

Comparison of ConsensusDocs and AIA Standard Design-Build Agreements

The Standard Forms

Philosophy

AIA	ConsensusDocs
<p><i>AIA A141 - 2014, Agreement Between Owner and Design-Builder</i> <i>Exhibit A: Design-Build Amendment</i> <i>Exhibit B: Insurance and Bonds</i> <i>Exhibit C: Sustainable Projects</i></p>	<p><i>CD 400 Preliminary Design-Build Agreement Between Owner and Design-Builder</i> <i>CD 410 Design-Build Agreement and General Conditions Between Owner and Design-Builder (Cost of Work Plus Fee with GMP)</i></p>
<p><i>AIA A142 - 2014, Agreement Between Design-Builder and Contractor</i> <i>Exhibit A: Terms and Conditions</i> <i>Exhibit B: Insurance and Bonds</i> <i>Exhibit C: Preconstruction Services</i> <i>Exhibit D: Determination of the Cost of the Work</i></p>	<p><i>CD 415 Design-Build Agreement and General Conditions Between Owner and Design-Builder (Lump Sum)</i> <i>CD 420 Agreement Between Design-Builder and Design Professional</i></p>
<p><i>AIA A441 - 2014, Agreement Between Contractor and Subcontractor for a Design-Build Project.</i></p>	<p><i>CD 422 Agreement Between Design-Builder and Design Professional for Federal Projects</i></p>
<p><i>AIA B143 - 2014, Agreement Between Design-Builder and Architect</i></p>	<p><i>CD 450 Agreement Between Design-Builder and Subcontractor</i></p>
<p><i>AIA C141 - 2014, Agreement Between Owner and Consultant for a Design-Build Project</i></p>	<p><i>CD 460 Agreement Between Design-Builder and Design-Build Subcontractor (Subcontractor Provides Design Elements and a GMP)</i></p>
<p><i>AIA C441 - 2014, Agreement Between Architect and Consultant for a Design-Build Project.</i></p>	<p><i>CD 498 Teaming Agreement for a Design-Build Project</i> <i>CD 499 Joint Venture Agreement for a Design-Build Project</i></p>

AIA	ConsensusDocs
<p><i>Architects should lead the design-build project.</i></p> <p><i>Bridging</i></p> <ul style="list-style-type: none"> <i>AIA's answer to the "problem" of owners giving up some direct control over the design process in exchange for the collaborative nature of design-build</i> <i>Presumption but not requirement that Owner retain separate consultant for the development of the Owner's Criteria</i> 	<p><i>Written in plain English to advance best interests of the project. Coalition of Industry associations identify best practices with fair risk allocation.</i></p>

Relationship of the Parties

AIA	ConsensusDocs
<p><i>AIA A141, Exhibit A</i> <i>§ A.5.6 Relationship of the Parties</i> <i>The Design-Builder accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to exercise the Design-Builder's skill and judgment in furthering the interests of the Owner; to furnish efficient construction administration, management services and supervision; to furnish at all times an adequate supply of workers and materials; and to perform the Work in an expeditious and economical manner consistent with the Owner's interests.</i></p>	<p><i>CD 410</i> <i>2.1 TEAM RELATIONSHIP AND ETHICS</i> <i>Each Party agrees to act on the basis of good faith and fair dealing and shall take all actions reasonably necessary to perform this Agreement in an economical and timely manner, including consideration of design modifications and alternative materials or equipment that will permit the Work to be constructed within the Guaranteed Maximum Price (GMP) and, if established, by the Dates of Substantial Completion and Final Completion.</i></p> <p><i>Art. 3 . Design-Builder represents that it is an independent contractor and that it is familiar with the type of Work required by this Agreement.</i></p>

When the Design-Builder First Enters the Picture

AIA	ConsensusDocs
<p>Bridging Concept - the design-build process begins with the development of the Owner's Criteria, before the Design-Builder is retained (AIA C141; AIA A141, §1.1).</p> <p>The Design-Builder's involvement with bridging under AIA A141 begins with:</p> <ul style="list-style-type: none"> • Changes to the Owner's Criteria proposed by the Design-Builder • Preliminary Evaluation (§4.2) • Preliminary Design (§4.3) <p>AIA does not have a preliminary design-build agreement as does ConsensusDocs; however, the A141 has optional preliminary design services in §§4.2-4.4:</p> <ul style="list-style-type: none"> • DB evaluates the Owner's Criteria (§4.2) • DB provides preliminary design (§4.3) • DB submits a proposal to Owner (§4.4) 	<p>CD 400 Preliminary Design-Build Agreement</p> <ul style="list-style-type: none"> • Preliminary Design-Build Services • Design-Builder can assist in development of Owner's Program (CD 400 - 2.2.1) • Preliminary Evaluation (§2.2.2), Schedule (§2.2.3) and Estimate (§2.2.4) • Schematic Design Documents (§2.2.5) • Owner's Election to Proceed (§4.2) - go forward with the Design-Builder <p>CD 410 Cost Plus Fee with GMP</p> <ul style="list-style-type: none"> • Design-Builder can assist in development of Owner's Program (CD 410 - 3.11.1) • Preliminary Evaluation (§3.1.1), Schedule (§3.1.2) and Estimate (§3.1.3) • Schematic Design Documents (§3.1.4) • Design Development Documents (§3.1.6) • Construction Documents (§3.1.7) <p>CD 415 Lump Sum</p> <ul style="list-style-type: none"> • Presumes Owner's Program developed to point of Schematic Design Documents

Approach to Bridging

AIA	ConsensusDocs
<p>Documents are flexible to allow for any form of design-build, including bridging, design competition and progressive design-build.</p> <p>AIA C141 Not a requirement, though perhaps a presumption that Owner retain own consultant for the development of the Owner's Criteria before the Design-Builder is engaged (AIA C141; AIA A141, §1.1)</p> <p>AIA A141: §7.2.5 Design-Builder is entitled to rely on the accuracy and completeness of the information provided by the Owner.</p> <p>AIA A141 §7.2.9 If requested, the Owner shall provide geotechnical engineers or other consultants to investigate subsurface conditions.</p>	<p>Documents could be used with a bridging approach, but the philosophy is not inherent in the structure of the documents.</p> <p>There is no standard form Owner-Consultant Agreement as there is with AIA.</p>

When Price is Set

AIA	ConsensusDocs
<p>AIA A141 Standard Form of Agreement Between Owner and Design-Builder</p> <ul style="list-style-type: none"> • Compensation for Work Performed Before Design-Build Amendment (§2.1) • Compensation for Work Performed After Design-Build Amendment (§2.2) • Design-Build Amendment (Ex. A) - Check the box (§A.1.1) <ul style="list-style-type: none"> ○ Stipulated sum (at time agreement executed) (§A.1.2) ○ Cost of the Work plus Design-Builder’s Fee (§A.1.3) ○ Cost of the Work plus Design-Builder’s Fee with a GMP (§A.1.4) • Design-Builder’s Proposal: <ul style="list-style-type: none"> ○ Upon the Owner’s issuance of a written consent to proceed under Section 4.3.2, the Design-Builder shall prepare and submit the Design-Builder’s Proposal to the Owner. (§ 4.4.1) 	<p>CD 400 - For Preliminary Design Services: lump sum or actual costs</p> <p>CD 415 - Lump Sum</p> <p>CD 410 - Cost of Work Plus Fee with GMP</p> <ul style="list-style-type: none"> • GMP Proposal: “At such time as the Owner and the Design-Builder jointly agree, the Design-Builder shall submit a GMP Proposal in a form acceptable to the Owner.” (§3.2.1) <p>Language attempts to strike balance between Owner’s desire to set GMP as soon as possible and Design-Builder’s desire to have design, scope of work more defined before setting price.</p>

GMP and Contingencies

AIA	ConsensusDocs
<p>GMP (A141, Exhibit A, §A.1.4.3) Sum of the Cost of the Work and the Design-Builder’s Fee</p> <ul style="list-style-type: none"> • Cost of the Work (A141 §A.5) • Design-Builder’s Fee (A141 §A.1.3.2, §A.1.4.2) <p>Itemized Statement of GMP:</p> <ul style="list-style-type: none"> • (§A.1.4.3.2): trade categories, allowances, contingencies, alternates, other items • Alternates (§A.1.4.3.3) • Unit Prices (§A.1.4.3.4) • Assumptions (§A.1.4.3.5) • Allowances and Contingencies (§A.3.1.5) <p>Contingencies Broader treatment of contingencies than prior AIA editions. Prior edition only had contingency for further development of design and construction when there was no GMP and only a Control Estimate.</p>	<p>GMP Sum of the estimated Cost of the Work plus the Design-Builder’s Fee (§3.2.1)</p> <ul style="list-style-type: none"> • If Design-Build Documents not complete, provide in GMP for further development (§3.2.1.1) • GMP Basis: (§3.2.2) <ul style="list-style-type: none"> ○ Drawings, specifications, addenda (§3.2.2.1) ○ Allowances and basis (§3.2.2.2) ○ Assumptions and Clarifications (§3.2.2.3) ○ Dates of Substantial and Final Completion and Schedule of Work (§3.2.2.4) ○ Alternates (§3.2.2.5) ○ Applicable Unit prices (§3.2.2.6) ○ Additional services (§3.2.2.7) ○ Deadline for acceptance of GMP (§3.2.2.8) ○ Design-Builder’s Contingency (§3.2.2.9) ○ Self-performed work (§3.2.2.10) ○ Patented, copyrighted materials (§3.2.2.11) <p>Design-Builder Contingency (§3.2.7)</p> <ul style="list-style-type: none"> • Amount mutually agreed upon and monitored • Costs which are properly reimbursable as a Cost of the Work but are not the basis for a Change Order • Not to be used for changes in scope or for any item that would be the basis for an increase in the GMP • Design-Builder provides to Owner contemporaneous accounting of charges against contingency.

Standards of Care and Performance Guarantees

AIA	ConsensusDocs
<p>Standards of Care:</p> <ul style="list-style-type: none"> • Owner’s Consultant and Design-Builder’s Architect’s <ul style="list-style-type: none"> ○ Professional skill, care (C141 §2.4/B143 §2.2) • For Design Professional Services <ul style="list-style-type: none"> ○ Required Certification for Design-Builder’s design professionals (B143 §2.7) ○ To best of knowledge, information and belief, documents or services ○ Consistent with the Design-Build Documents, except as noted ○ Comply with applicable laws, statutes, codes, etc. ○ Owner, its consultants may rely upon accuracy • For Design-Builder (A141) <ul style="list-style-type: none"> ○ Because of the definition of Work, Design-Builder has a strict liability standard usually applied to product manufactory liability. Exhibit A, section 5.6 created a fiduciary duty by the Design-Builder. <p>Performance Guarantees: No standard terms for performance guarantees.</p>	<p>Standards of Care:</p> <ul style="list-style-type: none"> • For the Design Professional: <ul style="list-style-type: none"> ○ Common law negligence standard (CD 420 §2.1, note, “covenants” and further interet language from 07 has been stricken.) • For Design-Builder: <ul style="list-style-type: none"> ○ Common law standard for contract - exercise reasonable skill and judgment (CD 410 Art.3). <p>Performance Guarantees: No standard terms for performance guarantees.</p>

Warranty

AIA	ConsensusDocs
<p>AIA A141 § 1.4.3 The Work. The term “Work” means the design, construction and related services required to fulfill the</p>	<p>CD 410 3.8.1 Design-Builder warrants that all materials and equipment furnished under the Construction Phase of this</p>

<p>Design-Builder’s obligations under the Design-Build Documents, whether completed or partially completed, and includes all labor, materials, equipment and services provided or to be provided by the Design-Builder. The Work may constitute the whole or a part of the Project.</p> <p>§ 3.1.12 Warranty. The Design-Builder warrants to the Owner that materials and equipment furnished under the Contract will be of good quality and new unless the Design-Build Documents require or permit otherwise. The Design-Builder further warrants that the Work will conform to the requirements of the Design-Build Documents and will be free from defects, except for those inherent in the quality of the Work or otherwise expressly permitted by the Design-Build Documents. Work, materials, or equipment not conforming to these requirements may be considered defective.</p> <p>AIA B143 § 2.2 The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services</p>	<p>Agreement will be new unless otherwise specified, of good quality, in conformance with the Contract Documents, and free from defective workmanship and materials.</p> <p>3.8.2 To the extent products, equipment, systems or materials incorporated in the Work are specified and purchased by Owner, they shall be covered exclusively by the warranty of the manufacturer. There are no warranties which extend beyond the description on the face of any such warranty. . . ALL OTHER WARRANTIES EXPRESSED OR IMPLIED INCLUDING THE WARRANTY OF MERCHANTABILITY AND THE WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE ARE EXPRESSLY DISCLAIMED.</p>
--	---

Design Iteration

AIA	ConsensusDocs
<p>Design-Build Documents (§A141 §1.4.1)</p> <p>Work Prior to Execution of Design-Build Amendment (A141 Article 4)</p>	<p>Design Phase Services (CD 410 §3.1)</p> <ul style="list-style-type: none"> • Preliminary Evaluation (CD 410 §3.1.1) <ul style="list-style-type: none"> ○ Review of Owner’s Program, provide preliminary evaluation of site, propose alternative systems • Preliminary Schedule (CD 410 §3.1.2)

<ul style="list-style-type: none"> • No modification of Owner’s Criteria unless Owner and Design-Builder executed a Modification (A141 §4.1.1) • Evaluation of Owner’s Criteria (A141 §4.2) <ul style="list-style-type: none"> ○ Conduct meetings with Owner to discuss and review Owner’s Criteria, preliminary evaluation of Owner’s Criteria ○ Written report summarizing evaluation of Owner’s Criteria (A141 §4.2.2) • Owner issues written consent to proceed to development of Preliminary Design (A141 §4.2,3) <ul style="list-style-type: none"> ○ Consent does not modify the Owner’s Criteria unless a Modification is executed. • Preliminary Design (A141 §4.3) <ul style="list-style-type: none"> ○ Preliminary Design report ○ Identifies any deviations from Owner’s Criteria • Preliminary Design shall not modify the Owner’s Criteria unless a Modification is executed • Design-Builder’s Proposal (A141 §4.4) <ul style="list-style-type: none"> ○ Upon Owner’s written notice to proceed following Preliminary Design ○ Includes list of deviations from the Owner’s Criteria (A141 §4.4.1.1) ○ If agreement on Proposal, parties execute Design-Build Amendment (A141 §4.4.3) <p>Work Following Execution of Design-Build Amendment (A141 Article 5)</p> <ul style="list-style-type: none"> • Upon Execution of Design-Build Amendment, Design-Builder prepares Construction Documents <ul style="list-style-type: none"> ○ The Construction Documents shall be consistent with the Design-Build Documents (A141 §5.1.1) ○ Construction Documents shall not modify the Design-Build Documents unless the 	<ul style="list-style-type: none"> • Preliminary Estimate (CD 410 §3.1.3) • Schematic Design Documents (CD 410 §3.1.4) • Design Development Documents (CD 410 §3.1.6) • Construction Documents (CD 410 §3.1.7) • At each level of documents, Design-Builder to identify in writing all material changes and deviations from the prior iteration of documents • Submit documents, including changes/deviations for Owner’s written approval. <p>Upon approval, Schematic Design, Design Development and Construction Documents become Contract Documents (CD 410 §15.1).</p>
---	---

<p>Owner and Design-Builder execute a Modification. (A141 §5.1.2)</p> <p>Owner's failure to discovery deviations in the Construction Documents does not relieve Design-Builder of obligation to perform Work in accordance with Design-Build Documents.</p>	
---	--

Site Information

AIA	ConsensusDocs
<p>Information and Services Required of the Owner (A141 §7.2)</p> <ul style="list-style-type: none"> • Reasonable promptness (A141 §7.2.1) • <u>Upon written request of Design-Builder surveys</u> describing physical characteristics, legal limitations, utility locations, written legal description of site (A141 §7.2.1) • To extent available to Owner, results and reports of prior tests, inspections and investigations conducted for Project involving structural and mechanical systems, chemical, air and water pollution, hazardous materials or environmental and subsurface conditions (A141 §7.2.2) • Easements, zoning variances, legal authorizations (A141 §7.2.4) • Services, information, surveys and reports furnished at Owner’s expense; Design-Builder entitled to rely upon accuracy and completeness (A141 §7.2.5) <p><u>Upon request of the Design-Builder</u>, services of geotechnical engineers, consultants, if not required of Design-Builder, for subsoil, air and water conditions (A141 §7.2.9)</p>	<p>To the extent Owner has obtained, or is required to obtain, it shall provide: (CD 410 §4.3)</p> <ul style="list-style-type: none"> • information describing the physical characteristics of the site and legal descriptions - existing buildings, other construction, adjacent property, utilities, services, connection points, benchmarks used in laying out the Work (§4.3.1) • tests, inspections, reports on environmental matters, structural, mechanical (§4.3.2) • information or services requested by Design-Builder, required for performance of the Work and under the Owner’s control (§4.3.3). • Mechanic’s and construction lien information (§4.5) <p>No statement that Design-Builder is entitled to rely upon completeness and accuracy of Owner-provided information. Instead, definition of Contract Documents in Article 15 has been revised to include information intended by the parties to be a Contract Document, in contrast to “information only”.</p> <p>Design-Builder Additional Services (§3.11): can include surveys, site evaluations, legal descriptions and aerial photographs, appraisals of existing equipment, properties, soil, subsurface, environmental studies, serving as green building facilitator, commissioning, reports and investigations required for governmental authorities or others having jurisdiction over the Project.</p>

Project Financial Information

AIA	ConsensusDocs
<p>AIA A141 7.2.7 Prior to the execution of the Design-Build Amendment, the Design-Builder 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 Design-Build Documents and the Design-Builder’s Proposal. Thereafter, the Design-Builder may only request such evidence if (1) the Owner fails to make payments to the Design-Builder as the Design-Build Documents require; (2) a change in the Work materially changes the Contract Sum; or (3) the Design-Builder identifies in writing a reasonable concern regarding the Owner’s ability to make payment when due. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. After the Owner furnishes the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Design-Builder.</p>	<p>CD 410 4.2 FINANCIAL INFORMATION Before commencing the Work and thereafter at the written request of the Design-Builder, the Owner shall provide the Design-Builder evidence of Project financing. Evidence of such financing shall be a condition precedent to Design-Builder’s commencing or continuing the Work. The Design-Builder shall be notified before any material change in Project financing.</p>

Order of Precedence

AIA	ConsensusDocs
<p>AIA A141 § 1.4.1 Design-Build Documents. The Design-Build Documents consist of this Agreement between Owner and Design-Builder and its attached Exhibits (hereinafter, the “Agreement”); other documents listed in this Agreement; and Modifications issued after execution of this Agreement. A Modification is (1) a written amendment to the Contract signed by both parties, including the Design-Build Amendment, (2) a Change Order, or (3) a Change Directive.</p> <p>§ 1.4.2 The Contract. The Design-Build Documents form the Contract. The Contract represents the entire and integrated agreement between the parties and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Design-Build Documents shall not be construed to create a contractual relationship of any kind between any persons or entities other than the Owner and the Design-Builder.</p> <p>Order of Precedence: Not Applicable.</p>	<p>CD 410 15.1 CONTRACT DOCUMENTS The Contract Documents are as follows: (a) This Agreement. (b) Basis of Design/Owner’s Program. (c) Owner provided information pursuant to section 3.7.4 and other Owner information identified as intended to be a contract document. (d) The Schematic Design Documents upon Owner approval pursuant to section 3.1.4. (e) The Design Development Documents upon Owner approval pursuant to section 3.1.6. (f) The Construction Documents upon Owner approval under section 3.1.7. (g) Other:</p> <p>15.2 ORDER OF PRECEDENCE In case of any inconsistency, conflict or ambiguity among the Contract Documents, the documents shall govern in the following order: (a) Change Orders and written amendments to this Agreement, including Amendment 1; (b) this Agreement; (c) design documents approved by the Owner pursuant to sections 3.1.4-3.1.7 in order of the most recently approved; (d) information furnished by the Owner pursuant to 3.7.4 or designated as a contract document in section 15.1; (e) other documents listed in this Agreement. Except as otherwise provided, among categories of documents having the same order of precedence, the term or provision that includes the latest date shall control. Where figures are given, they shall be preferred to scaled dimensions. Unless otherwise specifically defined in this Agreement, any terms that have well-known technical or</p>

	trade meanings shall be interpreted in accordance with their well-known meanings
--	--

Ownership of Documents

AIA	ConsensusDocs
<p>Agreement on protocols for digital transmission (A141 §1.1.12)</p> <p>Instruments of Service (A141 §1.4.5)</p> <p>Design-Builder retains all common law, statutory and other reserved rights including copyright (A141 §12.1)</p> <p>Design-Builder grants Owner limited, irrevocable and non-exclusive license to use solely and exclusively for constructing, using, maintaining, altering and adding to the Project, provided Owner substantially performs its obligations (A141 §12.3)</p> <p>Design-Builder obtains non-exclusive licenses from Architect, Consultants and Contractors (A141 §12.3.1)</p> <p>In event of termination other than for default of owner, or termination for cause by Architect, Consultant or Contractor, Owner obtains limited, irrevocable and non-exclusive license solely and exclusively for constructing, using, maintaining, altering and adding to the Project, provided Owner</p> <ul style="list-style-type: none"> ○ Agrees to pay Architect, Consultant or Contractor all amounts due ○ Provides Architect, Consultant or Contractor with written agreement to indemnify for costs and expenses arising from Owner alteration or use of Instruments of Service. (A141 §12.3.1) <p>If Owner alters Instruments of Service without author's written authorization, or uses the Instruments of Service without retaining authors, Owner releases Design-Builder, Architect, Consultants, and Contractors from claims and</p>	<p>Ownership of Tangible Documents (§3.1.8.1)</p> <ul style="list-style-type: none"> • Excluding copyrights, ownership of documents vests in Owner at time of payment <p>Copyright (§3.1.8.2)</p> <ul style="list-style-type: none"> • Check the box whether Owner also obtains copyright, subject to making regular payments and payment of agreed upon copyright fee. If no selection made, copyright remains with Design-Builder <p>Use of Documents in Event of Termination (§3.1.8.3)</p> <ul style="list-style-type: none"> • Provided payment made, including any payment required by termination provisions, Owner may use documents, reproduce and make derivative works to complete project, even if copyright not transferred <p>Use of Documents After Completion of Project (§3.1.8.4)</p> <ul style="list-style-type: none"> • For maintaining, renovating, remodeling or expanding Project at the Worksite • Use by Owner on other project without Design-Builder's involvement is at Owner's sole risk • Indemnification by Owner <p>Design-Builder's Use of Documents (§3.1.8.5)</p> <p>May reuse documents prepared by it in its practice but only in separate constituent parts and not as a whole.</p>

<p>causes of action arising from such use. Owner also indemnifies same parties from third-party claims. (A141 §12.3.2)</p> <p>Submission or distribution of documents for regulatory requirements is not publication in derogation of reserved rights. (A141 §12.1).</p>	
--	--

Retainage

AIA	ConsensusDocs
<p>AIA A141, Exhibit A §A.1.5.2.4 Blank provision for parties to insert reduction of retainage terms.</p>	<p>ConsensusDocs 415 10.2.1 after the Work is fifty percent (50%) complete, the Owner shall withhold no additional retainage and shall pay the Design-Builder the full amount due on account of subsequent progress payments;</p>