

THE NEW AIA AND CONSENSUSDOCS: BEWARE OF THE DIFFERENCES— THE CONSTRUCTION AGREEMENTS

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THE SECOND PAPER ON THE NEW CONTRACT DOCUMENTS ANSWERS SOME QUESTIONS AND RAISES NEW ONES ON THE DIFFERENCES BETWEEN THE CONSTRUCTION AGREEMENTS.

INTRODUCTION

In 2007, the American Institute of Architects (AIA) introduced new versions of its A101 owner-contractor agreement and the general conditions for construction, the A201. A new family of documents known as ConsensusDocs was also introduced in 2007. The ConsensusDocs 200 form is the ConsensusDocs *Standard Form Agreement and General Conditions Between Owner and Contractor*. The Engineering Joint Contract Documents Committee (EJCDC) has also released a new version of its suggested form of agreement between owner and contractor—stipulated sum (the “C-520”) and the general conditions for construction (the “C-700”). The referenced documents all involve traditional construction that involves the process of design, then bid, then build. The following paper explores the changes in these new traditional-method construction documents and examines differences between the new construction documents.

THE DESIGN PROFESSIONAL’S RESPONSIBILITIES

The architect is designated as the owner’s representative with respect to the

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construction contract, with administration responsibilities under the 2007 A201 which continue until the architect issues the certificate for final payment.¹ The administration responsibilities do not extend through the one year correction period as required under the 1997 A201.

The architect's administration responsibilities include visiting the site at intervals appropriate to the stage of construction,² to observe the progress and quality of the work to determine if the work, when fully completed, would be in accordance with the contract documents. The architect has the responsibility to keep the owner reasonably informed of deviations by the contractor from the contract documents or project schedule and to report any discovered defects in the construction to the owner, although the architect had no responsibility to the owner for the contractor's performance.³

The A201 requires communications between the contractor and owner to flow through the architect.⁴ The architect also is responsible for reviewing and responding to RFIs,⁵ for the preparation of change orders and change directives, and for making determinations or recommendations regarding concealed or unknown conditions.⁶ Further responsibilities include review of shop drawings and submittals, and the review and certification of payment applications. In accordance with his or her responsibilities, the architect also has the authority to reject work that does not conform to the contract documents.

The engineer under the EJCDC C-700 has many responsibilities which are similar to the responsibilities listed above for the architect.⁷ Under the 2007 C-700 the engineer is designated as the owner's representative during the construction period.⁸

Both the AIA and EJCDC recognize the design professional's obligations to provide representation for the owner during the construction process. Given the enormous expenditures associated with construction, the construction phase obligations of the design professional provide the owner with safeguards in obtaining a project completed in accordance with the contract documents.

In contrast to the AIA and EJCDC documents, the ConsensusDocs do not recognize the design professional as the owner's representative. The ConsensusDocs do allow the owner to select a representative.⁹ However, the authority and obligations of the design professional as indicated in the AIA and EJCDC documents do not exist in the ConsensusDocs. Instead, it appears that the ConsensusDocs have gone in a significantly different direction by removing the design professional from the construction phase and by placing all observation, review and approval of the contractor's work directly upon the owner.

The removal of the design professional as a formal participant in the construction process represents a significant change from the general procedures historically followed for construction contracts. The ConsensusDocs recognize two major participants in the construction process the owner and contractor. However, a completed construction project, whether it be a school, condominium building, water purification and distribution system, power plant, or other major improvement, will have significant impacts upon the safety, health, and environment of numerous individuals that are not direct parties to the contract. Unlike the owner and contractor, which may not be

obligated by statute to insure the protection of the public and subject to review of the standards of their practice on the project by an appointed board of other construction professionals, the design professional has obligations to the public safety and welfare which exceed its contractual obligations to the owner.

If the design professional violates his or her obligations to the public, the design professional is subject to disciplinary proceedings and potential license revocation. The failure of a design professional to properly perform his or her construction phase oversight responsibilities can have dangerous and severe consequences. For example, the failure of an engineer to properly review and reject a proposed change by a contractor to use two connected hanger rods instead of a single hanger rod as required in the contract documents led to catastrophic consequences when the supported walkway collapsed, immediately killing over 100 people.¹⁰ With examples of consequences that can result to the public when a design professional does not completely and carefully perform its construction phase responsibilities, one must wonder whether it is prudent to completely remove the licensed design professional from the construction process.

CHANGE ORDERS

The 2007 A201 remains virtually unchanged with respect to changes to the contract scope, price and time. Change orders under the agreement of the owner, architect and contractor requires a writing signed by all three parties, indicating the change in the contract work, the contract sum and the contract time.¹¹ In the absence of agreement with the contractor concerning the change in the contract sum and time, changes in the contract can be directed by the owner with agreement of the architect in the form of a construction change directive.¹² The contractor is required to promptly proceed with the work under the construction change directive with the amount of the adjustment to time and price to be determined by the architect.

Under the 2007 C-700 change orders are executed by the contractor and owner upon the recommendation of the engineer.¹³ Under the C-700 a work change directive issued by the owner upon the recommendation of the engineer orders an addition, deletion or revision to the contract work, but does not authorize a change in the contract price or time; instead, it recognizes the change with the expectation that the adjustments resulting from the work change directive will be incorporated in a subsequent change order.¹⁴

The change order process under the ConsensusDocs is significantly different from the AIA and EJCDC forms in that the design professional is not involved in the process. Under the ConsensusDocs, a change order can be directed by the owner or requested by the contractor.¹⁵ If the owner and contractor cannot agree upon the change order price, the ConsensusDocs recognize the owner's right to order an "Interim Directed Change" to the work which allows the contractor to bill up to 50% of its estimated costs within 30 days of the issuance of the interim directed change with the expectation that the final change will be made upon agreement and issuance of a change order.¹⁶ The ConsensusDocs do have a provision which accounts for situations in which there is disagreement between the owner and contractor regarding whether certain

work constitutes change order work. In those instances, the work is generally treated as an interim work directive without prejudice to the owner's right to reimbursement in the event that work is later determined to be within the scope of the base contract.¹⁷ It is noted that the change order provision in the ConsensusDocs does not require the contractor to immediately commence work upon execution of the change order or receipt of the interim work directive.

CHANGED CONDITIONS

The contractor has an obligation to provide written notice of field conditions which materially differ from the contract document within 21 days of the first discovery of the differing conditions. The architect is to promptly investigate the conditions and determine in writing whether the conditions are materially different from the conditions in the contract documents and whether the changed conditions cause an increase or decrease in the contract time or price.¹⁸

The 2007 A201 also requires the contractor to suspend performance if it encounters human remains or recognizes the existence of burial markers, archaeological sites or wetlands.¹⁹

The 2007 C-700 requires the contractor to notify the engineer and owner upon discovery of differing conditions. The engineer is to promptly investigate and notify the owner in writing of the necessity of further exploration or tests. If the changed condition could not have been reasonably discovered prior to the bid the contractor can obtain an adjustment of time or price.²⁰

ConsensusDocs 200 does not have a section outlining specific procedures for differing conditions, although differing conditions are referenced in the section for delays and extensions of time.

DELAYS

The 2007 A201 remains unchanged from the previous version allowing a contractor that is delayed by the owner, architect, change order, labor disputes, fires, unusual delays in deliveries, unavoidable casualties, or other causes beyond the contractor's control to obtain a change order for a reasonable extension of time.²¹

The 2007 C-700 allows the contractor to obtain an adjustment of contract time for delays which are not the fault of the contractor. The contractor can also obtain an adjustment of contract for delays which are specifically the fault of the owner.²²

The ConsensusDocs 200 allows the contractor to obtain a reasonable adjustment of contract time for any delay for which the cause of the delay is beyond the contractor's control. It is noted that the examples of delays beyond the contractors control listed in the ConsensusDocs 200 include not only items normally recognized under other contract documents such as owner delays, fire, and strike. Additional examples listed by ConsensusDocs include transportation delays not reasonably foreseeable, unavoidable circumstances, and concealed or unknown conditions.²³

The ConsensusDocs 200 allows the contractor to obtain adjustment of the contract price if the delay was caused by delays, acts, or omissions of the owner,

architect/engineer, or others, a change in sequence of work ordered by the owner, decisions by the owner that impact the time of performance of the work, if the contractor encounters hazardous materials or concealed or unknown conditions, or a delay authorized by the owner pending dispute resolution.²⁴

PAYMENT

The payment provisions in the 2000 A201 are virtually unchanged from the payment provisions in the previous version. The itemized application for payment still must be submitted at least ten days before the date established for each progress payment.²⁵ The requirement under the A201 should be coordinated with provision 5.1.3 of the A101 which requires a payment application to be received by a given date of the month. The applications may include changes in the work that have been properly authorized by construction change directives, or by interim determinations of the architect, but not yet included in change orders.²⁶ After receipt of the contractor's payment application, the architect has seven days to either issue a certificate of payment or inform the owner and contractor in writing it reasons for withholding the certification in whole or part.²⁷ The certification by the architect indicates that the work has progressed to the point indicated and that the quality of the work is in accordance with the contract documents.²⁸ The amount to paid to the contractor is based upon the contract work completed up to the application period minus previous payments and a retainage amount on a percentage basis to which is determined in the contract. There is an open provision in the A101 which allows the parties to agree to a release of retainage after the project has reached a determined stage of completion.²⁹

The architect can withhold certification to protect the owner, including the opinion of the architect that the progress and quality of work cannot be certified. The architect can also withhold certification based upon defective work, third party claims, failure of the contractor to make payment to subcontractors, evidence that the work cannot be completed for the contract sum, damage to the owner, evidence that the work cannot be completed in the contract time and the remaining contract balance would not be sufficient to cover actual or liquidated damages as a result of the delay, and repeated failure to carry out the work in accordance with the contract documents.³⁰ A new provision in the A201 gives the owner the option of issuing a joint check to subcontractor or supplier in the event that the architect withholds certification.³¹

The C-700 requires the contractor to submit payment applications at least 20 days prior to the date established for progress payments. The engineer then must review the payment applications within ten days of payment and either certify the payment application or return the application with the reasons for refusing to recommend payment in writing. The engineer's recommendation for payment constitutes a representation by the engineer to the owner that based on the engineer's observation of the work as a design professional that to the best of the engineer's knowledge information and belief the work has progressed to the point indicated, that the quality of work is in accordance with the contract documents subject to the evaluation and testing required at substantial

completion, and that the conditions precedent to payment appear to have been fulfilled. By recommending payment, the engineer is not representing that it performed exhaustive inspections of every aspect of the work. The engineer can refuse to recommend payment if the statement implied in the recommendation would be incorrect or if the work is defective, the contract price has been reduced by change orders, the owner has been required to correct or complete work or the engineer has knowledge of an occurrence supporting the termination of the contractor for cause. A progress payment to the contractor becomes due ten days after the owner receives the payment application with the engineer's recommendation.³² The contractor is paid for the contract work completed as of the date of the application minus previous payment applications and an amount agreed for retainage, after the work is 50% complete, no more retainage is withheld from subsequent progress payments.³³

The ConsensusDocs 200 recognizes a process for payment applications requiring the certification by the architect/engineer prior to the point in which payment becomes due. The owner must pay any amounts due on a certified payment application within 20 days of the contractor's submission of a payment application.³⁴ The owner may adjust or reject a payment application for any of the following causes: 1) The contractor's repeated failure to perform the work; 2) loss or damage caused by the contractor; 3) the contractor's failure to pay subcontractors or suppliers; 4) rejected nonconforming or defective work which was not corrected in a timely fashion; 5) reasonable evidence that the work will not be completed within the contract time; and 6) existing or likely third party claims. The owner must give notice of the adjustment within seven days of the owner's receipt of the application.³⁵ The ConsensusDocs do not provide a specific method to calculate payment, although they do have a provision for an agreed percentage of retainage to be withheld with each progress payment, with no retainage to be withheld after the project is more than 50% complete. The ConsensusDocs also allow the release of retainage relating to the completed work of a specific subcontractor.³⁶

DAMAGES

Under the A201, in the event that the contractor is terminated for cause the owner has the right to recover the cost of completing the work plus such other damages that are not expressly waived, including the excess fees of the architect resulting from the termination.³⁷ If the contractor terminates the contract through no fault of the contractor or its subcontractors for reasons such as suspension or non-payment, the contractor is entitled to recover payment for the work executed including reasonable overhead and profit, costs incurred by reason of such termination and damages. It is noted the 2007 A201 removed the contractor's right to recover damages for "proven loss with respect to materials equipment, tools and construction equipment and machinery," but added the right to recover the "costs incurred by reason of such termination."³⁸

INDEMNIFICATION

There is little change in the 2007 A201 from the previous version in relation to indemnification. There is no limitation of indemnification to any managers

protective liability insurance in the 2007 form. However, the indemnification responsibility is limited to the extent the injury, sickness, disease, death, or property damage is caused by the negligent acts of the contractor or its subcontractors.³⁹ The waiver of workers compensation limits remains in the provision.⁴⁰

Under the EJCDC C-700 the indemnification provision has similar language to the A201 language, although the C-700 provision excludes professional acts with similar language that is found in standard commercial general liability policies including: “The preparation of or approval of, or the failure to prepare or approve maps, Drawings, opinions reports surveys, Change Orders, designs or specifications; or 2) giving directions or instructions or failing to give them, if that is the primary cause of the injury or damage.”⁴¹

The indemnity provision in ConsensusDocs 200 has some significant differences from the A201. Primarily, there is dual indemnity under the ConsensusDocs requiring the contractor to indemnify the owner, but also under the same terms requiring the owner to indemnify the contractor. It is also noted that the indemnity provisions allow both the contractor and owner to recover defense costs to the extent that they exceed their respective percentages of liability.⁴²

CLAIMS

The initial claims resolution process has been changed under the 2007 version of the A101. Article 6, entitled “Disputes Resolution,” now introduces a new party: the “Initial Decision Maker” (the “IDM”), who may or may not be the architect. Specifically, the article states that the architect will serve as the IDM unless the parties appoint another individual that is not a party to the agreement to serve as the IDM. Under the A201, the article for claims is now found in Article 15 instead of Article 4. The claim must be initiated within 21 days after the occurrence or if later, after the claimant first recognizes the condition giving rise to the claim; however, the notice now goes to the other party and the IDM, not the architect, as in the 1997 version of the A201.⁴³ Many commercial general liability policies have provisions providing for the defense of an indemnitee under an “insured contract” if there are no conflicts and if the defense can be provided by common counsel. There is also a position under commercial general liability policies that the obligation to defend with certain exceptions is tied to the right of the insurer to control the defense. In the future years, the coverage implications if any, of the differing position by ConsensusDocs concerning dual indemnification and reimbursement of defense costs will likely be tested and provide additional information concerning how the ConsensusDocs language compares to traditional indemnification language in allocating losses resulting from unanticipated construction losses.

The IDM has the responsibilities formerly held by the architect, to review the claim within ten days and take action which could include requesting additional information, rejecting the claim, approving the claim, suggesting a compromise or informing the parties that the IDM is unable to resolve the claim because he or she lacks sufficient information or because it would be inappropriate⁴⁴ for the

IDM to resolve the claim. In evaluating the claim the IDM is entitled to consult with either party or an expert concerning the claim,⁴⁵ and either party that the IDM requests information from must respond within ten days. The 2007 form A201 is less than clear with regard to dispute resolution following the initial decision by the IDM. Pursuant to Article 15.2.6, either party may file for mediation at any time subject to the provisions of Article 15.2.6.1. However, according to Article 15.2.6.1, either party, within 30 days of the IDM decision, may demand that the other party file for mediation in writing within 60 days of the initial decision by the IDM. If the party in which the demand is made fails to file a demand for mediation within 60 days, the IDM decision becomes binding.

A successful party to the original decision of the IDM would have no motivation to demand that the other party file for mediation and would have every motivation to ignore a demand from the unsuccessful party that it file for mediation. Therefore, it seems that provision 15.2.6.1. will provide little assistance in furthering the dispute resolution process. If mediation is unsuccessful, arbitration is no longer the default procedure to be followed. Instead, the contracting parties select whether the binding dispute procedure will be resolved by litigation, arbitration, or some other method by checking a box in the A101. If arbitration is selected by the parties, consolidation is no longer precluded under the A201. To contrary, under the 2007 A201, either party under its sole discretion may consolidate an arbitration to which it is a party, provided that the arbitration agreement governing the other arbitration permits consolidation, the other arbitration involves common questions of law or fact, and the other arbitration has similar rules with respect to the selection of arbitrators.

Under the ConsensusDocs if the parties are unable to resolve a dispute by direct negotiation, there is a second round of discussions which takes place between senior executives of the parties within five days of the initial discussions between project personnel. If the dispute remains unresolved 15 days after the first discussion, the next step involves the determination of a dispute review board, project neutral, or, alternatively, mediation. The ConsensusDocs 200 completely removes the design professional from the dispute resolution process. If the dispute remains unresolved it is submitted to either litigation or arbitration as checked within the ConsensusDocs 200.

The removal of the design professional from the dispute resolution process represents a fundamental change from the historical process set forth in previous AIA and EJCDC documents. The move away from the dispute resolution process reflects further distance between the design professional and the construction process. The design professional is the licensed professional entrusted with public safety and responsible to insure that the project will conform to the habitability requirements set forth by the applicable government regulations. As the designer of the project, the design professional has a unique perspective on the project requirements and the interpretation of the project documents. The design professional's project knowledge and administration responsibilities provide a strong argument in support of the design professional's participation in the dispute resolution process. Arguments against

the participation of the use of the design professional as the initial arbitrator of claims are based upon conflict and potential bias. However, procedures which can mitigate the danger of potential conflict or bias combined with the rights of the parties to seek further resolution through mediation, arbitration or litigation significantly limits the arguments against the participation of the design professional in the initial dispute resolution process.

Under the 2007 EJCDC C-700 the engineer remains the initial decision maker over claims. Under provision 10.05(C). of the C-700, the engineer must issue a written decision within 30 days of the decision which either approves the claim, rejects the claim, informs the parties that the engineer is unable to resolve the claim, or informs the parties that it would be inappropriate for the engineer to resolve the claim. The engineer's decision becomes binding 30 days after the engineer's decision unless a party files a request for mediation prior to the time in which the initial decision becomes binding.⁴⁶ If the dispute is not resolved by mediation, the engineer's decision becomes binding within 30 days of the conclusion of mediation unless a party invokes the next resolution process as set forth in the supplementary conditions, by serving written notice of its intent to seek resolution through a court of competent jurisdiction.⁴⁷

INSURANCE

Given at least one recent state Supreme Court ruling regarding the lack of coverage provided to insure the contractors indemnity obligations in excess of workers compensation limits,⁴⁸ the requirements for contractors to provide additional insurance to supplement potential uncovered obligations under the indemnity provisions has taken on new importance. The 2007 A201 requirements are similar to the 1997 version with some notable changes. The contractor is now required to provide completed operations coverage until the expiration of the period for correction of work or for such other period for maintenance of completed operations coverage as specified in the contract documents.⁴⁹ The additional insurance requirements under the A201 now require the contractor to provide commercial general liability insurance identifying 1) the owner, architect and the architect's consultants as additional insured's for claims caused in whole or part by the contractor's negligent acts or omissions during the contractor's operations; and 2) the owner as an additional insured for claims caused in whole or part by the contractor's negligent acts or omissions during the contractor's completed operations.⁵⁰

The EJCDC C-700 requires the owner, engineer and any other entities identified in the supplementary conditions to be listed as additional insureds.⁵¹ The C-700 requires completed operations coverage to remain in effect at least two years after final payment.⁵²

Under the ConsensusDocs there is no default to provide any additional insurance coverage to any party. Instead, the parties elect whether the contractor will be required to provide additional insurance coverage by checking one of two designated boxes. If the parties elect to require the contractor to provide additional insurance coverage, the owner is responsible for paying any additional costs incurred in obtaining the coverage.⁵³ The ConsensusDocs require completed operations coverage to be provided for at least one year after

acceptance of the work, substantial completion of the project, or as required under the contract documents.

CONCLUSION

The 2007 construction documents represent some significant changes from previous contract documents. Noted changes include the AIA's step back from the architects involvement in the dispute resolution process and the AIA's move from arbitration as the default for dispute resolution. The introduction of ConsensusDocs is also anticipated to have a significant impact upon the construction industry. While a number of differences between the ConsensusDocs and the AIA documents are noted, the limitation of the design professional's role in the construction process indicates a fundamental divergence of the direction of the ConsensusDocs from the direction of traditional contract documents.~

ENDNOTES

¹2007 A201, Provision 4.2.1.

²Under the 2007 A201, the notation indicating that the architect is visiting the project as the representative of the owner has been removed.

³2007 A201, Provision 4.2.3.

⁴2007 A201, Provision 4.2.4.

⁵2007 A201, Provision 4.2.14.

⁶2007 A201, Provision 4.2.8.

⁷2007 EJCDC C-700 Article 9.

⁸2007 EJCDC C-700 Article 9.

⁹ConsensusDocs 200, Provision 4.7.

¹⁰*Duncan v. Board of Architects* 744 S.W.2d 524 (1988)

¹¹2007 AIA A201 provision 7.2.1.

¹²2007 AIA A201 provision 7.2.1.

¹³2007 EJCDC C-700, Provision 10.03

¹⁴2007 EJCDC C-700, Provision 1.01 A. 51.

¹⁵ConsensusDocs 200, Provision 8.1.1.

¹⁶ConsensusDocs 200, Provision 8.2.2

¹⁷ConsensusDocs 200, Provision 8.3.3.

¹⁸2007 AIA A201 Provision 3.7.4.

¹⁹2007 AIA A201 Provision 3.7.5.

²⁰2007 EJCDC C-700, Provision 4.03.

²¹2007 AIA A201 Provision 8.3.1.

²²2007 EJCDC C-700, Article 12.

²³ConsensusDocs 200, Provision 6.3.1.

²⁴ConsensusDocs 200, Provision 6.3.2.

²⁵2007 AIA A201 Provision 9.3.1.

²⁶2007 AIA A201 Provision 9.3.2.

²⁷2007 AIA A201 Provision 9.4.1.

²⁸2007 AIA A201 Provision 9.4.2.

²⁹2007 AIA A101 Provision 5.1.8.

³⁰2007 AIA A201 Provision 9.5.1.

³¹2007 AIA A201 provision 9.5.3.

³²2007 EJCDC C-700, Provision 14.02.

³³2007 EJCDC C-520 Provision 6.02.

³⁴ConsensusDocs 200, Provision 9.2.1.

³⁵ConsensusDocs 200, Provision 9.3.

³⁶ConsensusDocs 200, Provision 9.2.4.

³⁷2007 AIA A201, Provision 14.2.4.

³⁸2007 AIA A201, Provision 14.1.3.

³⁹2007 AIA A201, Provision 3.18.1

⁴⁰2007 AIA A201, Provision 3.18.2.

⁴¹2007 EJCDC C-700, Provision 6.20.

⁴²ConsensusDocs 200, Provision 9.3.

⁴³The architect is to be sent a copy of the notice if he is not the IDM.

⁴⁴The possibility of the IDM determining that it is inappropriate to resolve the claim will likely be lessened if the IDM is not the architect as the danger of a conflict between a design and construction issue is removed.

⁴⁵The expense of any expert consulted in relation to the claim is assessed to the owner.

⁴⁶2007 EJCDC C-700, Provision 16.01(A).

⁴⁷2007 EJCDC C-700, Provision 16.01(C).

⁴⁸*Virginia Surety Company, Inc. v. Nothern Insurnace Company of New York et al.*, 224 Ill.2d 550 (Ill. 2007).

⁴⁹2007 AIA A201, Provision 11.1.2.

⁵⁰2007 AIA A201, Provision 11.1.4.

⁵¹2007 EJCDC C-700, Provision 5.04 (B)1.

⁵²2007 EJCDC C-700, Provision 5.04 (B)6.

⁵³ConsensusDocs 200, Provision 10.6.