Documents, and other events, conditions, and circumstances beyond the control of the Architect and its consultants. While the Energy Model simulates future energy use and demands, energy costs, and potential energy cost savings, all such simulations are to be used solely to inform decisions regarding the selection of components, assemblies, materials, products, equipment, systems, and other aspects of the Work in a manner that, when taken as a whole, are more likely to maximize the energy performance of the Project. Because the actual conditions under which the Project will perform will vary from the design conditions assumed in the Energy Model, any reliance on the Energy Model's simulations, projections, and other similar estimates as being predictive of actual outcomes regarding future energy use and demand, energy costs, energy cost savings, and any other aspect of future energy performance is expressly denied and disclaimed by the Architect and its consultants.

[ALTERNATIVE IF THE OWNER ENGAGES ENERGY MODELER AS A CONSULTANT:] The Architect and its consultants are entitled to rely on the accuracy of data produced by the Energy Model and analysis and direction provided by the Energy Modeler in the design of the Project and during performance of the Sustainability Services.

§ 2.6.2 Construction Phase [minor revision]

This section is intended to set expectations with the Owner, that the Energy Model is a key component of the construction process and that it should be updated to validate substitution requests prior to approval of any changes to the project.

§ 2.6.2 All changes to the Work shall be provided to the Architect and Energy Modeler for review prior to acceptance by the Owner. If the Architect and Energy Modeler determines that a proposed change in the Work would materially impact a Sustainable Measure, a Building Performance Target, Building Performance Compliance, or the Sustainable Objective, the Architect shall notify the Owner and, upon the Owner's written authorization, further investigate such change.

§ 2.9 Additional Services [minor revision]

Some changes to the Work are Contractor-initiated (substitution requests) and some may be Owner-initiated. This section is intended to set expectations with the Owner, that the Energy Model should be updated to validate any proposed changes to the project that may affect Building Performance Compliance. Should the Architect need to revise design or construction documents (i.e. drawings, BIM model, specifications, etc.) in order for the Energy Model to be updated, there may be Additional Services incurred for the effort.

§ 2.9 Additional Services

§ 2.9.1 Upon recognizing the need to perform the following Additional Services, in addition to those listed in the Owner-Architect Agreement, the Architect shall notify the Owner with reasonable promptness and explain the facts and circumstances giving rise to the need. The Architect shall not proceed to provide the following services until the Architect receives the Owner's written authorization:

.1 Changing or editing previously prepared Instruments of Service, including the Sustainability Plan, necessitated by the Certifying Authority's changes in the requirements necessary to achieve the Sustainability Certification; or

.2 Assistance to the Owner or Contractor with preparation of Sustainability Documentation, for which the Owner or Contractor is responsible pursuant to the Sustainability Plan.

.3 Assistance to the Owner in analyzing proposed changes to the Work that impact a Sustainable Measure, Sustainable Objective, Building Performance Target, or Building Performance Compliance.

Article 3: Contractor

§ 3.4 Contractor Responsibilities [new section]

The E204 is designed to be attached to both the design and construction contracts once it is agreed to by the Owner, Architect, and Contractor. Many of the Contractor's obligations will be set out in the drawings, specifications, other Contract Documents issued for construction. Even so, it is important to begin a conversation on change management during construction in the pre-design phase. The modified E204 offers language that stresses importance of modeling changes during construction that may impact Building Performance Compliance. If a proposed change materially affects Building Performance Compliance, as determined by the Architect based on analysis by the Energy Modeler, the Contractor is required to identify alternative change solutions that reduce or eliminate these impacts. The Contractor is prohibited from proceeding with any change that materially affects Building Performance Compliance unless the Owner authorizes the Contractor to do so in writing and, thereby, accepts the consequences that result.

§ 3.4 The Contractor shall submit all proposed changes to the Work to the Architect and Energy Modeler for review. The Contractor shall include, with any proposed change, a written statement identifying any potential effect the proposed change may have on the Project's achievement of a Sustainable Measure, the Sustainable Objective, the Building Performance Target, or Building Performance Compliance. If the Architect and Energy Modeler determine the proposed change will materially impact a Sustainable Measure, the Sustainable Objective, the Building Performance Target, or Building Performance Compliance, the Contractor will cooperate with the Owner, Architect and Energy Modeler in identifying an alternative change solution that reduces or eliminates such impact. The Contractor shall not proceed with a proposed change that materially impacts a Sustainable Measure, the Sustainable Objective, the Building Performance Target, or Building Performance Compliance unless otherwise authorized in writing by the Owner.

§ 3.8 Substantial Completion [minor revision]
This section is intended to set expectations with the Owner, that the Project schedule may not be aligned with a specific BEPS cycle as it delivers, and therefore the Owner should not expect documentation of Building Performance Compliance prior to or as a condition of issuance of a Certificate of Substantial Completion.

§ 3.8 Substantial Completion
Verification that the Project has achieved the Sustainable Objective or Building Performance Compliance, or the actual achievement of the Sustainable Objective or Building Performance Compliance, shall not be a condition precedent to issuance of a Certificate of Substantial Completion. Except for that portion of the Sustainability Documentation that by its nature must be provided after Substantial Completion, the Contractor shall submit all other Sustainability Documentation required from the Contractor by the Contract Documents no later than the date of Substantial Completion.

§ 3.9 Final Completion [minor revision]
This section is intended to set expectations with the Owner, that the Project schedule may not be aligned with a specific BEPS cycle as it delivers, and therefore the Owner should not expect documentation of Building Performance Compliance prior to or as a condition of issuance of a final Certificate for Payment, nor does final payment waive the Contractor's legal obligations to achieve the Sustainable Objective (Building Performance Compliance).

§ 3.9.2 Verification that the Project has achieved the Sustainable Objective or Building Performance Compliance, or the actual achievement of the Sustainable Objective or Building Performance Compliance, shall not be a condition precedent to issuance of the final Certificate for Payment. Final payment does not relieve the Contractor's obligation to fulfill its responsibilities related to achieving the Sustainable Objective.

Article 4: Owner

§ 4.4 – 4.7 Owner Responsibilities [minor revision]
Much of the E204 document describes how the design team will position the Project to successfully pursue the Sustainable Objective through design practices, and addresses to a lesser degree the maintenance of anticipated performance through construction oversight. This section clarifies that the building Owner is responsible for annual benchmarking (performance reporting) to DOEE, as required under the Clean and Affordable Energy Act, and is responsible for any appeals or other actions related to Building Performance Compliance. Such actions could include seeking a Delay of Compliance, Baseline Adjustment, Exemption, Custom Alternative Compliance Pathway Options, or general guidance under BEPS.

The Owner is also responsible for coordinating with the commissioning consultant, as required by the DC Energy code.

During the agreed-upon Compliance Period, if there are any issues that the Owner notes do not conform to Contract Documents (drawings, specifications, other) and would affect Building Performance Compliance, the Owner is responsible for notifying the Architect and Contractor promptly. This allows parties to respond to non-conformance issues in a timely manner (for example, during warranty period, or under Enhanced Commissioning contract). It would not be helpful to wait until the end of a BEPS cycle, claim the building did not achieve Building Performance Compliance and that it was due to non-conformance with Contract Documents – multiple years after Substantial Completion. This section is intended to preclude such a delayed response.

§ 4.4 The Owner shall be responsible for all Building Performance Reporting and preparing, filing, and prosecuting appeals to the Certifying Authority and authority having jurisdiction, or taking any other actions determined by the Owner to be necessary or desirable, arising from the revocation or reduction of an awarded Sustainability Certification or notice of noncompliance with respect to Building Performance Compliance.

§ 4.5 The Owner shall provide the services of a commissioning agent who shall be responsible for commissioning of the Project, or the Owner may engage the Architect to provide commissioning services as an Additional Service. The Owner shall provide the commissioning agent with a copy of the Sustainability Plan for incorporation into the commissioning agent's agreement.

§ 4.6 During the Compliance Period, the Owner shall, promptly after discovery of the condition, give the Architect and Contractor notice of any of the Work that does not conform with the requirements of the Contract Documents and such nonconforming Work impacts the Project's ability to achieve Building Performance Compliance.

§ 4.7 During the Compliance Period the Owner shall, promptly after discovery of the condition, give the Architect and Contractor notice of anv of the Work that is found to be not in accordancewith the requirements of the Contract Documents and such nonconforming Work impacts the Project's ability to achieve Building Performance Complicance.