

Comparison of Industry Standard Form Design-Build Contracts

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The Standard Forms

Philosophy

AIA	ConsensusDocs	DBIA
<p>AIA A141 - 2014, Agreement Between Owner and Design-Builder Exhibit A: Design-Build Amendment Exhibit B: Insurance and Bonds Exhibit C: Sustainable Projects</p> <p>AIA A142 - 2014, Agreement Between Design-Builder and Contractor Exhibit A: Terms and Conditions Exhibit B: Insurance and Bonds Exhibit C: Preconstruction Services Exhibit D: Determination of the Cost of the Work</p> <p>AIA A441 - 2014, Agreement Between Contractor and Subcontractor for a Design-Build Project.</p> <p>AIA B143 - 2014, Agreement Between Design-Builder and Architect</p> <p>AIA C141 - 2014, Agreement Between Owner and Consultant for a Design-Build Project</p> <p>AIA C441 - 2014, Agreement Between Architect and Consultant for a Design-Build Project.</p>	<p>CD 400 Preliminary Design-Build Agreement Between Owner and Design-Builder</p> <p>CD 410 Design-Build Agreement and General Conditions Between Owner and Design-Builder (Cost of Work Plus Fee with GMP)</p> <p>CD 415 Design-Build Agreement and General Conditions Between Owner and Design-Builder (Lump Sum)</p> <p>CD 420 Agreement Between Design-Builder and Design Professional</p> <p>CD 422 Agreement Between Design-Builder and Design Professional for Federal Projects</p> <p>CD 450 Agreement Between Design-Builder and Subcontractor</p> <p>CD 460 Agreement Between Design-Builder and Design-Build Subcontractor (Subcontractor Provides Design Elements and a GMP)</p> <p>CD 498 Teaming Agreement for a Design-Build Project</p> <p>CD 499 Joint Venture Agreement for a Design-Build Project</p>	<p>DBIA 501 Contract for Design-Build Consultant</p> <p>DBIA 520 Preliminary Agreement Between Owner and Design-Builder</p> <p>DBIA 525 Owner/Design-Builder Agreement - Lump Sum</p> <p>DBIA 530 Agreement between Owner and Design-Builder - Cost Plus Fee With an Option for a GMP</p> <p>DBIA 535 General Conditions of Contract Between Owner and Design-Builder</p> <p>DBIA 540 Agreement Between Design-Builder and Designer</p> <p>DBIA 550 Agreement Between Design-Builder and General Contractor - Cost Plus Fee With an Option for a GMP</p> <p>DBIA 555 Agreement Between Design-Builder and General Contractor - Lump Sum</p> <p>DBIA 560 Agreement Between Design-Builder and Design-Build Subcontractor - Cost Plus Fee With GMP Option</p> <p>DBIA 565 Agreement Between Design-Builder and Design-Build Subcontractor - Lump Sum</p> <p>DBIA 570 Agreement Between Design-Builder and Subcontractor (Subcontractor Does Not Provide Design Services)</p> <p>DBIA 575 Agreement Between Design Consultant and Design-Build Sub-Consultant</p>

AIA	ConsensusDocs	DBIA
<p>Architects should lead the design-build project.</p> <p>Bridging</p> <ul style="list-style-type: none"> • 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 • Presumption but not requirement that Owner retain separate consultant for the development of the Owner’s Criteria 	<p>Written in plain English to advance best interests of the project. Coalition of Industry associations identify best practices with fair risk allocation.</p> <p>ConsensusDocs and DBIA possess commonalities.</p>	<p>It’s All About “Design-Build Done Right”</p> <p>Promote the value of design-build project delivery and teaches the effective integration of design and construction services</p> <ul style="list-style-type: none"> • Documents designed to incorporate DBIA’s Best Practices documents. • Flexible documents usable for a variety of industries.

Relationship of the Parties

AIA	ConsensusDocs	DBIA
<p>AIA A141, Exhibit A</p> <p>§ A.5.6 Relationship of the Parties</p> <p>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.</p>	<p>CD 410</p> <p>2.1 TEAM RELATIONSHIP The Parties each agree to proceed with the Project on the basis of trust, 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 by the Dates of Substantial Completion and Final Completion if they are established by Amendment 1.</p>	<p>DBIA 535</p> <p>1.1.1 <i>Owner and Design-Builder</i> commit at all times to cooperate fully with each other, and proceed on the basis of trust and good faith, to permit each party to realize the benefits afforded under the Contract Documents.</p>
<p>Commentary: All documents mention cooperation among the Parties. The 2014 AIA documents language likely will be interpreted to create a fiduciary relationship between the Owner and Design-Builder.</p>		

When the Design-Builder First Enters the Picture

AIA	ConsensusDocs	DBIA
<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 do DBIA and 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 	<p>DBIA 520 Standard Form of Preliminary Agreement Between Owner and Design-Builder</p> <ul style="list-style-type: none"> • Option for retaining Design-Builder at earliest possible point. • If Owner's Project Criteria not developed prior to execution of Agreement, Design-Builder will assist Owner in developing such as an Additional Service (§2.2.2) • Written Evaluation of Owner's Project Criteria/mtg. (§2.2.2) • Schematic Design Documents (§2.3) • Proposal (§2.4) <p>DBIA 530 Cost Plus with GMP</p> <ul style="list-style-type: none"> • Two options: 1) GMP established at execution and 2) post award development of GMP • With post award GMP development, the Owner can bring Design-Builder on early. Design-Builder works with Owner to establish program and then submits Proposal for GMP. If Owner accepts, then parties proceed with contract. <p>DBIA 525 Lump Sum contract.</p> <ul style="list-style-type: none"> • Price established at the outset. • Must have either bridging documents or design competition in procurement.
<p>Commentary: All of the forms provide for the earliest possible involvement of the Design-Builder in the development of the project. DBIA and ConsensusDocs do so through both preliminary agreements and by providing the Design-Builder a role in the development of the Owner's project program or criteria, should the Owner so wish. The AIA B141 provides for optional preliminary services. All of the forms provide flexibility as to the amount of design required by the Owner prior to the procurement of the Design-Builder and allow for the owner to provide bridging documents.</p>		

Approach to Bridging

AIA	ConsensusDocs	DBIA
<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 DBIA, AIA.</p>	<p>Documents are flexible to allow for any form of design-build, including bridging, design competition and progressive design-build.</p> <p>DBIA 501 - Contract for Design-Build Consultant Services:</p> <ul style="list-style-type: none"> • Owner who engages a criteria professional/owner’s consultant to assist him in the selection of a design-builder using the competitive selection process. • Also for retention of the consultant after selection and award of a design-build contract, to assist during the design and construction phase. <p>DBIA 525/DBIA 530 §3.4 If Owner’s Project Criteria contain design specifications: (a) Design-Builder shall be entitled to reasonably rely on the accuracy of the information represented in such design specifications and their compatibility with other information set forth in Owner’s Project Criteria, including any performance specifications; and (b) Design-Builder shall be entitled to an adjustment in the Contract Price and/or Contract Time(s) to the extent Design-Builder’s cost and/or time of performance have been adversely impacted by such inaccurate design specification.</p>
<p>Commentary: Any of the families of standard forms could be used with a bridging approach though perhaps philosophically the AIA documents anticipate bridging in a way the others do not. The AIA notes that the DB can rely on information provided by the Owner, and requires the Owner, rather than the DB to hire geotechnical consultants to verify subsurface information. The DBIA documents also allow the DB to rely on the Owner’s information; however, the design-builder is ultimately responsible to meet the performance criteria. If there is a conflict between the prescriptive information provided by the Owner and achieving the performance criteria, the DB will receive a change order.</p>		

When Price is Set

AIA	ConsensusDocs	DBIA
<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>	<p>DBIA 520 (Preliminary Agreement)</p> <ul style="list-style-type: none"> • Design-Builder’s services conclude with a Proposal, including a proposed pricing approach (§2.4.1) • If Project proceeds, Price is established via either the DBIA 525 or 530 <p>DBIA 525 (Lump Sum)</p> <ul style="list-style-type: none"> • Price is established at execution of the contract. <p>DBIA 530 (GMP)</p> <ul style="list-style-type: none"> • Option for when price is established <ul style="list-style-type: none"> ○ Upon execution of the Agreement (§6.6.1) ○ After execution of the Agreement (§6.6.2) • For post award GMP, the Design-Builder submits a GMP proposal to the Owner after the program is sufficiently complete to price it. <ul style="list-style-type: none"> ○ Owner reviews and either accepts the proposal or rejects it. ○ If accepted, the parties proceed with the project. <p>The language is flexible to allow the parties to set a price when it best fits the project’s needs.</p>

GMP and Contingencies

AIA	ConsensusDocs	DBIA
<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. 	<p>GMP</p> <ul style="list-style-type: none"> • Design-Builder’s Fee (§6.2.1) • Cost of the Work (§6.3) <p>GMP Upon Execution of Agreement (§6.6.1)</p> <ul style="list-style-type: none"> • including any Design-Builder’s Contingency <p>GMP After Execution of Agreement (§6.6.2)</p> <ul style="list-style-type: none"> • GMP Proposal (§6.6.2.1) - Fee plus Cost of Work plus other applicable prices (§6.1.2) • Basis of Design Documents (§6.6.2.1.2) • Assumptions and clarifications (§6.6.2.1.3) • Scheduled Substantial Completion Date (§6.6.2.1.4) • Allowance items and values (§6.6.2.1.5) • Alternates (§6.6.2.1.6) • Unit prices (§6.6.2.1.7) • Statement of Additional Services (§6.6.2.1.8) • Time limit for acceptance (§6.6.2.1.9) <p>Design-Builder’s Contingency (§6.6.1.2)</p> <ul style="list-style-type: none"> • Designated dollar value • <i>For exclusive use of the Design-Builder; not available to Owner for any reason</i> • Unanticipated costs that are not the basis for a Change Order, for example: <ul style="list-style-type: none"> ○ trade buy-out differentials; ○ Overtime or acceleration; ○ Escalation of materials; ○ Correction of defective, damaged, nonconforming Work, design errors, omissions, however caused; ○ Subcontractor defaults; ○ Events that result in extension of Contract Time but not increase in Contract Price.

		<ul style="list-style-type: none"> • Design-Builder provides notice of all anticipated charges against the Contingency; Monthly report and three month forecast • Design-Builder must take reasonable steps to obtain recovery from defaulting subcontractors; any reimbursement credited to the Contingency.
<p>Commentary: Contingencies can be incorporated and used with any of the families of standard forms. The contingency is a protection to the GMP, by providing a means to address the kinds of issues that invariably arise without impacting the overall GMP. Examples of uses for the contingency include gaps in scope differences between trade packages, trade contractor defaults, corrective work, estimating errors, and design errors and omissions. One item the contingency is not used for are differing site conditions, as those claims would provide the basis for a change order.</p>		

Standards of Care and Performance Guarantees

AIA	ConsensusDocs	DBIA
<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"> ○ No express standard; implied duty to exercise reasonable skill, judgment <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) • 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>	<p>Standards of Care: For Design Professional Services:</p> <ul style="list-style-type: none"> • Common law negligence standard: care and skill ordinarily used by members of the design profession practicing under similar conditions at the same time and locality of the Project (DBIA 535, §2.3.1; DBIA 540 §2.2.1) <p>General Standard for Design-Builder:</p> <ul style="list-style-type: none"> • Implied in every contract: Duty to perform with requisite expertise, skill and competence (DBIA 535, §2.7.2) <p>Performance Guarantees: DBIA 525/530 Article 11: parties can formulate further performance standards. If established, Design-Builder is obligated to achieve</p>
<p>Commentary: Standard of care as impacted by warranty is one of the biggest differences in the documents. AIA defines the “Work” to include design and build services and then requires the design-builder to provide defect free Work. Consequently the standard of care is heightened (more like product strict liability standard which is more typical of manufacturing products.). Also, AIA has a mechanism for designer certifications, though it no longer provides that the Design-Builder’s designer will certify that all documents and services “comply with applicable professional standards”.</p> <p>The DBIA documents have a specific requirement that the design submissions and construction services must be consistent with the Basis of Design Documents and the Contract Documents, therefore, creating a higher standard for design-builders than what is required for contractors in design-bid-build. DBIA instructions provide that, the incorporation of performance guarantees will significantly impact the standard of care. Only the DBIA forms contain standard terms regarding performance guarantees through optional provisions (DBIA 525, 530, Article 11). A performance standard or guarantee will create a heightened standard of care with insurance ramifications. Therefore, they should be reviewed with insurance advisors and legal counsel.</p> <p>CDs provides for a traditional standard of care for design services, and a negligence standard for construction work.</p>		

Warranty

AIA	ConsensusDocs	DBIA
<p>AIA A141 § 1.4.3 The Work. The term “Work” means the design, construction and related services required to fulfill the 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>CD 410 3.8.1 The Design-Builder warrants that all materials and equipment furnished under the Construction Phase of this 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 the 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>	<p>DBIA 535: 1.2.19 <i>Work</i> is comprised of all Design-Builder’s design, construction and other services required by the Contract Documents, including procuring and furnishing all materials, equipment, services and labor reasonably inferable from the Contract Documents.</p> <p>2.9.1 Design-Builder warrants to Owner that the construction, including all materials and equipment furnished as part of the construction, shall be new unless otherwise specified in the Contract Documents, of good quality, in conformance with the Contract Documents and free of defects in materials and workmanship. Design-Builder’s warranty obligation excludes defects caused by abuse, alterations, or failure to maintain the Work in a commercially reasonable manner. Nothing in this warranty is intended to limit any manufacturer’s warranty which provides Owner with greater warranty rights than set forth in this Section 2.9 or the Contract Documents. Design-Builder will provide Owner with all manufacturers’ warranties upon Substantial Completion.</p>
<p>Commentary: CDs the standard of care for building is the typical negligence standard, and design services is the typical professional negligence standard. AIA defines the Work to include design and build services and thereby has a heightened standard by warranting the work will be free from defects (more like product liability of care which is a strict liability standard). DBIA limits the warranty in §2.9.1 to construction services, which alleviates the issue of providing a higher products liability standard. ConsensusDocs limits the warranty to materials, and equipment and further limits the warranty for equipment, products and systems to the manufacturer’s warranty.</p>		

Design Iteration

AIA	ConsensusDocs	DBIA
<p>Design-Build Documents (§A141 §1.4.1)</p> <p>Work Prior to Execution of Design-Build Amendment (A141 Article 4)</p> <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>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) • 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>Basis of Design Documents (DBIA 535 §1.2.2)</p> <ul style="list-style-type: none"> • For DBIA 530 (GMP): documents listed in GMP Exhibit or Proposal as being Basis of Design Documents • For DBIA 525 (LS): Owner’s Project Criteria, Design-Builder’s Proposal and Deviation List, if any <p>Design Development Services (DBIA 535 §2.4)</p> <ul style="list-style-type: none"> • Parties agree upon any interim submissions Owner may wish to review (§2.4.1) • May include design criteria, drawings, diagrams and specifications • Interim design submissions shall be consistent with the Basis of Design Documents, as they may have been changed through the design process set forth in §2.4.1 and Change Orders. • On or about time for scheduled submission, parties meet and confer about submissions • Design-Builder identifies the evolution of design and any changes to the Basis of Design Documents, or previously submitted design submissions. • Changes to the Basis of Design Documents process in accordance with Article 9 Changes. • Minutes of meeting maintained by Design-Builder and provided to attendees • Owner reviews and approves interim design submissions however, review does not shift responsibility for meeting the Basis of Design • Construction Documents (§2.4.2)

<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 Owner and Design-Builder execute a Modification. (A141 §5.1.2) <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>		<ul style="list-style-type: none"> ○ Design-Builder proceeds with construction in accordance with approved Construction Documents ○ Submits to Owner one set of approved Construction Documents prior to start of construction. ○ Interim design submissions and Construction Documents may be prepared to permit construction to proceed on a portion of the Work prior to completion of all Construction Documents. (§2.4.4).
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Commentary: The ConsensusDocs articulation of the design development process follows a more traditional structure of schematic, design development and construction documents. Those new to design-build may find this description of the steps in the design process more instructive and beneficial. The process under the AIA forms is in practice no different (except to the extent bridging documents are involved), but the description in the documents is seemingly more fluid. The process under the DBIA form provides for an iterative process where the Design-Builder’s submissions must be consistent not only with the Basis of Design Documents but also decisions made during design meetings and previous submissions.

More critical is the processes by which deviations from prior design documents are identified as the design evolves. The DBIA, AIA and ConsensusDocs forms each address this, with the goal of ensuring that an owner’s original objectives are met and avoiding later disputes over scope. There are interesting differences among the three approaches. The ConsensusDocs employs a progressive sign-off with Owner approval required at each level of design documents (schematic, design development and construction), and deviations identified based on the prior level of documents. In contrast, the AIA forms use the Design-Build Documents as the benchmark for deviations at each level of development. The DBIA forms use the Basis of Design Documents serving as the original benchmark for changes, but the interim submissions must also comply with decisions made during design meetings as well as previous submissions and change orders. The process is intended to memorialize the decisions made by the parties during the design process. Where ConsensusDocs and DBIA documents build each level of approval builds upon the prior, the AIA compels the Design-Builder to continually check the design against the Owner’s Criteria, and once Construction Documents are reached, the Design-Build Documents. As for process, the DBIA’s “meet and confer” process, memorialized by meeting minutes, may promote the greatest clarity and collaboration among the parties.

The four sets of documents also have seemingly slight but significant differences in the evolution of design. Under ConsensusDocs, as each level of design documents (schematic, design development and construction) are approved by the Owner, they become, by definition, Contract Documents (CD 410 §15.1). The DBIA approach incorporates both interim submissions as well as decisions in meetings into the Construction Documents, while the AIA’s definition of the Design-Build Documents does not expressly include Construction Documents in the definition of the Design-Build Documents.

Site Information

AIA	ConsensusDocs	DBIA
<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</u> surveys 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, reports and investigations required for governmental authorities or others having jurisdiction over the Project.</p>	<p>Furnishing of Services and Information (DBIA 535 §3.2)</p> <ul style="list-style-type: none"> • Owner provides at own cost and expense and Design-Builder entitled to rely upon <ul style="list-style-type: none"> ○ Surveys describing property boundaries, reference points ○ Geotechnical studies for subsurface conditions, surveys describing latent or concealed conditions ○ Temporary or permanent easements, zoning, other requirements and encumbrances ○ Legal description ○ As-built and record drawings of existing structures, if available ○ Environmental studies, reports, impact statements.
<p>Commentary: Unlike the DBIA and AIA forms, CD 410 does not contain language expressly stating that the Design-Builder is entitled to rely upon the accuracy and completeness of owner-provided information. Such language was included in the original version of CD 410. In updating the form in 2011, ConsensusDocs eliminated this language in favor of a revised definition of the Contract Documents (a change that was also made in the ConsensusDocs 200 Owner-Contractor agreement) that permits the parties to specifically identify Owner-provided information that will be treated as Contract Documents. These site information provisions should be reviewed and modified to the extent the design-builder is providing the site on a turnkey basis or has had the opportunity to do extensive review and testing of the existing site.</p>		

Project Financial Information

AIA	ConsensusDocs	DBIA
<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 Prior to commencement of 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 the Design-Builder's commencing or continuing the Work. The Design-Builder shall be notified prior to any material change in Project financing.</p>	<p>DBIA 535 3.3.1 At Design-Builder's request, Owner shall promptly furnish reasonable evidence satisfactory to Design-Builder that Owner has adequate funds available and committed to fulfill all of Owner's contractual obligations under the Contract Documents. If Owner fails to furnish such financial information in a timely manner, Design-Builder may stop Work under Section 11.3 hereof or exercise any other right permitted under the Contract Documents.</p>
<p>Commentary: ConsensusDocs allows the Design-Builder financial information both before and after the project commences, and provide consequences if the request is not responded to by allowing the Design-Builder to stop work. AIA previously took a similar approach but now requires a reasonableness standard for an Owner to respond upon the project commencing.</p>		

Order of Precedence

AIA	ConsensusDocs	DBIA
<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. Information identified in one Contract Document and not identified in another shall not be considered a conflict or inconsistency.</p>	<p>DBIA 525 and 530 2.1 The Contract Documents are comprised of the following: 2.1.1 All written modifications, amendments, minor changes, and Change Orders to this Agreement issued in accordance with DBIA Document No. 535, <i>Standard Form of General Conditions of Contract Between Owner and Design-Builder</i> (2010 Edition) (“General Conditions of Contract”); 2.1.2 The GMP Exhibit referenced in Section 6.6.1.1 herein or, if applicable, the GMP Proposal accepted by Owner in accordance with Section 6.6.2 herein; 2.1.3 This Agreement, including all exhibits (List for example, performance standard requirements, performance incentive arrangements, markup exhibits, allowances, unit prices, or exhibit detailing offsite reimbursable personnel) but excluding, if applicable, the GMP Exhibit; 2.1.4 The General Conditions of Contract; and 2.1.5 Construction Documents prepared and approved in accordance with Section 2.4 of the General Conditions of Contract.</p> <p>Order of Precedence 3.2 The Contract Documents are intended to permit the parties to complete the Work and all obligations required by the Contract Documents within the Contract</p>

		<p>Time(s) for the Contract Price. The Contract Documents are intended to be complementary and interpreted in harmony so as to avoid conflict, with words and phrases interpreted in a manner consistent with construction and design industry standards. In the event inconsistencies, conflicts, or ambiguities between or among the Contract Documents are discovered after execution of the Agreement, or if applicable, after Owner's acceptance of the GMP Proposal, Design-Builder and Owner shall attempt to resolve any ambiguity, conflict or inconsistency informally, recognizing that the Contract Documents shall take precedence in the order in which they are listed in Section 2.1 hereof. <i>(Note, the parties are strongly encouraged to establish in the GMP Exhibit or GMP Proposal (as applicable) the priority of the various documents comprising such exhibit or proposal.)</i></p>
<p>Commentary: ConsensusDocs and DBIA provide an order of precedence clause which gives supremacy to the most recent documents that conflict.</p>		

Ownership of Documents

AIA	ConsensusDocs	DBIA
<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>Work Product (DBIA 520/525/530 §4.1)</p> <ul style="list-style-type: none"> • Instruments of Service - Design-Builder retains ownership and property interests including copyright <p>Default provision: Owner granted limited license upon payment in full to use in connection with occupancy of project at owner's sole risk (DBIA 520/525/530 §4.2)</p> <ul style="list-style-type: none"> • Parties have option of transferring some or all of the Work Product, including copyright, to Owner, for those architectural and design elements that are unique to the Project; with understanding that any alteration of Work Product without involvement of Design-Builder will be at Owner's sole risk and with Owner obligation to indemnify. <p>Owner granted limited license to use Work Product complete and occupy the Project in the event of termination for convenience or Design-Builder termination for cause, conditioned upon:</p> <ul style="list-style-type: none"> • Payment of amounts due • Owner's use at sole risk • Additional payment for right to use if Owner resumes project through others. (DBIA 520/525/530 §4.3) <p>If Design-Builder defaults, Owner granted limited license for completion and occupancy, without Owner indemnification to the Design-Builder. (DBIA 520/525/530 §4.4)</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>		<p>Owner indemnifies Design-Builder if Design-Builder is terminated for convenience, and the Work Product is used without Design-Builder's involvement. (DBIA 520/525/530 §4.5)</p>
<p>Commentary: Each of the families provides the Owner with a least a limited license for use of the Design-Builder's/Designer's instruments of service/Documents. DBIA's license, upon completion and final payment, is for use in connection with occupancy of project. The DBIA documents have optional language to transfer ownership of a portion of the Work Product. AIA's is for constructing, using, maintaining, altering and adding to the Project. ConsensusDoc's license, after final completion and upon final payment, is for maintaining, renovating, remodeling or expanding Project at the Worksite.</p> <p>ConsensusDocs goes a step further by granting the Owner ownership of the tangible documents, though not the intellectual property. Unlike ConsensusDocs and DBIA, the AIA forms do not have a mechanism for the transfer of copyright interests.</p>		

Retainage

AIA	ConsensusDocs	DBIA
<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>	<p>DBIA 525/530 §7.2.1 Owner will retain _____ percent (____%) of each Application for Payment provided, however, that when fifty percent (50%) of the Work has been satisfactorily completed by Design-Builder and Design-Builder is otherwise in compliance with its contractual obligations, Owner will not retain any additional retention amounts from Design-Builder’s subsequent Applications for Payment. Owner will also reasonably consider reducing retainage for Subcontractors completing their work early in the Project.</p> <p>[Optional Provision] Owner will retain _____ percent (____%) from Design-Builder’s Applications for Payment, exclusive of general conditions costs, and any amounts paid to Design-Builder’s Design Consultant, from each Application for Payment provided, however, that when fifty percent (50%) of the Work has been satisfactorily completed by Design-Builder and Design-Builder is otherwise in compliance with its contractual obligations, Owner will not retain any additional amounts from Design-Builder’s subsequent Applications for Payment. Owner will also reasonably consider reducing retainage for Subcontractors completing their work early in the Project.</p>
<p>Commentary: In the DBIA, AIA, and ConsensusDocs retainage is typically released at Substantial completion. ConsensusDocs and DBIA allow for retainage to stop when the project is 50% complete. DBIA requires satisfactory completion of 50% of the work before the retainage obligation stops. DBIA provides that the Owner will reasonably consider releasing retainage for Subcontractors who complete their work early. DBIA has an optional provision to except General Conditions costs and amounts paid to the Design Consultant from the retainage.</p>		