

Construction Law Report *Special Edition*

A Comparison of the New ConsensusDOCS™ and AIA® Construction Forms



A Consideration of New Documents for a New Day

Last Fall, two organizations, one well known and established and one recently formed, published a series of contract forms for the construction industry. In releasing its 2007 revised edition of its popular series of project forms, including the widely utilized A201™ * General Conditions of the Contract for Construction, the American Institute of Architects (AIA) expressly acknowledged considerable industry concerns about various of the terms in the A201-1997 form, most notably those relating to financial matters and dispute resolution. Consequently, AIA attempted to refine its product in order, in its perspective, to “fairly balance divergent interests, and accurately reflect the modern construction industry.” We have previously highlighted some of the more important changes in the new A201-2007 edition. See www.seyfarth.com (Construction Group/Publications).

While AIA has been publishing and revising its forms every ten years for many decades, within the last few years a consortium of owner, contractor, and trade groups joined together to develop and publish what they consider to be “contract documents based on best practices and proper risk allocation, for the benefit of organization members and the construction industry at large.” The end result of the effort are documents branded ConsensusDOCS™ **.

Among the endorsers of ConsensusDOCS are owner associations such as Construction Owners Association of America, Inc. (COAA), National Association of State Facilities Administrators (NASFA), and The Construction User Roundtable (CURT); contractor associations like Associated General Contractors of America (AGC), and Associated Builders and Contractors, Inc. (ABC); a dozen subcontractor associations, surety associations such as National Association of Surety Bond Producers (NASBP) and The Surety & Fidelity Association of America (SFAA), and others, e.g., Construction Industry Roundtable (CIRT) and Lean Construction Institute (LCI). The release of the ConsensusDOCS forms marks the first time in the 100+ year history since AIA began publishing its forms that an industry-wide collaborative set of contract documents has been published.

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The current revision of the ever-popular AIA set of contract documents, coupled with the emergence of the new ConsensusDOCS forms, inevitably leads to such questions as “So, what’s the difference?”, “Which form more fairly and appropriately allocates risks among the parties in view of their respective abilities to manage and control risk?” and “Which form should be used for my project?”

To begin to answer those questions, which may well vary from project to project and from company to company, this Special Edition compares certain features of a ConsensusDOCS form for a lump sum project, namely the ConsensusDOCS 200 form, with analogous AIA forms set out in the A101-2007 and A201-2007. To do so, we have tried to quote the current texts in a neutral fashion and then comment on them separately. At times the nature of a section or clause did not lend itself easily to that format, and in those situations we have summarized the language.

To be sure, there are also many provisions that do not differ materially between the AIA and ConsensusDOCS forms. Those provisions include, for instance, design delegation responsibilities, suspension of the work, additional insureds, the freedom to the parties to choose either litigation or arbitration as the preferred method of alternative dispute resolution, and consolidation of arbitrations. We have chosen not to comment on those provisions.

We recognize that our efforts here, of necessity, are limited. Both AIA and ConsensusDOCS have published different forms for a variety of kinds of projects. Some of these contain unique and worthwhile features, but the scope of a broad analysis of the respective family of forms must be left to others, who will undoubtedly write volumes about the AIA revisions and the ConsensusDOCS forms.

Our purpose here is merely to focus on two principal forms and compare and contrast the approaches used for significant contract elements as to which there are substantive differences. We hope that you find our comparison useful.

Roger Price/Mark Johnson
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Contract Structure

AIA	CONSENSUSDOCS
The current AIA contract for a stipulated sum project consists of at least two documents, the AIA A101-2007 and the AIA A201-2007 forms.	The ConsensusDOCS analog consists of a single, integrated form, the Consensus 200.

COMMENTARY

AIA maintains its format of separating the Owner-Contractor agreement from the document containing the General Conditions that are intended to govern the project. ConsensusDOCS elects to combine those features into a single document. While the use of a single document and the integration of the general conditions into the primary contract should reduce possible inconsistencies and simplify drafting, the Consensus 200 lacks an index that would be helpful in navigating through the form. ConsensusDOCS does provide an order for interpreting its contract document in Paragraph 14.2.

Project Administration

AIA

Article 4 of A201-2007 no longer is captioned “Administration of the Contract”, but Section 4.2.1 provides now as it did previously that the “Architect will provide administration of the Contract” In Sections 15.2.1 to 15.2.5, the text of former A201-1997 Sections 4.4.1 to 4.4.5, which outlined procedures for evaluating, presenting, and resolving claims by the Architect, now permits the designation of an “Initial Decision Maker,” defined in Section 1.1.8 as “the person identified in the Agreement to render initial decisions on Claims . . . and certify termination of the Agreement”

CONSENSUSDOCS

2.1 RELATIONSHIP OF PARTIES

Paragraph 2.1 requires the **Owner** and **Contractor** “to proceed with the Project on the basis of mutual trust, good faith and fair dealing.”

Subparagraph 2.1.1 provides that the “**Contractor** shall furnish construction administration and management services and use . . . diligent efforts to perform the Work”

COMMENTARY

There are clear differences in tone and approach between the AIA and ConsensusDOCS forms. ConsensusDOCS emphasizes the importance of the Owner-Contractor relationship, literally invokes language of “harmony and cooperation,” stresses the desirability of direct communications and places the burden of dispute resolution on the principal parties themselves. AIA inserts a third party into the administration and dispute resolution processes. Its new form allows for that third party to be someone other than the Architect, but there is, still, a third party involved along with the Owner and Contractor.

The utilization of an Initial Decision Maker (IDM) was reportedly made by AIA in response to Owners’ and Contractors’ complaints that they did not always prefer to have the Architect serve in the role of the initial decision maker. Now, through the revised AIA 2007 Owner-Contractor Agreements, the parties have the opportunity to select an independent third-party neutral to serve as the IDM instead of the Architect. In the event that the parties do not make that selection, the default choice is for the Architect to serve as the IDM, consistent with prior practice. For more on the IDM, see commentary below (at 35) on Dispute Resolution.

Contract Construction

AIA	CONSENSUSDOCS
<p data-bbox="115 506 467 600">§ 1.2 CORRELATION AND INTENT OF THE CONTRACT DOCUMENTS</p> <p data-bbox="115 638 467 1167">§ 1.2.1 “The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and . . . performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.”</p>	<p data-bbox="505 506 1166 533">14.2. INTERPRETATION OF CONTRACT DOCUMENTS</p> <p data-bbox="505 571 1495 701">14.2.1 “The drawings and specifications are complementary. If Work is shown only on one but not on the other, the Contractor shall perform the Work as though fully described on both consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.”</p> <p data-bbox="505 739 1507 932">14.2.2 “In case of conflicts between the drawings and specifications, the specifications shall govern. In any case of omissions or errors in figures, drawings or specifications, the Contractor shall immediately submit the matter to the Owner for clarification. The Owner’s clarifications are final and binding on all Parties, subject to an equitable adjustment in Contract Time or Price pursuant to Articles 6 and 7 or dispute resolution in accordance with Article 12.”</p> <p data-bbox="505 970 1507 1304">14.2.5 “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; (b) this Agreement; (c) subject to Subparagraph 14.2.2 the drawings (large scale governing over small scale), specifications and addenda issued prior to the execution of this Agreement; (d) approved submittals; (e) information furnished by the Owner pursuant to Paragraph 4.3; (f) other documents listed in this Agreement. 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>

COMMENTARY

Both AIA and ConsensusDOCS provide that the Contract Documents are complementary and are intended for Contractor to perform the Work to the extent consistent with them and as reasonably inferable from them, as being necessary to produce the indicated results.

ConsensusDOCS additionally provides a mechanism for Contractor to call to Owner’s attention omissions or errors in figures, drawings or specifications. (See ConsensusDOCS Subparagraph 3.2.4.) AIA does not, other than as provided in AIA Section 3.2. Further, ConsensusDOCS provides an order of preference for interpreting contract documents, with change orders being accorded the highest precedence. (See ConsensusDOCS Subparagraph 14.2.5.)

Document Ownership

AIA	CONSENSUSDOCS
<p>§ 1.5 OWNERSHIP AND USE OF DRAWINGS, SPECIFICATIONS AND OTHER INSTRUMENTS OF SERVICE</p> <p>§ 1.5.1 The Architect and the Architect’s consultants shall be deemed the authors and owners of their respective Instruments of Service . . . and will retain all common law, statutory and other reserved rights</p>	<p>2.3 ARCHITECT/ENGINEER</p> <p>2.3.1 “The Owner shall obtain from the Architect/Engineer either a license for Contractor . . . to use the design documents . . . or ownership of the copyrights for such design documents, and shall indemnify and hold harmless the Contractor”</p>

COMMENTARY

AIA expressly and ConsensusDOCS implicitly recognize that Contractor does not usually have an ownership interest in the design drawings. While AIA continues to employ its “Instrument of Service” terminology to specify the ownership of such documents, ConsensusDOCS emphasizes the need of Owner to provide appropriate documents to Contractor to enable Contractor to proceed with its work.

Electronic Document Transmission

AIA	CONSENSUSDOCS
<p>§ 1.6 TRANSMISSION OF DATA IN DIGITAL FORM</p> <p>§ 1.6 “If the parties intend to transmit . . . information or documentation in digital form, they shall endeavor to establish necessary protocols governing such transmissions, unless otherwise already provided”</p>	<p>4.6.1 DIGITIZED DOCUMENTS “If the Owner requires that the Owner, Architect/Engineer and Contractor exchange documents and data in electronic or digital form, . . . the Owner, Architect/Engineer and Contractor shall agree on a written protocol governing all exchanges in ConsensusDOCS 200.2 or a separate Agreement”</p>

COMMENTARY

For the first time, the AIA A201 form refers to electronic transmission of data. And, for the first time, AIA offers a Digital Data Protocol Exhibit, known as AIA Document E201-2007. Section 1.1 of that document provides that it “establishes the procedures the parties agree to follow with respect to the transmission or exchange of “ information created or stored in digital form. E201 contains relatively few operative provisions. It does contain the transmitting party’s warranty of ownership of the data transmitted, but no warranty that the data conveyed is complete, suitable or worthy of reliance. There is no direct license to use the data (AIA has a new form, C106-2007, for that purpose), but there is a statement (at § 2.4) that “the receiving party’s use, modification, or further transmission is specifically limited to the design and construction of the Project The receiving party, however, agrees to indemnify the transmitting party with respect to the claims arising out of the latter’s modification or unlicensed use of the data. Finally, E201 takes precedence over the terms of the Agreement to which it is an exhibit. But E201 is a two party agreement and the transmitting and receiving party may not, and are likely not to, be the same parties as the parties to the main Agreement.

ConsensusDOCS 200.2 – Electronic Communications Protocol Addendum, which is a more detailed document than the AIA E201, expressly provides a “limited license to use the information transmitted (Paragraph 4.10), and tends to address practical issues of administration rather than transmission, for instance with the identification of an IT Management Coordinator (Subparagraph 3.3.1). As for issues of responsibility and liability, the ConsensusDOCS 200.2 assigns to the transmitting party the responsibility for the accuracy of conveyed data (Paragraph 8.3), and addresses and allocates issues of translation errors (Paragraph 4.7). Significantly, it provides a mutual indemnification from damages incurred or arising by transmissions that do not conform to the agreed systems (Paragraph 8.2).

In short, the ConsensusDOCS 200.2 is more complete and more balanced than the AIA E201. But neither document addresses seriously issues arising from information sharing, in the form of collaborative design, or supplemental design, such as where a subcontractor designs a particular phase of system in the project, much less issues related to the complete project model.

Financial Information

AIA

§ 2.2 INFORMATION AND SERVICES REQUIRED OF THE OWNER

§ 2.2.1 Contractors may request financial information from Owner after the Work has commenced “only . . . 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.”

CONSENSUSDOCS

4.2 FINANCIAL INFORMATION. “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.”

COMMENTARY

AIA A201-1997 had increased Owner’s obligation to furnish certain information. The A201-2007 revision, however, attempts to rebalance the relationship and reduce Contractor’s previous unfettered right to obtain information financial information from Owner at any time during the project. While Contractor may still gain access to the Owner’s financial information prior to commencement of the Work, its ability to do so after the Work commences is now much more restricted.

ConsensusDOCS obligates Owner to provide evidence only of project financing, as opposed to general financial information, but Owner is obligated to do so both prior to commencement of the work and at anytime thereafter upon written request of Contractor.

Indemnity

AIA

§ 3.18 INDEMNIFICATION

§ 3.18.1 “To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect . . . from and against claims, damages, losses and expenses . . . attributable to bodily injury, sickness . . . destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor . . . regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate . . . obligations of indemnity which would otherwise exist as to a party or person described in this Section 3.18.”

CONSENSUSDOCS

10.1 INDEMNITY

10.1.1 “To the fullest extent permitted by law, the **Contractor** shall indemnify and hold harmless the **Owner** . . . the **Architect/Engineer** and Others (the Indemnitees) from all claims for bodily injury and property damage, other than to the Work itself and other property insured under Subparagraph 10.3.1, . . . but only to the extent caused by the negligent acts or omissions of the **Contractor** . . . The **Contractor** shall be entitled to reimbursement of any defense costs paid above **Contractor’s** percentage of liability for the underlying claim to the extent provided for under Subparagraph 10.1.2.”

10.1.2 “To the fullest extent permitted by law, the **Owner** shall indemnify and hold harmless the **Contractor** . . . from all claims for bodily injury and property damage, other than property insured under Subparagraph 10.3.1 . . . but only to the extent caused by the negligent acts or omissions of the **Owner, Architect/Engineer** or Others. The **Owner** shall be entitled to reimbursement of any defense costs paid above **Owner’s** percentage of liability for the underlying claim to the extent provided for under Subparagraph 10.1.1.”

COMMENTARY

AIA imposes an indemnity obligation only upon Contractor. Other than as it relates to dealing with hazardous materials (see Section 10.3.3 below, at 26), there is no reciprocal indemnification obligation running from Owner to Contractor.

ConsensusDOCS, on the other hand, provides for mutual indemnity obligations between Owner and Contractor, whereby each indemnifies the other for losses that the indemnifying party causes. Parties are also allowed to recover defense costs beyond their respective levels of negligence, although there is no express duty to defend imposed.

ConsensusDOCS includes the term “Others” (Subparagraph 2.4.11) which is defined as “other contractors, material suppliers and persons at the worksite who are not employed by the **Contractor** or Subcontractors.” Without further clarification here, use of the word “Others” in defining the scope of parties entitled to indemnification could lead to a broadening of liability to parties whom Owner and Contractor may not have intended to benefit.

Contractor Reporting

AIA

§ 3.2 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR

§ 3.2.2 “. . . Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents . . . , 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.”

§ 3.2.2 “Contractor shall promptly report to the Architect any errors, inconsistencies or omissions discovered by or made known to the Contractor as a request for information in such form as the Architect may require.”

§ 3.2.3 Contractor shall report nonconformities promptly to Architect “as a request for information in such form as the Architect may require.”

§ 3.2.4 “If the Contractor fails to perform the obligations of Sections 3.2.2 and 3.2.3, the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations”

CONSENSUSDOCS

3.3 RESPONSIBILITY FOR PERFORMANCE

3.3.1 “. . . prior to commencing the Work the **Contractor** shall examine and compare the drawings and specifications with information furnished by the **Owner** pursuant to Paragraph 4.3 [worksite information], relevant field measurements made by the **Contractor** and any visible conditions at the Worksite affecting the Work.”

3.3.2 “If . . . the **Contractor** discovers any errors, omissions or inconsistencies in the Contract Documents, the **Contractor** shall promptly report them to the **Owner**. It is recognized, however, that the **Contractor** is not acting in the capacity of a licensed design professional, and that the **Contractor’s** examination is to facilitate construction and does not create an affirmative responsibility to detect errors”

3.3.3 “The **Contractor** shall have no liability for errors, omissions or inconsistencies discovered under Subparagraphs 3.3.1 and 3.3.2 unless the **Contractor** knowingly fails to report a recognized problem to the **Owner**.”

COMMENTARY

Section 3.2 of A201-1997 was criticized for reducing Contractor’s obligations because Contractor was liable only for errors and omissions it “recognized” and “knowingly” failed to report. The revised text imposes on Contractor new obligations both in the kinds of information it must report to Architect and the format for reporting that information. For example, Contractor must now report not only errors it discovers, but also anything that is “made known” to Contractor. Failure to do so may obligate Contractor to reimburse Owner for any resulting losses.

While ConsensusDOCS similarly requires Contractor to report errors, the burden on Contractor is less onerous. It needs to only report those errors Contractor discovers and Contractor is liable only to the extent it “knowingly fails” to report a recognized problem. That is, ConsensusDOCS essentially adopts the A201-1997 approach.

Owner's Responsibilities

AIA	CONSENSUSDOCS
<p data-bbox="115 506 363 533">§ 3.8 ALLOWANCES</p> <p data-bbox="115 573 743 667">§ 3.8.3 "Material and equipment under an allowance shall be selected by the Owner with reasonable promptness."</p>	<p data-bbox="829 506 1507 600">4.1 INFORMATION AND SERVICES "Any information or services to be provided by the Owner shall be provided in a timely manner so as not to delay the Work."</p>

COMMENTARY

Former A201-1997 Section 3.8.3 required Owner to make its selection "in sufficient time to avoid delay in Work." The new standard makes Owner's obligation more ambiguous.

ConsensusDOCS is consistent with the previous AIA position, and ties Owner's obligation to a delay of the Work. Failure of Owner to do so could trigger a claim by Contractor for an adjustment to the contract price or contract time, or both.

Superintendents

AIA

§ 3.9 SUPERINTENDENT

§ 3.9.2 “The Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the name and qualifications of a proposed superintendent. The Architect may reply within 14 days to the Contractor in writing stating 1) whether the Owner or the Architect has reasonable objection to the proposed superintendent or 2) that the Architect requires additional time to review. Failure of the Architect to reply within the 14-day period shall constitute notice of no reasonable objection.”

§ 3.9.3 “The Contractor shall not employ a proposed superintendent to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not change the superintendent without the Owner’s consent, which shall not unreasonably be withheld or delayed.”

CONSENSUSDOCS

3.4 CONSTRUCTION PERSONNEL AND SUPERVISION

3.4.1 “. . . **Contractor** shall notify **Owner** in writing of the name and qualifications of its proposed superintendent(s) and project manager If, for reasonable cause, the **Owner** refuses to approve the individual, or withdraws its approval after once giving it, **Contractor**” shall tender a different name. “Any disapproved superintendent shall not perform in that capacity thereafter at the worksite.”

COMMENTARY

AIA Sections 3.9.2 and 3.9.3 are new and recognize both the importance of a superintendent to a project and the importance of a positive relationship between the superintendent and Owner and Architect. The new sections provide a procedure by which either Owner or Architect may reject Contractor’s designated choice, though any such rejection must be “reasonable.” The scope of the superintendent’s role and authority is left unclear.

ConsensusDOCS also calls for the designation and approval of a superintendent, but Architect plays no official role in that process. In addition, ConsensusDOCS calls for the appointment of specific Contractor and Owner representatives who can bind their respective parties.

Schedule

AIA	CONSENSUSDOCS
<p data-bbox="115 506 792 533">§ 3.10 CONTRACTOR'S CONSTRUCTION SCHEDULES</p> <p data-bbox="115 573 792 898">§ 3.10.2 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," which shall not be unreasonably withheld. "If the Contractor fails to submit a submittal schedule, the Contractor shall not be entitled to any increase in the Contract Sum or extension of Contract Time based on the time required for review of submittals."</p>	<p data-bbox="829 506 1214 533">6.2 SCHEDULE OF THE WORK</p> <p data-bbox="829 573 1511 1003">6.2.1 "Before submitting the first application for payment, the Contractor shall submit to the Owner, and if directed, its Architect/Engineer, a Schedule of the Work that shall show the dates on which the Contractor plans to commence and complete various parts of the Work, including dates on which information and approvals are required from the Owner. On the Owner's written approval of the Schedule of the Work, the Contractor shall comply with it [sic] unless directed by the Owner to do otherwise or the Contractor is otherwise entitled to an adjustment in the Contract Time. The Contractor shall update the Schedule . . . on a monthly basis or at appropriate intervals"</p>

COMMENTARY

The prior A201-1997 format merely required Contractor to submit a schedule that was coordinated with its construction and allowed Architect reasonable time to review submittals. The new A201-2007 is more stringent with respect to the timing and maintenance of submittal schedules, the Architect's approval role is more intrusive, and the penalties for failing to comply are more severe.

The ConsensusDOCS approach does not necessarily require Architect's approval, nor does it discuss any penalties on Contractor for failing to submit the schedule of the work in a timely manner.

Interim Change Directives

AIA

§ 7.3 CONSTRUCTION CHANGE DIRECTIVES

§ 7.3.1 “. . . The Owner may by Construction Change Directive [which must be prepared by the Architect and signed by the Architect and Owner], without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.”

§ 7.3.7 “If the Contractor . . . disagrees with the method for adjustment in the Contract Sum, the method and the adjustment shall be determined by the Architect”

§ 7.3.9 “. . . . The Architect’s interim determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a Claim in accordance with Article 15.”

CONSENSUSDOCS

8.2 INTERIM DIRECTED CHANGE

8.2.1 “The **Owner** may issue a written Interim Directed Change directing a change in the Work prior to reaching agreement with the **Contractor** on the adjustment, if any, in the Contract Price or the Contract Time.”

8.2.2 “The **Owner** and the **Contractor** shall negotiate expeditiously and in good faith for appropriate adjustments, as applicable, to the Contract Price If there is a dispute as to the cost to the **Owner**, the **Owner** shall pay the **Contractor** fifty percent (50%) of its estimate cost to perform the work. In such event, the Parties reserve their rights as to the disputed amount, subject to the requirements of Article 12.”

COMMENTARY

Both AIA and ConsensusDOCS allow Owner to issue an interim change directive, requiring Contractor to implement a change in the Work until the parties reach a final agreement, in the form of a change order, regarding any impact to the contract sum or the time for performance. They differ, however, on the procedures for resolving a dispute regarding the impact of the directed work on the contract sum.

AIA provides that the Architect shall determine both the method for and the adjustment of the contract sum. The Initial Decision Maker (see Section 15.2 below, at 34-35), is not a party to the process at that point. Instead, Architect’s decision shall be binding, subject to the parties’ right to invoke the dispute resolution procedures set forth in Article 15, which theoretically could involve an IDM. Consequently, if Architect rejects Contractor’s anticipated costs, Contractor may be left having to fund the entire cost of the directed change until a final resolution is reached, which could be long after the directed Work was required to be performed and, indeed, after completion of the project.

While ConsensusDOCS similarly allows a final resolution to disputed adjustment in the contract sum, it differs from AIA in two significant respects. First, it requires Owner and Contractor, as the parties most directly impacted by the resolution, to try to reach an accord themselves, rather than relegating that authority to Architect. Second, it provides interim relief to Contractor where AIA does not. Specifically, in the event of a dispute regarding an adjustment to the contract sum based on Contractor’s estimated costs of the directed work, ConsensusDOCS requires Owner to at least pay fifty percent (50%) of Contractor’s estimate. This will result in an immediate infusion of funds to Contractor to defray the cost of the directed work until a final resolution occurs. In this regard, ConsensusDOCS believes that it has struck an important balance for Contractor to maintain financial viability, while allowing Owner to retain legitimate claims in dispute.

Overhead

AIA	CONSENSUSDOCS
<p data-bbox="115 506 675 535">§ 7.3 CONSTRUCTION CHANGE DIRECTIVES</p> <p data-bbox="115 573 760 701">§ 7.3.6 The default method for determining an appropriate adjustment in the Contract Sum is for the Architect to determine an amount, which shall include “an amount for overhead”</p>	<p data-bbox="829 506 1216 535">8.3 DETERMINATION OF COST</p> <p data-bbox="829 573 1490 737">8.3.1.3 ConsensusDOCS provides alternative methods for calculating a change in Contract Price resulting from a change in the Work, one of which refers to a recovery of a percentage of “overhead” (which is defined in ¶ 2.4.12).</p> <p data-bbox="829 774 1511 1102">2.4.12 “The term Overhead shall mean 1) payroll costs and other compensation of Contractor employees in the Contractor’s principal and branch offices; 2) general and administrative expenses of the Contractor’s principal and branch offices including deductibles paid on any insurance policy, charges against the Contractor for delinquent payments, and costs related to the correction of defective work; and 3) the Contractor’s capital expenses, including interest on capital used for the Work.”</p>

COMMENTARY

Both forms allow for the recovery of overhead. AIA does not define the term, however, and ConsensusDOCS does. Presumably, the detailed definition will minimize disputes by allowing for a smoother resolution of change order requests.

Liquidated Damages

AIA	CONSENSUSDOCS
<p>§ 8.3 DELAYS AND EXTENSIONS OF TIME</p> <p>§ 8.3.3 “This Section 8.3 does not preclude the recovery of damages for delay by either party under other provisions of the Contract Documents.”</p>	<p>6.5 LIQUIDATED DAMAGES</p> <p>6.5.1.1 SUBSTANTIAL COMPLETION “The Contractor understands that if the Date of Substantial Completion . . . is not attained, the Owner will suffer damages which are difficult to determine and accurately specify. The Contractor agrees that if the Date of Substantial Completion is not attained the Contractor shall pay the Owner _____ Dollars (\$ _____) as liquidated damages and not as a penalty for each Days [sic] that Substantial Completion extends beyond the date of Substantial Completion. The liquidated damages provided herein shall be in lieu of all liability for any and all extra costs, losses, expenses, claims, penalties and any other damages of whatsoever nature incurred by the Owner which are occasioned by any delay in achieving the Date of Substantial Completion.”</p> <p>6.5.1.2 FINAL COMPLETION Language similar to Subparagraph 6.5.1.1, above, allows for liquidated damages for delay in achieving final completion.</p>

COMMENTARY

AIA Section 8.3.1 provides that Architect, in the event Contractor is delayed in its performance, may determine that the Contract Time should be extended. AIA A201-2007 does not, however, contain a provision authorizing, or disallowing, liquidated damages for either Owner or Contractor. Section 8.3.3 makes clear that the allowance of a contract extension does not necessarily bar such damages, should the parties agree to them.

ConsensusDOCS gives Owner and Contractor an express opportunity to provide for liquidated damages instead of other damages that may be incurred because of a delay. And it does so both in the context of Substantial Completion as well as Final Completion. Because this provision allows for the election of liquidated damages, it must be read in connection with the waiver of consequential damages found in Paragraph 6.6. (See below, at 32-33.) On that issue, there are some competing concerns among the ConsensusDOCS member organizations. AGC, for example, has expressed concern that having both Owner and Contractor waive consequential damages, but simultaneously allowing Owner to recover liquidated damages, is not an even trade-off, in that liquidated damages are typically intended to compensate Owner for its actual delay damages, such as lost revenues or income, which also are a type of consequential damages. Thus, AGC reasons, allowing Owner to recover lost revenues or income in the form of liquidated damages, but then requiring both Owner and Contractor to waive such in the form of consequential damages, may actually result in Contractor giving up more rights than Owner. In any event, before agreeing to or rejecting a liquidated damages, the parties should assess the applicable economic risks and also consult with local construction counsel familiar with the applicable law on the enforceability of such a provision.

Third Party Claims and Progress Payments

AIA

§ 9.5 DECISIONS TO WITHHOLD CERTIFICATION

§ 9.5.1 “The Architect may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner The Architect may also withhold a Certificate for Payment . . . to protect the Owner from loss for which the Contractor is responsible, including . . . third party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the Contractor”

CONSENSUSDOCS

9.3 ADJUSTMENT OF CONTRACTOR'S PAYMENT APPLICATION

9.3.7 [“The **Owner** may adjust or reject a payment application . . . to the extent that the **Contractor** is responsible therefor under this Agreement”] for “third party claims involving the **Contractor** or reasonable evidence demonstrating that third party claims are likely to be filed unless and until the **Contractor** furnishes the **Owner** with adequate security in the form of a surety bond, letter of credit, or other collateral or commitment which are sufficient to discharge such claims if established.”

COMMENTARY

Both AIA and ConsensusDOCS allow Owner to withhold payment if a third party files a claim, such as a mechanics lien. They differ, however, in the determination of what is sufficient security to require the eventual release of those funds.

AIA empowers Architect to withhold funds until Contractor provides “security acceptable to the Owner,” but provides no guidance as to what is sufficient security, other than leaving it up to Owner’s, or Architect’s, seemingly unilateral determination.

ConsensusDOCS, on the other hand, requires the release of funds upon the furnishing by Contractor of adequate security that is “sufficient to discharge” such claims, which provides more guidance than AIA and, arguably, reduces the arbitrariness in the determination of what is acceptable security to Owner.

Substantial Completion

AIA	CONSENSUSDOCS
<p>§ 9.8 SUBSTANTIAL COMPLETION</p> <p>§ 9.8.1 “Substantial Completion is the stage in the progress of the Work 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.”</p> <p>§ 9.8.2 “When the Contractor considers that the Work . . . is substantially complete, the Contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected prior to final payment. . . .”</p> <p>§ 9.8.3 “Upon receipt of the Contractor’s list, the Architect will make an inspection to determine whether the Work . . . is substantially complete. . . .”</p> <p>§ 9.8.4 “When the Work . . . is substantially complete, the Architect will prepare a Certificate of Substantial Completion which shall establish the date of Substantial Completion”</p>	<p>2.4 DEFINITIONS</p> <p>Subparagraph 2.4.17 defines Substantial Completion of the Work as occurring on “the date 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.” This date is to be confirmed in writing “by the Owner and Contractor.”</p>

COMMENTARY

The definition of Substantial Completion does not differ appreciably between AIA and ConsensusDOCS, but the method of confirmation of that date surely does. AIA requires a submission by Contractor to and inspection and approval by the Architect. ConsensusDOCS merely requires that Contractor and Owner agree.

Retainage

AIA	CONSENSUSDOCS
<p data-bbox="115 506 540 537">§ 9.8 SUBSTANTIAL COMPLETION</p> <p data-bbox="115 573 786 804">§ 9.8.5 “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. Upon such acceptance and consent of surety, if any, the Owner shall make payment of retainage applying to such Work or designated portion thereof”</p>	<p data-bbox="829 506 1170 537">9.2 PROGRESS PAYMENTS</p> <p data-bbox="829 573 1479 737">9.2.4 RETAINAGE “From each progress payment made prior to Substantial Completion the Owner may retain ___ percent (___%) of the amount otherwise due If the Owner chooses to use this retainage provision:</p> <p data-bbox="854 772 1495 905">9.2.4.1 after the Work is fifty percent (50%) complete, the Owner shall withhold no additional retainage and shall pay the Contractor the full amount of what is due on account of progress payments; . . .</p> <p data-bbox="854 940 1503 1035">9.2.4.3 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.”</p>

COMMENTARY

Under the AIA approach retainage is not to be released until the achievement of substantial completion of the entire Work of the project, and only then as to designated portions of the Work if there still remain parts that are not substantially complete. Thus, as to early finishing trades and other subcontractors, whose work has been accepted or as to which Owner has made no complaints, Owner may withhold the applicable retainage until the end of the project, when substantial completion is achieved.

ConsensusDOCS adopts a different approach. It allows Owner to release retainage applying to the work of early finishing trades and other subcontractors once their work has been accepted. Once the overall Work of the project is 50% complete, then Owner is not permitted to withhold any additional retainage. ConsensusDOCS believes that its approach allows for payment to flow in a more fair and equitable manner on the project.

Mechanics Liens and Waivers of Lien

<p>AIA</p> <p>N/A</p>	<p>CONSENSUSDOCS</p> <p>9.2.3 LIEN WAIVERS AND LIENS</p> <p>9.2.3.1 PARTIAL LIEN WAIVERS AND AFFIDAVITS “If required by the Owner, as a prerequisite for payment, the Contractor shall provide partial lien and claim waivers in the amount of the application for payment Such waivers shall be conditional upon payment. In no event shall the Contractor be required to sign an unconditional waiver of lien or claim, either partial or final, prior to receiving payment or in an amount in excess of what it has been paid.”</p>
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COMMENTARY

It is not an uncommon occurrence on construction payouts to require Contractor to obtain lien waivers from its subcontractors as a prerequisite to payment, typically in the form of conditional lien waivers. Oftentimes, Contractors are required to obtain unconditional waivers, whether partial or final, that exceed the amount of what has been paid. ConsensusDOCS seeks to eliminate this aspect of the payment process.

Final Completion

AIA

§ 9.10 FINAL COMPLETION AND FINAL PAYMENT

§ 9.10.1 "Upon receipt of the Contractor's written notice that the Work is ready for final inspection and acceptance . . . the Architect will promptly make such inspection and, when the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment" stating that the Work has been completed and final payment is due.

CONSENSUSDOCS

2.4 DEFINITIONS

2.4.9 "Final Completion occurs on the date when the **Contractor's** obligations under this Agreement are complete and accepted by the **Owner** and final payment becomes due and payable, as established in Article 6 [Contract Time]. This date shall be confirmed by a Certificate of Final Completion signed by the **Owner** and the **Contractor**."

COMMENTARY

AIA provides no direct definition of final completion, but leaves the determination in Architect's hands. ConsensusDOCS, on the other hand, de-emphasizes the role of Architect and effectively places the decision as to acceptable completion with the Owner. (See *also*, Final Payment below, at 25.)

Final Payment

AIA	CONSENSUSDOCS
<p>§ 9.10 FINAL COMPLETION AND FINAL PAYMENT</p> <p>§ 9.10.2 “Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner’s property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien”</p>	<p>9.8 FINAL COMPLETION AND FINAL PAYMENT</p> <p>9.8.4 “Final payment shall be due on the Contractor’s submission of the following to the Owner: . . . an affidavit declaring any indebtedness connected with the Work, e.g. [sic] payrolls or invoices for materials or equipment, to have been paid, satisfied or to be paid with the proceeds of final payment, so as not to encumber the Owner’s property . . . release of any liens, conditioned on final payment being received”</p>

COMMENTARY

AIA requires Contractor’s attestation that all subcontractors and suppliers have been paid prior to receipt of final payment, including any unconditional full and final lien waivers (or posting of a bond) that may be requested by Owner, as a precondition to final payment. ConsensusDOCS, on the other hand, allows Contractor to receive final payment by attesting that all subcontractors and suppliers either have been paid or will be paid out of the proceeds of final payment from Owner, without the need for posting a bond.

Hazardous Materials

AIA

§ 10.3 HAZARDOUS MATERIALS

§ 10.3.1 “The Contractor is responsible for compliance with any requirements included in the Contract Documents regarding hazardous materials.”

§ 10.3.3 Owner must indemnify Contractor, Subcontractor and Architect for damages relating to the presence of hazardous materials “except to the extent such damage, loss, or expense is due to the fault or negligence of the party seeking indemnity.”

§ 10.3.4 “The Owner shall be responsible for materials or substances required by the Contract Documents, except to the extent of the Contractor’s fault or negligence in the use and handling of such materials or substances.”

§ 10.3.5 “The Contractor shall indemnify the Owner for the cost and expense the Owner incurs (1) for remediation of a material or substance the Contractor brings to the site and negligently handles or (2) where the Contractor fails to perform its obligations under Section 10.3.1, except to the extent that the cost and expense are due to the Owner’s fault or negligence.”

CONSENSUSDOCS

3.13 HAZARDOUS MATERIALS

3.13.2 “If after the commencement of the Work Hazardous Material is discovered at the Worksite, the **Contractor** shall be entitled to immediately stop Work in the affected area. The **Contractor** shall report the condition to the **Owner**, the **Architect/Engineer**, and, if required, the government agency with jurisdiction.”

3.13.3 “The **Contractor** shall not be required to perform any Work relating to or in the area of Hazardous Material without written mutual agreement.”

3.13.4 “The **Owner** shall be responsible for retaining an independent testing laboratory to determine the nature of the material encountered and whether the material requires corrective measures or remedial action. Such measures shall be the sole responsibility of the **Owner**, and shall be performed in a manner minimizing any adverse effects upon the Work. The **Contractor** shall resume Work in the area affected by any Hazardous Material only upon written agreement between the Parties after the Hazardous Material has been removed or rendered harmless and only after approval, if necessary, of the governmental agency with jurisdiction.”

COMMENTARY

The language of A201-2007 focuses on risk allocation, with an emphasis on which party has a right of indemnification under what circumstances. (This is the only place in the A201 form that imposes an indemnity obligation on Owner.) By contrast, ConsensusDOCS focuses on field operations, presumably leaving the allocation of risk to the mutual contract indemnification clauses contained in Paragraph 10. (See Indemnity above, at 12.)

Of course, the new AIA text did not develop in a vacuum. The A201-1997 form limited Contractor's liability to conditions "encountered on the site by the Contractor." The new AIA language expands that liability by making Contractor directly responsible to comply with all contractual hazardous materials requirements even if Contractor has not specifically encountered such conditions on the site.

The A201-1997 text also had broadened the scope of Owner's indemnification obligations for environmental matters. Specifically, the 1997 version permitted Owner to avoid indemnity only where the damage, loss, or expense was due to the "sole negligence" of the party seeking indemnity. That language entitled a party to seek indemnification from Owner even if that party shared in the blame for the loss. The 2007 language, however, limits Owner's indemnification obligation proportionally to the (1) degree of "fault" or (2) degree of "negligence" of the other party seeking indemnity.

Finally, the A201-1997 language held Owner responsible for hazardous materials brought to the site by Contractor that were required by the Contract Documents. The new language narrows Owner's responsibility for losses sustained from such hazardous materials, to the extent that they are due to Contractor's fault or negligence in using or handling the materials.

Time Limits

AIA	CONSENSUSDOCS
<p data-bbox="115 506 505 537">§ 13.7 TIME LIMITS ON CLAIMS</p> <p data-bbox="115 573 797 926">§ 13.7.1 “The Owner and Contractor shall commence all claims and causes of action, whether in contract, tort, breach of warranty or otherwise, against the other arising out of or related to the Contract in accordance with the requirements of the final dispute resolution method selected in the Agreement within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Contractor waive all claims and cause of action not commenced in accordance with this Section 13.7.1.”</p>	<p data-bbox="1149 506 1198 537">N/A</p>

COMMENTARY

AIA has eliminated from the A201-1997 language that triggered the limitation period upon one of three events: substantial completion, final completion, or to the date of warranty work corrected, which allowed for the possibility of shortening limitation periods to bring claims, such as for latent defects against Contractors, under applicable state-law by eliminating the “discovery rule” for bringing claims. AIA now links the right of the parties to bring claims with the requirements established by governing law, so that any applicable discovery rule will still apply. But, AIA still imposes a statute of repose that bars all claims ten (10) years from the date of substantial completion. That period may be less than allowed in some states. Failure to commence claims in accordance with this provision results in a waiver of those claims.

ConsensusDOCS does not address time limits for claims. Similar to AIA, it links the right of parties to bring claims with the requirements established by governing law, including any applicable discovery rule. Unlike AIA, however, ConsensusDOCS does not impose any contractual statute of repose, which would serve to bar all claims as of a date certain. Only if applicable law imposes a statute of repose would such an automatic cut-off date exist.

Termination by Contractor

AIA	CONSENSUSDOCS
<p data-bbox="115 499 667 531">§ 14.1 TERMINATION BY THE CONTRACTOR</p> <p data-bbox="115 569 797 768">§ 14.1.2 “Contractor may terminate the Contract if . . . repeated suspensions, delays or interruptions of the entire Work by the Owner as described in Section 14.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.”</p> <p data-bbox="115 806 797 1005">§ 14.1.3 If a proper reason for termination exists, “the Contractor may, upon seven days’ written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed, including reasonable overhead and profit, costs incurred by reason of such termination, and damages.”</p>	<p data-bbox="829 499 1382 531">11.5 CONTRACTOR’S RIGHT TO TERMINATE</p> <p data-bbox="829 569 1495 831">11.5.1 “Upon seven (7) Days’ written notice to the Owner, the Contractor may terminate this Agreement if the Work has been stopped for a thirty (30) Days period through no fault of the Contractor for any of the following reasons: . . . under court order . . . [or] as a result of the declaration of a national emergency . . . [or] suspension by Owner for convenience pursuant to Paragraph 11.1”</p> <p data-bbox="829 869 1495 1131">11.5.2 “In addition, upon seven (7) Days’ written notice to the Owner, the Contractor may terminate the Agreement if the Owner: . . . fails to furnish reasonable evidence pursuant to Paragraph 4.2 that sufficient funds are available and committed for Project financing, or . . . fails to pay the Contractor in accordance with this Agreement . . . or . . . otherwise materially breaches this Agreement.”</p> <p data-bbox="829 1169 1463 1398">11.5.3 “Upon termination by the Contractor in accordance with paragraph 11.5, the Contractor shall be entitled to recover from the Owner payment for all Work executed and for any proven loss, cost or expense in connection with the Work, including all demobilization costs plus reasonable overhead and profit on Work not performed.”</p>

COMMENTARY

Both AIA and ConsensusDOCS allow for the termination by Contractor for Owner’s breaches, although the allowable grounds for termination are broader under ConsensusDOCS. Both also allow Contractor to recover payment due for Work performed, including reasonable overhead and profit, and costs, such as demobilization costs. ConsensusDOCS allows recovery of profit for Work not performed, while AIA does not. Further, AIA allows recovery for “damages,” but does not define what those are in addition to the other listed items. ConsensusDOCS is silent about any entitlement to damages beyond those listed, and could well be interpreted not to permit them.

Termination for Cause

AIA

§ 14.2 TERMINATION BY THE OWNER FOR CAUSE

§ 14.2.2 “When any [reasons for termination for cause] exist, the Owner, upon certification by the Initial Decision Maker that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and Contractor’s surety, if any, seven days’ written notice, terminate employment of the Contractor”

CONSENSUSDOCS

11.3 OWNER’S RIGHT TO TERMINATE FOR DEFAULT

11.3.1 TERMINATION BY OWNER FOR DEFAULT “If, within seven (7) Days of receipt of a notice to cure pursuant to Paragraph 11.2, the **Contractor** fails to commence and satisfactorily continue correction of the default set forth in the notice to cure, the **Owner** may notify the **Contractor** that it intends to terminate this Agreement for default absent appropriate corrective action within fourteen (14) additional Days. After the expiration of the additional fourteen (14) Days period, the **Owner** may terminate this Agreement by written notice absent appropriate corrective action.”

COMMENTARY

Both AIA and ConsensusDOCS allow for the termination of Contractor for cause and for essentially the same reasons. While there are relatively minor linguistic differences in the basis for termination, there are major differences in procedure. AIA requires certification by a third party, the Initial Decision Maker, while under ConsensusDOCS, Owner may act unilaterally. AIA provides for only one seven (7) day notice. ConsensusDOCS requires two notices to Contractor, and an opportunity to cure, extending over twenty-one (21) days.

Termination for Convenience

AIA	CONSENSUSDOCS
<p data-bbox="115 506 643 569">§ 14.4 TERMINATION BY THE OWNER FOR CONVENIENCE</p> <p data-bbox="115 604 776 768">§ 14.4.3 “In case of such termination for the Owner’s convenience, the Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.”</p>	<p data-bbox="834 506 1479 533">11.4 TERMINATION BY OWNER FOR CONVENIENCE</p> <p data-bbox="834 573 1479 667">11.4.2 “If the Owner terminates this Agreement pursuant to this Paragraph 11.4, the Contractor shall be paid:</p> <ul style="list-style-type: none"> <li data-bbox="857 688 1463 751">11.4.2.1 for the Work performed to date including overhead and profit; <li data-bbox="857 772 1503 898">11.4.2.2 for all demobilization costs and costs incurred as a result of the termination but not including overhead or profit on work not performed; <li data-bbox="857 919 1503 1014">11.4.2.3 and shall receive a premium as set forth in a schedule below. (Insert here the schedule agreed to by the Parties.)”

COMMENTARY

Both AIA and ConsensusDOCS entitle Contractor to be paid for the Work actually performed as of the time that Owner terminates for convenience, as well as other costs incurred by such termination, including demobilization costs. AIA expressly allows Contractor to recover a “reasonable overhead and profit” on Work not executed, but does not provide any guidelines for determining reasonableness. By contrast, ConsensusDOCS allows for recovery of overhead and profit on Work performed, but not on Work not performed. Further, ConsensusDOCS allows a separate premium to be awarded to Contractor, the amount of which is to be agreed to between the parties at the time of contracting. The AGC claims that this premium more carefully balances Owner’s and Contractor’s risks and interests. Care needs to be taken in arriving at, and articulating the basis for, the amount of the premium in order to tie it to actual anticipated losses by Contractor, such as lost business opportunities, as opposed to simply a penalty, which might not be recoverable under applicable state contract law, similar to the treatment of liquidated damages provisions.

Consequential Damages

AIA

§15.1 CLAIMS

§ 15.1.6 CLAIMS FOR CONSEQUENTIAL DAMAGES

“The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:

- § 15.1.6.1 damages incurred by Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
- § 15.1.6.2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party’s termination in accordance with Article 14. Nothing contained in this Section 15.1.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.”

CONSENSUSDOCS

6.6 LIMITED MUTUAL WAIVER OF CONSEQUENTIAL DAMAGES

“Except for damages mutually agreed upon by the Parties as liquidated damages in Paragraph 6.5 and excluding losses covered by insurance required by the Contract Documents, the **Owner** and the **Contractor** agree to waive all claims against each other for any consequential damages that may arise out of or relate to this Agreement, except for those specific items of damages excluded from this waiver as mutually agreed upon by the Parties and identified below. The **Owner** agrees to waive damages including but not limited to the **Owner’s** loss of use of the Project, any rental expenses incurred, loss of income, profit or financing related to the Project, as well as the loss of business, loss of financing, principal office overhead and expenses, loss of profits not related to this Project, loss of reputation, or insolvency. The **Contractor** agrees to waive damages including but not limited to loss of business, loss of financing, principal office overhead and expenses, loss of profits not related to this Project, loss of bonding capacity, loss of reputation, or insolvency”

COMMENTARY

In general, consequential damages are those that do not flow directly and immediately from a breach of contract (such as the direct costs of repair or for extras), but arise rather from some other consequence or result of the breach (such lost income or extended office overhead).

AIA provides for a mutual waiver of consequential damages because, according to it, such a waiver serves the purpose of avoiding large, complex claims that are oftentimes uninsurable. AIA reasons that if Owner and Contractor are aware that consequential damages are not recoverable, they can plan accordingly.

ConsensusDOCS, by contrast, provides for a limited mutual waiver of consequential damages. There are, however, significant competing concerns among the ConsensusDOCS member organizations. As noted above (at 19) regarding liquidated damages (Paragraph 6.5), AGC believes that a waiver of consequential damages is only truly mutual where Owner is not entitled simultaneously to recover liquidated damages. But Owner groups frequently complain that their losses due to consequential damages, such as for lost income, typically dwarf the amounts of Contractor's consequential damages, such as home office overhead. Owners reason, therefore, that a waiver of consequential damages is not truly mutual or equitable because they are giving up more rights than Contractors. COAA, for example, believes that allowing Owners to recover liquidated damages is a fair and balanced approach, and enables them to minimize some of the risks attendant to a waiver of consequential damages. Before agreeing to waive consequential damages, each party should assess its respective economic risk and also consult with competent local construction counsel.

Dispute Resolution

AIA

§ 15.2 INITIAL DECISION

§ 15.2.5 “The Initial Decision Maker will render an initial decision approving or rejecting the Claim, or indicating that the Initial Decision Maker is unable to resolve the Claim. This initial decision shall (1) be in writing; (2) state the reasons therefor The initial decision shall be final and binding on the parties but subject to mediation and, if the parties fail to resolve their dispute through mediation, to binding dispute resolution.”

§ 15.2.6 “Either party may file for mediation of an initial decision at any time”

§ 15.2.6.1 “Either party may, within 30 days from the date of an initial decision, demand in writing that the other party file for mediation . . . [and if] the party receiving the demand fails to file for mediation within the time required, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision.”

§ 15.3 MEDIATION

§ 15.3.1 “Claims, disputes, or other matters in controversy arising out of or related to the Contract . . . shall be subject to mediation as a condition precedent to binding dispute resolution.”

CONSENSUSDOCS

12.2 DIRECT DISCUSSIONS “If the Parties cannot reach resolution on a matter . . . , the Parties shall endeavor to reach resolution through good faith direct discussions between the Parties’ representatives, . . . If the Parties’ representatives are not able to resolve such matter within five (5) business Days of the date of first discussion, the Parties’ representatives shall immediately inform senior executives of the Parties . . . (who) shall meet within five (5) business Days to endeavor to reach resolution. If the dispute remains unresolved after fifteen (15) Days from the date of first discussion, the Parties shall submit such matter to the dispute mitigation and dispute resolution procedures selected herein.”

12.3 MITIGATION / 12.4 MEDIATION

If direct discussions do not resolve the matter, the parties shall pursue further resolution through either specified mitigation procedures (Paragraph 12.3) or mediation (Paragraph 12.4).

12.5 BINDING DISPUTE RESOLUTION

“If the matter is unresolved after submission of the matter to a mitigation procedure or to mediation, the Parties shall submit the matter to the binding dispute resolution procedure designated herein” – either arbitration or litigation.

COMMENTARY

Both AIA and ConsensusDOCS require the parties to pursue some form of alternative dispute resolution as a condition precedent to either final arbitration or litigation. The procedures articulated by each, however, demonstrate a difference in philosophy and approach.

AIA requires that an initial assessment and proposed resolution of the dispute be made by a third-party serving as the initial decision maker (IDM) – either the Architect or some third-party whom Owner and Contractor are required to designate at the time of contracting in the Owner-Contractor Agreement. (See A101-2007, § 6.1.) If they fail to do so, then Architect serves as the default IDM. The IDM's decision is final and binding, unless either Owner or Contractor elects to challenge it. Note that if one of the parties is pleased with the IDM's ruling, it may force an early binding resolution by demanding that the other party immediately file for mediation, the failure of which constitutes a waiver of that right. If a challenge to the IDM's ruling is pursued, it must initially be in the form of mediation. Following mediation, the parties can pursue binding dispute resolution of the ruling through either arbitration or litigation, which they must, again, pre-select at the time of contracting in the Owner-Contractor Agreement. (See A101-2007, § 6.2.) If they fail to so designate, litigation is the default choice.

While AIA allows for the introduction of a third person in the decision-making process, it provides no practical guidance for the selection or operation of such a person, leaving open many, many questions. For instance:

1. What, if any, qualifications should the IDM have?
2. How, if at all, is the IDM to be compensated?
3. What, if any, immunity will be provided to the IDM?
4. What, if any, insurance will be required of the IDM (and can it secure any)?

Each of these questions, in turn, raises others, rendering the entire concept somewhat problematic.

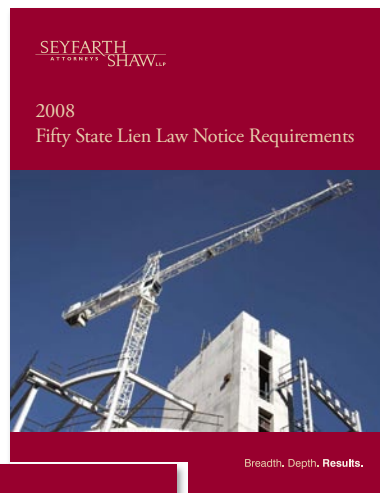
ConsensusDOCS, on the other hand, places initial responsibility for resolving a dispute in the hands of the parties themselves. It requires, in the first instance, that they try to mitigate their claims by communicating directly before claims and expenses escalate. This process, called the direct-discussions procedure, may ultimately lead to senior executives of the parties meeting to endeavor to reach a resolution. This requirement reflects ConsensusDOCS's view that the parties themselves, who will ultimately be directly impacted by the resolution, must initially try to work together to reach a resolution of the dispute, as opposed to vesting that duty to a third-party who may not be aware of the intricacies of a dispute or subject to the same business pressures as the parties themselves. If no resolution is reached, then the parties may either pursue mediation or some other mitigation procedure as a condition precedent to final binding dispute resolution. Notably, if some other mitigation procedure is selected, then the non-binding finding that is yielded can be introduced at a subsequent binding arbitration or litigation. Finally, similar to AIA, ConsensusDOCS affords the parties themselves the freedom to choose either arbitration or litigation as the forum in which to resolve the matter with finality.

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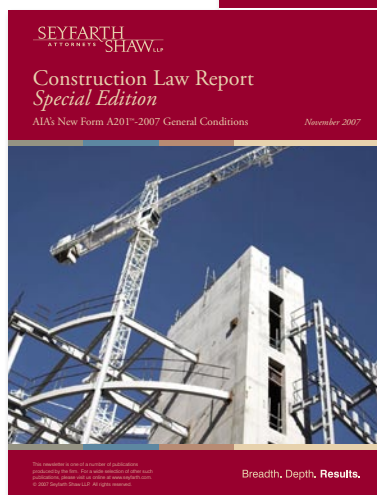
Construction Group References

The following reference materials have been published recently by the Construction Group and can be accessed at www.seyfarth.com

2008 Fifty State Lien Law Notice Requirements
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