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ASSOCIATED GENERAL CONTRACTORS OF AMERICA  
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## Comparing the AIA and ConsensusDOCS in a Real World Setting

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## Introduction to ConsensusDOCS

*What is "ConsensusDOCS?"*

- ConsensusDOCS, introduced in 2007, is a new family of form construction documents and a new voice in the construction industry
- Did you know?
  - Form contracts have been used in the construction industry for many years (some for over 100 years!)
    - AIA – The American Institute of Architects
    - AGC – The Associated General Contractors
    - EJCDC – The Engineers Joint Contract Documents Committee
    - DBIA – The Design Build Institute of America
- AIA-A201, was updated in 2007.




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## Introduction to ConsensusDOCS

*Drafting ConsensusDOCS – A Collaborative Effort*

- ConsensusDOCS are written and endorsed by 23 participating associations, representing:
  - Designers
  - Owners
  - Contractors
  - Subcontractors, and
  - Sureties.

Putting the "DOCS" in ConsensusDOCS




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## Introduction to ConsensusDOCS

*Comprehensive Catalog – 90+ Contract Documents*

- Consensus 200 Series – General Contracting
- Consensus 300 Series – IPD/BIM/Green
- Consensus 400 Series – Design-Build
- Consensus 500 Series – CM At-Risk
- Consensus 700 Series – Subcontracting
- Consensus 800 Series – CM, Agency and Program Management.



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## Program Agenda

*AIA v. ConsensusDOCS – With a Twist.*

- First project's will unfold under certain fact scenarios under AIA A201 (2007 edition) contract document
- Then a second project faces similar facts but operates under ConsensusDOCS under ConsensusDOCS 200 Owner/Contractor Agreement + General Conditions
- Moderators insights will highlight key differences in the contract



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## Program Agenda

*The Stay and Play Hotel and Casino*

- Having just won the richest lottery jackpot in United States history, Sam Smart decides that he wants to fulfill his lifelong dream of building a new hotel and casino in Las Vegas called the "Stay and Play"
- Sam finds the perfect property for his new venture: a 25-acre parcel of land owned by a local mining company, Gold Dust Miners, Inc.



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### The Project



- The property, known as Goldmine, used to be a rich resource for Nevada gold
- Goldmine is a rugged landscape on the outskirts of Las Vegas
- After 100 years of mining, Gold Dust Miners concludes that Goldmine no longer contains any gold and sells Goldmine to Sam for a low price.

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### The Project

- After purchasing Goldmine, Sam hires Thoughtless Designs, Inc. to draw up plans for the Stay and Play
- Art Les is the Architect for the Project
- Art designs the perfect building complex: a 35 story tower in the shape of a southwestern cactus
- The tower plans call for huge amounts of structural steel to support its innovative cactus design, including extensive and deep underground supports.



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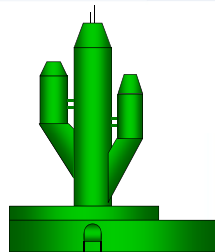
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### The Project

This is the basic design for the *Stay and Play*.



Stay and Play Hotel and Casino

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## The Project

- With its property and designer in place, Sam hires Second-to-All Contractors, Inc., a local construction contractor
- Bob D. Builder is the President of Second-to-All Contractors
- The parties agree that the Stay & Play Hotel and Casino will be completed and open for business in 365 days
- Knowing it is on a strict schedule, Second-to-All Contractors gets right to work on the Project, which begins with the excavation of the underground supports for the cactus tower.



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## First Issue

- Second-to-All Contractors immediately started to prep for excavation, but did not take field measurements at the northeast corner
- As it turns out, there is a large deposit of iron sulfide at the surface of the northeast corner of Goldmine, an area that must be excavated for the underground support system
- Although the plans show the iron sulfide, they do not show that the iron sulfide deposit encroaches approximately twenty feet onto the area to be excavated
- The Project has now sustained delays as a result of inconsistencies with the Contract Documents
- As a result, the Owner/Architect (Sam and Thoughtless) has requested a meeting with the Contractor (Second-to-All) to discuss who will accept liability for the delays.

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## First Issue – Means and Methods

AIA A201-2007, Arts. 3.2.2 & 3.2.4	ConsensusDOCS 200, Art. 3.3.3
“... the Contractor ... shall take field measurements of any existing conditions related to that portion of the Work, and shall observe any conditions at the site affecting it.”	Although the Contractor shall compare the plans to relevant field measurements:
“If the Contractor fails to perform [field measurements], the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations.”	“The Contractor shall have no liability for errors, omissions or inconsistencies discovered [in the Contract Documents] unless the Contractor knowingly fails to report a recognized condition to the Owner.”

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**First Issue – Means and Methods**

- Under the AIA A201, the Contractor bears an affirmative responsibility to take field measurements and perform site inspections
- ConsensusDOCS 200 requires the Contractor to compare the plans with its field measurements, but the Contractor does not have an affirmative responsibility to take field measurements and detect errors.



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**First Issue – Means and Methods**

**AIA A201 2007**

- Affirmative duty to take field measurements
- Failure to do so can lead to contractor liability
- Recognizes Contractor is not licensed professional

**ConsensusDOCS 200**

- No explicit affirmative duty to take field measurements
- Liability where Contractor knowingly fails to report a "recognized condition" to the Owner
- Recognizes Contractor is not licensed professional.

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**Second Issue**

- The Architect, Thoughtless Designs, has taken several weeks to review and approve structural steel submittals
- As a result, the Project has been delayed and the Contractor was required to seek an increase in the Contract Time
- The Contractor did not submit a separate submittal schedule.

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**Second Issue – Submittal Schedule**

<p>AIA A201-2007, Arts. 3.10.2 &amp; 3.12.5</p>	<p>ConsensusDOCS 200, Arts. 3.14.1 &amp; 3.14.2</p>
<p>“The Contractor shall prepare a submittal schedule, promptly after being awarded the Contract and thereafter as necessary to maintain a current submittal schedule, and shall submit the schedule(s) for the Architect’s approval. . . . If the Contractor fails to submit a submittal schedule, the Contractor shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of submittals.”</p>	<p>“The Contractor shall prepare and deliver its submittals to the Owner in a manner consistent with the Schedule of the Work and in such time and sequence so as not to delay the performance of the Work or the work of the Owner or Others. . . .”</p>




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**Second Issue – Submittal Schedule**

- AIA A201- If a Contractor fails to submit a submittal schedule, the Contractor cannot receive an adjustment in Contract Sum or Contract Time based on the Architect’s delay in responding to a submittal
- ConsensusDOCS 200, Contractor must not submit schedules as to delay the work, but lack of submittal schedule doesn’t excuse the Owner or Architect’s delays.

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**Second Issue – Submittal Schedule**

<p><b>AIA A201 2007</b></p> <ul style="list-style-type: none"> <li>• Affirmative duty to submit and get approved a submittals schedule</li> <li>• Contract explicitly precludes increases in contract sum or time based on time to review submittals, if contractor fails to submit schedule</li> <li>• Architect’s approval of submittal schedule “shall not be unreasonable delayed or withheld (see 3.10.2).</li> </ul>	<p><b>ConsensusDOCS 200</b></p> <ul style="list-style-type: none"> <li>• Contractor must submit a schedule of the work with relevant dates for submittals and approvals</li> <li>• Contractor is not explicitly precluded for adjustments in contract time or price for failure to submit a submittal schedule</li> <li>• Owner is responsible for review and approval of submittals with reasonable promptness and to avoid delay (see 3.14.2).</li> </ul>
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### Third Issue

- During the construction phase, the Contractor reads an article about the Owner, which noted large losses the Owner sustained this year on other projects
- As a result of this information, the Contractor requests that the Owner provide financial information that evidences the Owner's ability to fulfill its obligations.



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### Third Issue – Owner Financial Information

AIA A201-2007, Art. 2.2.1	ConsensusDOCS 200, Art. 4.2
<p>"Prior to commencement of the Work, the Contractor may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract. Thereafter, the Contractor may only request such evidence if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) a change in the Work materially changes the Contract Sum; or (3) the Contractor identifies in writing a reasonable concern regarding the Owner's ability to make payment when due."</p>	<p>"Prior to commencement of the Work and thereafter at the written request of the Contractor, the Owner shall provide the Contractor with evidence of Project financing. Evidence of such financing shall be a condition precedent to the Contractor's commencing or continuing the Work. The Contractor shall be notified prior to any material change in Project financing."</p>

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### Third Issue – Owner Financial Information

- Although the Contractor has an affirmative right to request financial information in ConsensusDOCS 200, the Contractor must have a specific reason for the request (after commencing the work) under AIA A201.



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### Third Issue – Owner Financial Information

**AIA A201 2007**

- Contractor entitled to financial information prior to commencement of work as a matter of right
- Thereafter, contractor needs specific reason to obtain financial information
- When contractor is entitled to review financial information, the owner's furnishing of such evidence is a condition precedent to the commencement or continuing of the work
- After furnishing evidence, owner cannot materially change financial arrangements without prior notice to contractor.

**ConsensusDOCS 200**

- Contractor is entitled to financial information as a matter of right throughout the project
- Contractor does not need to prove it has a right to request project financing
- The owner's furnishing of evidence of financing is a condition precedent to the commencement or continuing of the work
- The owner must *always* notify the contractor prior to any material change in project financing (4.2.)
- ConsensusDOCS 290 & 290.1 provides guidance on requesting project financial information.

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### Fourth Issue

- The Contractor disagrees that mining scrap materials that need to be moved during excavation are part of the Original Scope of Work
- As a result, the Owner has issued a Change Directive and the Contractor submitted its anticipated cost estimate to the Owner
- The Owner will not agree to the anticipated cost estimate.

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### Fourth Issue – Changes

AIA A201-2007, Art. 7.3.9	ConsensusDOCS 200, Art. 8.3.3
"Pending final determination of the total cost of a Construction Change Directive to the Owner, the Contractor <u>may request payment for Work completed under the Construction Change Directive in Applications for Payment. The Architect will make an interim determination for purposes of monthly certification for payment for those costs and certify for payment the amount that the Architect determines, in the Architect's professional judgment, to be reasonably justified.</u> "	"If the Owner and the Contractor disagree as to whether work required by the Owner is within the scope of the Work, the Contractor shall furnish the Owner with an estimate of the costs to perform the disputed work in accordance with the Owner's interpretations. If the Owner issues a written order for the Contractor to proceed, <u>the Contractor shall perform the disputed work and the Owner shall pay the Contractor fifty percent (50%) of its estimated cost to perform the work.</u> "

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**Fourth Issue – Changes**

- Under the A201, the Architect may review the contractor's cost estimate for approval on a disputed change
- Under ConsensusDOCS – the Owner must pay 50% of the anticipated cost of the change. This payment has no legal effect.

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**Fourth Issue – Changes**

**AIA A201 2007**

- Envisages Change Orders made on an individual basis
- Contractor's right to seek payment for Work performed under a "Construction Change Directive" no longer limited to "amount not in dispute." *Art. 7.3.9.*
- Change Orders may be issued for part of Construction Change Directive (*Art. 7.3.10*), but do not have to be issued in respect of partial payments for Construction Change Directive. *Art. 7.3.9.*

**ConsensusDOCS**

- Mandates that a Change Order shall include all outstanding Interim Directive Changes on which agreement has been reached since the issue of the last Change Order. *Art. 8.2.3*
- Recognizes and provides for situations where there is a dispute between the parties as to whether or not the Owner's instruction constitutes a change in the Scope of the Work. *Art. 8.3.3.*
  - If this happens:
    1. Contractor furnishes estimates of costs to perform
    2. if Owner issues written Order to proceed
    3. Contractor performs and Owner pays 50%

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**Fourth Issue – Changes**

**AIA A201 2007**

- Time Provision: No requirement under A201 2007 that the parties expeditiously negotiate a Change Order.
- Does not require the Owner to pay the Contractor a stipulated percentage of its actual costs for performing changed work before the adjustment to the Contract Sum has been agreed. *Art. 7.3.9.*

**ConsensusDOCS**

- Time Provision: "Acceptance of the Change Order and any adjustments in the Contract Price or Contract Time shall not be unreasonably withheld." *Art. 8.1.2.*
- Provides methods for adjusting the Contract Sum for both Change Orders and Interim Directive Changes *Art. 8.3.*

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### Fifth Issue

- The Parties were unable to resolve their dispute regarding the Change Directive, so the Contractor has initiated the contractual dispute resolution process
- Note a new party here on each side:
  - On the AIA side: an "Initial Decision Maker."
  - On the ConsensusDOCS side: "Project Neutral."

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### Fifth Issue – Dispute Resolution

AIA A201-2007, Art. 15	ConsensusDOCS 200, Art. 12
<p>"Claims . . . Shall be referred to the Initial Decision Maker for initial decision. The Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement. . . . [A]n initial decision shall be required as a condition precedent to mediation of any Claim arising prior to the date final payment is due . . . ."</p>	<p>"If the Parties cannot reach resolution on a matter relating to or arising out of the Agreement, the Parties shall endeavor to reach resolution through <u>good faith direct discussions</u> between the Parties' representatives . . . . If the Parties' representatives are not able to resolve such matter within five (5) business Days of the day of first discussion . . . senior executives of the Parties shall meet within five (5) business Days to endeavor to reach resolution."</p>

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### Fifth Issue – Dispute Resolution and Claims Avoidance

- How to resolve and even avoid dispute are approached differently
- In the AIA-A201, an initial decision maker (architect or third-party) will make initial decisions on claims before parties pursue further dispute resolution
- ConsensusDOCS 200 takes a tiered approach that requires direct party communications in good faith. Thereafter, disputes are submitted to a project neutral or "DRB" – if chosen by the parties.



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**Fifth Issue – Dispute Resolution and Claims Avoidance**

AIA A201 2007

ConsensusDOCS

- Introduction of new player – The Initial Decision Maker.
  - Claims must be submitted in writing to the Initial Decision Maker within 21 days of event
  - IDM will only decide disputes involving the Owner
  - Written decision approving, rejecting or indicating IDM is unable to resolve claim
  - The Architect is the IDM default
- Direct Discussions: parties' representatives who possess necessary authority will attempt to resolve issues (see 12.2)
- If the parties cannot resolve dispute within 5 business days from the first discussion, Senior Executives shall meet within 5 days from failed discussions.

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**Fifth Issue – Dispute Resolution and Claims Avoidance**

AIA A201 2007

ConsensusDOCS

- Initial Decision required as condition precedent to mediation of any Claim arising prior to the due date of final payment
- If dispute remains unresolved after 15 business days parties shall submit dispute to dispute to either dispute mitigation or mediation
- Mitigation (12.3)  
Nonbinding finding by either:
  - Project Neutral, or
  - Dispute Review Board
  - costs are shared equally,
  - Neutral or DRB will make regular visits to Project
  - findings w/ 5 business days.




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**Fifth Issue – Dispute Resolution and Claims Avoidance**

AIA A201 2007

ConsensusDOCS

- Parties select Arbitration or Litigation, except
- Arbitration is the default in AIA software
- A/E can now be brought in by joinder, generally
- Parties select Arbitration or Litigation
- Cost is borne by the non-prevailing party
- Venue is the location of the project
- A/E can be brought in by joinder.

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### Sixth Issue

- The Project is approximately 65% complete and the steel fabricator/erector has approached the Contractor about release of retainage
- The Contractor also wants the Owner to discontinue holding retainage on its payment applications now that the Owner has a substantial retainage amount.

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### Sixth Issue – Retainage

AIA A201-2007, Art. 9.8.5	ConsensusDOCS 200, Art. 9.2.4
<p>"The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate. <u>Upon such acceptance and consent of surety, if any, the Owner shall make payment of retainage applying to such Work or designated portion thereof. Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents.</u>"</p>	<p>"If the Owner chooses to use this retainage provision:</p> <p>9.2.4.1 <u>after the Work is fifty percent (50%) complete, the Owner shall withhold no additional retainage</u> and shall pay the Contractor the full amount of what is due on account of progress payments;</p> <p>9.2.4.2 the Owner may, in its sole discretion, reduce the amount to be retained at any time;</p> <p>9.2.4.3 <u>the Owner may release retainage on that portion of the Work a Subcontractor has completed in whole or in part, and which the Owner has accepted.</u>"</p>

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### Sixth Issue – Retainage

- Under the A201, retainage is not released until the achievement of Substantial Completion
- In ConsensusDOCS, once 50% of the project is completed, additional retainage is no longer withheld – and the owner can release retainage on portions of the project.



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### Sixth Issue – Retainage

**A201 2007**

- Even upon substantial completion of the entire work of the project, Owner may limit release of retainage to designated portions of work that are substantially complete. *Art. 9.8.5.*
- Result: Owner may withhold retainage as to early work that has been accepted, e.g., early finishing trades and subcontractor work, until substantial completion of the entire work of the project

**ConsensusDOCS**

- Once the entire work is 50% complete, Owner may not withhold additional retainage and shall pay Contractor the full amount of what is due on account of progress payments. *Art. 9.2.4.1.*
- Owner may release retainage for work of early finishing trades and subcontractors upon Owner's acceptance of their work. *Art. 9.2.4.3.*

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### Seventh Issue

- The Owner is now utilizing the Project for its intended purpose and the Contractor is requesting affirmation of Substantial Completion on the day before Liquidated Damages begin to run.

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### Seventh Issue – Substantial Completion

AIA A201-2007, Art. 9.8	ConsensusDOCS 200, Art. 2.4.17
<p>“Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.”</p>	<p>“Substantial Completion of the Work, or of a designated portion, occurs on the date when the Work is sufficiently complete in accordance with the Contract Documents so that the Owner may occupy or use the Project, or a designated portion, for the use for which it is intended, <u>without unscheduled disruption.</u>”</p>

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**Seventh Issue –  
Substantial Completion**

- Under the A201, **the Architect** makes the determination when the work is sufficiently complete for the Owner to use the building for its intended purpose
- In ConsensusDOCS 200, substantial completion occurs when **the Owner and Contractor** agree that the building may be used for its intended purpose without “unscheduled disruption” due to finish work or punch list work.

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**Seventh Issue –  
Substantial Completion**

**AIA A201 2007**

- Substantial Completion - When the Work is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use” Art. 9.8.1
- Confirmation of Substantial Completion occurs only after:
  - Contractor submits to the Architect a list of items to be completed prior to final payment
  - The Architect makes an inspection to confirm that the work is Substantially Complete, and
  - The Architect prepares a dated Certificate of Substantial Completion

**ConsensusDOCS**

- Substantial Completion – “When the Work is sufficiently complete in accordance with the Contract Documents so that the Owner may occupy or utilize the Project . . . for the use for which it is intended, without unscheduled disruption.” Art. 2.4.17.
- Confirmation occurs after Owner and Contractor agree in writing that the Work is substantially complete.

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**Eighth Issue**

- The Contractor has purchased completed operations liability insurance, which extends one year from the date of Substantial Completion
- Eighteen months after substantial completion, the Owner requests the Contractor file a claim under its insurance policy
- Note: the period for correction work is two years.

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### Eighth Issue – Insurance

AIA A201-2007, Art. 11.1.2	ConsensusDOCS 200, Art. 10.2.4
<p>“Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from the date of the commencement of the Work until the date of final payment and termination of any coverage required to be maintained after final payment, and, with respect to the Contractor’s completed operations coverage, <u>until the expiration of the period for correction of Work</u> or for such other period for maintenance of completed operations coverage as specified in the Contract Documents.”</p>	<p>“The Contractor shall maintain completed operations liability insurance for <u>one year after acceptance of the Work, Substantial Completion of the Project</u>, or to the time required by the Contract Documents, whichever is longer.”</p>

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### Eighth Issue – Insurance Completed Operations

- Under the A201, the Contractor must carry insurance until the expiration of the period for corrective work (2 years)
- In contrast, ConsensusDOCS 200 requires coverage for one year following substantial completion.

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### Eighth Issue – Insurance

A201 2007	ConsensusDOCS
<ul style="list-style-type: none"> <li>• “Completed operations” coverage on liability insurance – required now for warranty period or longer, if specified</li> <li>• Contractor must prove evidence of completed operations, final payment may be conditioned on providing this proof</li> <li>• How do claims “arising out of completed ops”?</li> <li>• Can Contractor get this insurance on the market now? In the future?</li> </ul>	<ul style="list-style-type: none"> <li>• Sets “completed operations” affirmatively at one year.</li> <li>• More specific “fill in the blanks” set limits of coverage</li> <li>• Allows for combining primary and excess coverages to reach total limits</li> <li>• Allows Owner to require additional coverages above the “Standard” liability insurance, Owner will bear the cost of additional coverages.</li> </ul>

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## Eighth Issue – Insurance

### A201 2007

- Generally required Owner to purchase “all risk” form.
- Affirms requirement to name Owner and Architect as additional insureds during construction AND for the completed operations.

### ConsensusDOCS

- Specifically requires that Contractor, Subcontractors and Architect be added as insureds on policy.
- Expansive in describing perils, includes damage “due to defective design, workmanship or material.”
- Imposes obligation on Owner to notify Contractor if it does not intend to obtain BR for “terrorism.”

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## Notable Overarching Differences ConsensusDOCS 200 v. 2007 A201

- Active vs. Passive Owner
- Plain English vs. Legalese
- Direct Communications vs. Contractual Silos.



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## Other Notable Differences ConsensusDOCS 200 v. 2007 A201

- Role of the Architect
  - AIA A201
    - traditionally, Architect has played a “quasi-judicial” role
    - under the 2007 A201, the parties may select a third party
  - ConsensusDOCS 200
    - Architect is not the project referee
      - doesn’t decide project disputes
      - doesn’t certify substantial completion.

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*Other Notable Differences*  
**ConsensusDOCS 200 v. 2007 A201**

- Indemnification
  - AIA A201
    - Contractor indemnifies Owner and Architect (Art. 3)
  - ConsensusDOCS 200
    - Contains reciprocal indemnification obligations (Art 10):
      - Contractor indemnifies Owner and Architect;
      - Owner indemnifies Contractor.

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*Other Notable Differences*  
**ConsensusDOCS 200 v. 2007 A201**

- Liquidated Damages
  - AIA A201
    - Does not contain a provision authorizing or disallowing LDs
    - LDs are referenced in waiver of conseq. damages (15.1.6) but change to no longer reference "direct" LDs
  - ConsensusDOCS 200
    - Parties communicate if LDs apply
      - Parties may establish LDs for both substantial completion and final completion (See Paragraph 6.5).

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**ConsensusDOCS 200 v. 2007 A201**

*Other Notable Differences*

- Order of Precedence of Contract Documents
  - AIA A201
    - **NO** order of precedence clause (Golden Rule?)
  - ConsensusDOCS 200
    - Order of precedence clause assigns priority if contract documents conflict (14.2):

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**ConsensusDOCS 200 v. 2007 A201**

*Conclusions*

- Plenty of similarities, but also significant differences
- These differing approaches can have direct and substantial impacts on the course of the project
- Contracting parties should determine at the outset, which contracts are best suited for the particular project.

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**Questions and Answers**

More info at  
[www.ConsensusDOCS.org](http://www.ConsensusDOCS.org)



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