

**Annual AGC Meetings
on
Surety Bonding and
Risk Management
2008**

The New Kids on the Block:
How ConsensusDOCS and the 2007 AIA A201
Address Key Contractual Issues

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CONSENSUS DOCS

Industry Consensus Documents
Balanced and Best Practices

ConsensusDOCS

Participating Organizations

- National Association of State Facilities Administrators (NASFA)
- Construction Users Roundtable (CURT)
- Construction Owners Association of America (COAA)
- Associated General Contractors of America (AGC)
- Construction Industry Round Table (CIRT)
- Lean Construction Institute (LCI)
- Associated Specialty Contractors, Inc. (ASC)
- American Subcontractors Association, Inc. (ASA)
- Associated Builders and Contractors (ABC).

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Participating Organizations

- Finishing Contractors Association (FCA)
- Mechanical Contractors Association of America (MCAA)
- Plumbing-Heating-Cooling Contractors—National Association (PHCC)
- National Electrical Contractors Association (NECA)
- National Insulation Association (NIA)
- National Subcontractor Alliance (NSA)
- National Roofing Contractors Association (NRCA)
- Painting and Decorating Contractors of America (PDCA)
- Sheet Metal and Air Conditioning Contractors' National Association (SMACNA)
- National Association of Surety Bond Producers (NASBP)
- Surety & Fidelity Association of America (SFAA)
- Engineers Joint Contract Documents Committee (EJCDC).*
 - *Actively participated in the drafting process, but considering endorsement after initial publication.

Drafting Principles

- Balanced Risk Allocation
- Best Practices
- Consensus Process
- Developing a Full Family of Documents for Each Project Delivery System.

Primary ConsensusDOCS

- Consensus 200 Standard Agreement and General Conditions Between Owner and Contractor (Where the Contract Price is Lump Sum)
- Consensus 200.2 Electronic Communications Protocol Addendum
- Consensus 240 Standard Agreement Between Owner and Architect/Engineer
- Consensus 300 Standard Form of Tri-Party Agreement for Collaborative Project Delivery

Primary ConsensusDOCS

- Consensus 410 Standard Design-Build Agreement and General Conditions Between Owner and Design-Builder (Where the Basis of Payment is the Cost of the Work Plus a Fee With a Guaranteed Maximum Price)
- Consensus 500 Standard Agreement and General Conditions Between Owner and Construction Manager (Where the Basis of Payment is a Guaranteed Maximum Price)
- Consensus 750 Standard Agreement Between Contractor and Subcontractor.

Consensus Doc 200: The Cornerstone Document

Changes to 200 flow through to other
documents.

ConsensusDOCS 200:

¶10.5 Additional Liability Insurance

- Provision is optional
- If option selected, then coverage options:
 - Additional Insured
 - Contractor's CGL policy
 - For operations and completed operations
 - But only with respect to liability for BI, PD to the extent caused by the negligent acts, omissions of Contractor, subcontractors
 - Owner's and Contractor's Protective Liability Insurance (OCP)
- Additional cost for surcharge paid by Owner
- Certificate of coverage provided prior to commencement of Work.

AIA A201 § 11 Insurance

- Property Insurance Changes Minor
- CGL Changes Remarkable
 - Completed Operations
 - Additional Insured Protection

AIA A201 § 11 Insurance

- Golden Rule
 - A promise to procure should be drafted so that the party promising may keep it.
 - Does § 11 violate the Golden Rule?
 - For the most part it is just fine
 - Perils v. Policies
 - AIA opts for perils and all are insurable
 - Completed Op's & AI is the exception

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§ 11.1.3 Certificates of Insurance

- Purpose to Certify Coverage “In-Place” During Project
- But Coverage Period & Project Period Rarely Coincide Exactly
- Renewals Bring New Insurers & Coverage Differences
 - Old Form Recognized Changes in Market Must Allow Flexibility in Certifying Coverage
 - New Form Knowingly Encourages False Certifications

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§ 11.1.4 Additional Insured

- The Debate is All About Shifting Risks
- How the Document Resolves Matters:
 - Contractor Must Procure AI Protection for O & Others
 - But the Scope of Coverage Is Limited
 - Expressly limited to damages “caused by” Contractor’s negligence
 - Owners want more protection
 - GC’s want more protection
 - The provision is a “contribution” model—vicarious liability

ConsensusDOCS 200

Indemnification

- ¶10.1.1 Contractor indemnifies and holds harmless Owner, A/E, others for BI, PD, but only to extend caused by negligent acts or omissions of Contractor, Subcontractors
- No duty to defend, but
- Indemnification includes reasonable attorney's fees, costs and expenses
- Contractor entitled to reimbursement of defense costs paid above Contractor's percentage of liability to extent provided under ¶10.1.2.
- ¶10.1.2 Owner's indemnification
- Reciprocal provision to ¶10.1.1.

AIA A201 Indemnification

- General Indemnity Clause Unchanged
 - § 3.18 Still a Contribution Clause in Many States
 - Does Not Pass Clear & Unequivocal Test
 - Does Not Clear Most Statutory Bars
- New Indemnity Provisions
 - Human Remains & Wetlands
 - Hazardous Materials

ConsensusDOCS 200

¶6.6 Limited Mutual Waiver of Consequential Damages

- Overall general waiver of types of consequential damages described
- Waiver does not include agreed upon liquidated damages (¶6.5).
- Owner and Contractor can agree upon certain items of damages that are excluded from mutual waiver.

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§ 15.1.6 Consequential Damages Waiver & Liquidated Damages

- “Direct v. indirect damages”
- LD’s will include calculated consequential damages
 - Reflects a Current Practice

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¶6.5 Liquidated Damages

- Optional
- Substantial Completion
- Final Completion
- May also be based on other project milestones, performance requirements.

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Dispute Resolution

- ¶12.2 Direct discussions
 - Parties' Representatives
 - Then senior representatives
- ¶12.3 Mitigation – optional
 - Project Neutral
 - Dispute Review Board
- ¶12.4 Mediation
- ¶12.5 Binding Dispute Resolution
 - Arbitration
 - Litigation
- Venue is location of Project.

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§ 1.1.8 Initial Decision Maker (IDM)

- Replaces A/E for some, but not all decisions
- May or may not review A/E errors
- No contract for hiring an IDM
- Cottage industry in the works

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§ 15 Claims and Disputes

- § 15.1 Definition is broad
 - But broad enough to encompass claims v. A/E?
 - Adjustments to Contract price *and time*?
 - Concealed conditions?
- § 15.1.2 Notice within 21 days!
 - Of what?
 - To whom?
- § 15.1.3 Work Through Dispute
 - IDM's decision may circumvent A/E's CCD's and force payment when A/E and Owner dispute claim

AIA A201 § 15.2 Initial Decision

- By IDM
 - Except claims relating to:
 - Hazardous substances (§ 10.3)
 - Emergencies (§ 10.4)
 - Property Insurance Claims (§§ 11.3.9 & 11.3.10)
- Can it render decision v. A/E?
 - Claim definition = yes
 - This language = no

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§ 15.2.6.1 Appeal of IDM Decision

- Either Party May Demand that “the Other” file for Mediation of IDM’s Decision
 - 30 Days runs from date of decision, not receipt
 - What if Unhappy party Demands that the Other file for Mediation but the Other Party Does not?
 - Do §§ 15.2.5 or 15.2.6.1 allow the unhappy party to file for Mediation?
- Mediation Shall Occur Within 60 Days of IDM’s Decision?
- Appeals After Unsuccessful Mediation Are Not Necessarily Arbitrated

AIA A201 § 15.4 Arbitration

- This is No Longer the Primary Process of Dispute Resolution
 - Default is to Litigation
 - Contractor Must “check the box” for it
- §15.4.4 Now Allows Consolidation of Arbitrations and Joinder of Other Parties
 - All Participants Have Arbitration Rights
 - Common Issues of Law or Fact
 - Similar Procedural Rules

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¶4.2 Financial Information

- Prior to commencement of Work and thereafter at written request of Contractor.
- Evidence is condition precedent to Contractor commencing or continuing Work
- Contractor notified prior to any material change in Project financing.

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§ 2.2 Owner Disclosure of Financial Information

- Waters Down Contractor's Right to Know
- Early-bird Requests Are Essential
- Limited Disclosure Obligation After Work Starts
 - Three Conditions
 - Owner Failure to Pay
 - Material Change in Contract Sum
 - “Reasonable Concern” for Additional Knowledge
- What to Ask For

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Article 11 Termination

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§ 14 Termination of Contract

- § 14.1 Contractor Terminates:
 - Clarifies Contractor's right to recover "damages" after terminating the Contract
 - Recoverable "costs" should mean attorneys' fees
 - Damages are still recoverable
 - Presumably directly arising from the Contractor's Performance, and not indirect consequential damages
- § 14.2 Owner Terminates:
 - IDM decides

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Contractor Submittals

- ¶2.4.4 Definition of Contract Documents includes approved submittals.
- ¶3.14 Submittals
- Contractor responsible for accuracy, conformity to Contract Documents
- Contractor required to identify in submittals any changes, deviations, substitutions from Contract Documents
- Owner (A/E) approval does not authorize deviations unless express written approval.
- Contractor performance strictly in accordance with approved submittals.

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§ 3.10.2 Contractor's Submittal Schedule

- ✦ Contractor Must Submit for A/E's Approval
 - ✦ A/E May Order Multiple Revisions
 - ✦ A/E May Ignore Entirely
- ✦ Old Rule Required Submission of Submittals, not a Schedule
- ✦ New Rule Bars Contractor Claim for REA's Unless Schedule Submitted
- ✦ Mechanism for A/E Mischief is Obvious

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Ownership of Documents

- ConsensusDOCS 240 Owner-Architect Agreement:
- ¶10.1 Ownership of Tangible Documents
- ¶10.1.1 Copyright
- Use after termination/completion
- Electronic Documents

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§ 1.1.7 Instruments of Service

- Project manual is gone
- Digital transfer of information
- Protocols regarding
 - Ownership §1.5
 - Use §1.6
 - Liability
- Where to find protocols

ConsensusDOCS 200 Changes

- ¶8.2 Interim Directed Change
- If dispute as to cost to Owner, Owner pays Contractor 50% of its estimate cost to perform work
- Parties reserve rights as to disputed amount per Dispute Resolution provisions.

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Changes

- ¶8.3 Determination of Cost
- If increase or decrease cannot be agreed to, costs determined by reasonable actual expense and savings.
- If a net increase in Contract Price, Contractor's Overhead and profit priced accordingly.
- If a net decrease, Contractor's Overhead and profit not adjusted unless 10% or more of Project is deleted.
- If disagreement whether work required by Owner is within scope of Work, Contractor furnishes estimate, performs disputed work and Owner pays 50% of estimated cost of disputed work; parties reserve rights.

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§ 7.3.7 Construction Change Directives (CCD's)

- OLD Rule = Reasonable profit and overhead?
- NEW Rule = maybe YES or NO!
- Depends on Contract Documents
 - Percentage of fee
 - Unit pricing
 - Contractor may not argue presumptively greater than Contract percent!
- Payment of “Undisputed Amounts” has been strengthened for Contractor in § 7.3.9

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Owner Directed Means and Methods

- ¶3.1.2. Contractor not responsible for damages resulting from compliance with specific instructions unless Contractor recognized and failed to timely report to Owner error, unsafe practice, etc.

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§ 3.3.1 Owner Directed Means and Methods

- OLD Rule = Owner responsible
- NEW Rule = Contactor responsible for “shared liability”
- Owner liable only if 100% at fault

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¶3.13 Hazardous Materials

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§ 10 Hazardous Materials

- General Loosening of the Scope of the Old Provisions
- Radical Change of Haz-Mat Provisions
 - Old Rule: Whoever was responsible for its presence was singularly liable for its consequence
 - New Rule: Owner may order Contractor to determine how to safely use and hold it jointly liable for consequences

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§ 10 What Should the Contractor Do?

- Refuse the new contract language where possible
- If the new language is used:
 - Scour the Contract Documents for unwanted delegation of responsibility for Haz-Mat
 - Use § 10.3.3 protection
 - Report to Owner & A/E before delivery of specified materials that they may be hazardous and insist upon Owner to “render harmless.”
 - Do not work with the materials without direction from Owner’s professional advisor
 - Demand time extension and damages if delays ensue

§ 13.7 *Statute of Repose*

- Old “Accrual of Action” Provision is Deleted
- New Ten year Statute of Repose regarding claims between Owner and Contractor
 - Consistent with the majority of state’s rules on barring claims arising out of improvements to real property