

Guidelines for Improving Practice

A Resource from Schinnerer and CNA

Examining Differences Between AIA Documents and ConsensusDOCS

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Late in 2007, The American Institute of Architects (AIA) introduced new versions of its documents used in the traditional design-bid-build project delivery system. The Associated General Contractors of America (AGC) also introduced significantly revised editions of its documents. This time, however, AGC joined in a coalition of construction industry and client groups to form ConsensusDOCS. The coalition addresses the interests of construction contractors, represented by AGC, and owners, represented by the Construction Owners Association of America, a group comprising educational, healthcare, and commercial clients. The interests of subcontractors, specialty contractors, sureties, and others within the construction industry also were addressed; no organizations representing design professionals were part of the ConsensusDOCS coalition.

Most design professionals are familiar with the AIA documents, considered by many to be the industry standard, and the 2007 versions provide no significant changes to how most firm's deliver their professional services. The ConsensusDOCS contract forms do not have the same familiarity to clients, design professionals, and contractors. As a possible alternative to the use of AIA documents, ConsensusDOCS offers clients and contractors an option that design firms should understand.

Documents Create Dissimilar Delivery Procedures

AIA Document B101-2007 is the new standard owner-architect agreement and is coordinated for use with A201-2007, *General Conditions of the Contract for Construction*. ConsensusDOCS issued 240 as the owner-design professional form. It pairs with ConsensusDOCS 200, which is the combined lump-sum construction agreement and general conditions. Professional services agreements that include construction phase services should match the responsibility with the authority of the design firm in the construction contract. If the professional services agreement and the construction contract contain differing duties or procedures, problems occur. The AIA clearly saw the danger of uncoordinated agreements and included the following provision in B101:

§ 3.6.1.1 The Architect shall provide administration of the Contract between the Owner and the Contractor as set forth below and in AIA Document A201™–2007, General Conditions of the Contract for Construction. If the Owner and Contractor modify AIA Document A201–2007, those modifications shall not affect the Architect’s services under this Agreement unless the Owner and the Architect amend this Agreement.

B101 does not mention a situation where a different set of construction general conditions may be used. If ConsensusDOCS 200 is used between the client and the contractor, however, it is reasonable that the professional services agreement should be renegotiated.

ConsensusDOCS Do Not Create a Liability Target

The ConsensusDOCS professional services document does not create or shift uninsurable or unmanageable exposures to the design professional. The AGC professional services contract did, but those onerous provisions were modified. There are no direct attempts to disadvantage the design professional. In fact, although ConsensusDOCS 240 does not specify many of the risks and responsibilities as remaining with or allocated to the client, which are intrinsic to the B101/A201 combination, the ConsensusDOCS owner-design professional agreement does protect the design firm in many situations, such as through a mutual waiver of consequential damages.

Conflict over Extent of Design Services

The 240 requires that the construction documents “completely describe all work necessary to bid and construct the project.” The design professional’s fees should reflect this significantly greater scope of detailed design and comprehensive construction documents. Even if the design time and compensation are increased, issues often arise during construction that require the exercise of professional judgment.

The 240 also does not recognize the use of shared expertise in the design process or that design and construction entities communicate on specific details. The B101 recognizes this by stating:

The Owner and Architect acknowledge that in order to construct the Work the Contractor will provide additional information, including Shop Drawings, Product Data, Samples and other similar submittals, which the Architect shall review....

Constraints on the Role of the Design Professional

ConsensusDOCS follows a philosophy that the relationship during construction is only between the client and contractor. There is no agency relationship with the design professional as the representative of the client (the principal) during the construction phase.

The new AIA documents have eliminated the designation of the architect as the representative of the client, but placed essentially the same representative responsibilities on the architect. The B101 sets the

architect as a limited agent for the client while performing construction phase services. The architect’s role in administering the contract for construction is to advise and consult with the client to the extent authorized in the contract. On projects involving the architect in contract administration, the requirements and procedures of the general conditions of the construction contract are a major factor in determining the architect’s compensation.

The reduced ability of the design professional to act on behalf of its client is a significant change that could create exposure problems. The

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240 system of project communication specifically states:

Except as provided in this Agreement or unless otherwise directed by the Owner, the design professional shall communicate with the Contractor and Subcontractors only through the Owner.

The A201, however, channels communications between the contractor and client through the architect. This assists the architect in carrying out the contractual duty to facilitate completion of the project in accordance with the contract documents. Beyond the obligation to the client, design professionals have a duty to protect the public that exceeds contractual obligations.

Although not recognized as a representative of the client in the 240 and 200 documents, the design professional must perform services during the construction phase. The design professional must: review and advise the client as to the accuracy and sufficiency of the schedule of values; coordinate the project schedule with the schedule for the construction work; prepare design documents in connection with change orders; respond to requests for information; review submittals; and evaluate the work so that payments can be certified “based on onsite observations and other relevant information.” The design professional’s duties extend beyond inspecting for substantial and final completion by continuing through the one-year correction period for contractor deficiencies.

Under the AIA documents, the architect’s certification of payment is based upon the architect’s professional judgment. Influencing this is the extent of completion, the quality of the work, and the architect’s general evaluation. With a qualified certification based on the architect’s evaluation, the client is protected from overpayment by the ability of the architect to withdraw or revise a previous certificate if the work is later found not to conform to the requirements of the contract documents. This makes it far easier in many states for the client to recover previously advanced sums. Those protections for the client do

not exist in the ConsensusDOCS.

Although some design firms would like to avoid involvement during the construction of projects, the removal of the design professional as a formal participant does not negate the risk. Providing services under the ConsensusDOCS owner-design professional agreement diminishes the status of the design professional while subjecting the design professional to an increased scope of design services and increased risk during construction.

For more details on the differences between AIA and ConsensusDOCS agreements, go to www.PlanetRiskManagement.com. ♦