

Comparing Contracts

A Review of the AIA 201 and ConsensusDocs

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Every ten years, the American Institute of Architects (AIA) updates its standard contract documents including the AIA A201, which governs the general conditions of construction contracts between the owner, general contractor, and architect. In 2007, ConsensusDocs first published its own set of standard contract documents including ConsensusDocs 200, a form construction contract governing the relationship between owner and general contractor (and to some extent involving the architect) like the AIA A201. Shortly after ConsensusDocs released its first set of documents, the AIA released its updated A201 contract. Interestingly, for the first time in more than fifty years, the board of directors of the Associated General Contractors of America (AGC) voted unanimously not to endorse the 2007 version of AIA A201. Since that time, ConsensusDocs has updated its standardized forms, publishing new editions in 2011. It is important to note that while there are key differences between the AIA A201 and ConsensusDocs 200 approach (the AIA remains more owner friendly although probably more neutral than its 1997 AIA A201 predecessor), there are similarities between them. The following provides a summary comparison of the key issues between the 1997 and 2007 AIA A201 documents, and the ConsensusDocs 200.

Financial Assurances

Generally, Contractors want to know that the Owner can pay for the project under consideration. In addressing this, the 1997 edition of AIA A201, Section 2.2.1, states that

[t]he Owner shall, at the written request of the Contractor **prior to commencement of the Work and thereafter** furnish to the Contractor reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract.

The 2007 edition of AIA A201, Section 2.2.1, however, states that

[p]rior to commencement of the Work, the Contractor may request in writing that the owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations Thereafter, the Contractor may only request such evidence if (1) the Owner fails to make payments . . . ; (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.

The 2007 version of the A201 document, then, limits the contractor's ability to obtain evidence of the owner's financial conditions.

The 2007 and 2011 editions of ConsensusDocs 200, Section 4.2, on the other hand, indicate that both before and after commencement of the work, at the written request of the constructor (the contractor), the owner must provide reasonable evidence of sufficient financial arrangements to fulfill its obligations. This is a condition precedent to the constructor commencing or continuing work. Further, the owner must notify the

constructor before any material changes in its funding condition occur.

Design Risk

Pursuant to the 1997 and 2007 versions of the AIA A201, the contractor must (1) carefully study and compare the contract documents, (2) take field measurements, and (3) observe site conditions affecting the work. The contractor will be liable if it fails to perform these obligations and damages result therefrom. The contractor is **not** required to ascertain whether the documents are in accordance with applicable law, statute, ordinance, etc.

The central difference between the two AIA versions regarding design risk is the slight difference in wording between Section 3.2.4 of the 2007 edition and Section 3.2.3 of the 1997 edition. In the 2007 edition, “[i]f the Contractor performs [the designated review], the Contractor shall not be liable to the Owner or Architect for damages resulting from errors.” Pursuant to the 1997 edition, however,

[t]he Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents or for the differences between field measurements or conditions and the Contract Documents **unless the Contractor recognized such error, inconsistency or omission or difference and knowingly failed to report it to the Architect.**

(Emphasis added).

Contractors (and their counsel) need to be vigilant in making certain the standard form provision is not altered. For instance, in one modified AIA A201 document, the

owner had changed the language to read as follows:

...the Contractor shall carefully study and compare the various Drawings and other Contract Documents relative to that portion of the Work ... These obligations are for the purpose of facilitating construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, any errors, inconsistencies or omissions discovered ... shall be reported promptly to the Architect ... Having discovered such errors, inconsistencies or omissions, **or if by reasonable study** of the Contract Documents the Contractor **should have discovered such**, the Contractor shall bear all costs arising therefrom.

This language threatens to shift design liability over to the contractor and should be stricken.

ConsensusDocs 200, Section 3.15, states that the constructor is not responsible for design criteria specified in the contract documents. If the contract documents specifically require the constructor to procure design services, the owner must specify all required performance and design criteria. The constructor then must procure design professional services but is not responsible for the adequacy of the performance and design criteria supplied by the owner. Otherwise, pursuant to Section 3.3.1–3.3.2, before commencing work, the constructor is required to examine and compare drawings and specifications with information furnished by the owner, relevant field measurements made by the constructor, and any visible conditions that could affect the work. If the constructor discovers any errors, omissions, or inconsistencies in the contract documents, the

constructor must report them in writing to the owner.

Contract Administration

In both the 1997 and 2007 AIA A201, the architect is the contract administrator. The documents require the architect to become generally familiar with and to keep the owner informed of the work progress and quality. There are, however, a few significant differences between the 1997 and 2007 editions. For instance, Section 4.2.3 of the 2007 edition states that the architect is required to report only “known deviations” and “observed” deficiencies or defects in the work. No longer is the architect required “to endeavor to guard the Owner against defects and deficiencies in the Work ...” as it was in the 1997 edition.

Unlike the AIA A201, ConsensusDocs 200 virtually removes the design professional (architect) from the intermediary role between owner and constructor, instead placing much of the supervisory and contract administration duties on the Owner. Pursuant to Section 3.10.1, for example, the owner, not the design professional, requests that the constructor uncover work for the owner’s inspection and review. Similarly, pursuant to Section 3.11.6, the owner, not the design professional, notifies the constructor when the owner deems any part of the work or worksite to be unsafe. The owner, not the design professional, also directs the constructor to stop work and/or take corrective action. Additionally, under ConsensusDocs 200, the owner issues certificates of substantial completion and final completion pursuant to Sections 9.6.1 and 9.8.1, respectively.

Schedule and Time

There are no differences between the 1997 and 2007 A201 editions concerning work schedule and time. Under both, the contractor must prepare and submit a construction schedule providing for work to be completed within the time limits required in the contract documents promptly after being awarded the contract. The schedule may be revised at appropriate intervals. Under Section 3.10.2, if the contractor fails to submit a schedule, the contractor is not entitled to any additional compensation or a time extension based on the owner's or the architect's slow processing of submittals.

The 2007 and 2011 editions of ConsensusDocs 200, Section 6.2, require the constructor to submit an initial schedule to the owner only before "first application for payment" and thereafter on a monthly basis. The owner is allowed to change the sequences provided in the schedule as long as it does not "unreasonably interfere with the Work."

Consequential Damages

Sections 15.1.6 of the 1997 and 2007 A201 documents contain a **mutual waiver** of consequential damages.

Sections 6.5 and 6.6 of the 2007 and 2011 ConsensusDocs 200, on the other hand, provide a **limited waiver** of consequential damages. That is, ConsensusDocs gives the owner and constructor an express opportunity to provide for liquidated damages instead of other damages that may be incurred for extra costs, losses, expenses, claims, penalties, and other damages. Where Section 6.5 allows the constructor and owner to elect liquidated damages, it must be read in connection with the waiver of consequential damages in Section 6.6. When read together, the waiver is limited because owners are

prompted to delineate liquidated damages and to identify items specifically excluded from the default waiver of consequential damages. This allows owners to describe the costs associated with unsatisfactory performance prior to the start of work.

Claims Process

Most contracts contain a claims process and in such instances the claims process must be followed, or claims can be waived. The AIA added Section 1.1.8 to the 2007 AIA A201 edition. It states that “[t]he Initial Decision Maker is the person identified in the Agreement to render initial decisions on claims in accordance with Section 15.2 and certify termination of the Agreement under Section 14.2.2.” The architect, who played this role in the 1997 edition, is the “default” initial decision maker in the 2007 A201 edition.

In the AIA documents, the contractor must preserve its rights in the event of a denial of its claim. Moreover, the claims process still requires that claims be initiated within 21 days after the occurrence of the event giving rise to the claim or within 21 days after the claimant first recognizes a condition giving rise to the claim, whichever is later. Both the 1997 and 2007 A201 documents require that the contractor work under protest in the event of a dispute.

Similarly, under Section 8.4 of ConsensusDocs 200, claims for additional cost or time require written notice within 14 days after the occurrence giving rise to the dispute or 14 days after the constructor first recognizes the condition giving rise to the claim, whichever is later. Written documentation of the claim itself must occur within 21 days of giving notice, and the owner must approve or deny the claim in writing within 14 days after that. As with the AIA A201, under Section 12.1 of ConsensusDocs 200, the

constructor must continue to work while the dispute is being resolved.

In both cases, contractors should be careful of modified versions requiring either shorter notice or notice from when the contractor *should have* known of the claim. Such language should be removed. Doing so decreases the potential for a future disagreement concerning whether a claim was timely made due to the subjective nature of when a party “should have known” of the claim versus when it “actually knew.”

Dispute Resolution

The 1997 A201 contains a default provision requiring arbitration while the 2007 A201 contains a default provision requiring litigation. Per the 2007 version, arbitration must be selected as part of the contract negotiation process if it is to be required. Both editions require mediation before resorting to arbitration or litigation, at least in most instances.

The dispute resolution process outlined in ConsensusDocs 200 is different from that of the AIA documents. Pursuant to ConsensusDocs 200, Section 12.2, party representatives with the authority to resolve matters must do so within five business days. If not resolved within 15 days of first discussion, then matters proceed to dispute resolution. Section 12.3 first requires “mitigation”—a non-binding review either with a dispute review board or a project neutral. If mitigation is unsuccessful, mediation must follow. If mediation is unsuccessful, the parties must arbitrate or litigate, depending on which choice they selected as part of negotiating the contract.

The 2007 ConsensusDocs requires the nonprevailing party to pay **court costs** while Section 12.5.1 of the 2011 ConsensusDocs requires the nonprevailing party to pay **attorneys’ fees**.

Insurance and Indemnification

Generally, contractors should beware of indemnifying the architect or any design professional because a general liability policy does not cover indemnification related to professional liability (which is what the design professional often is sued for). Similarly, contractors should ensure that the standard provision is not amended to require indemnification beyond the scope of property damage and personal injury. Attorneys also should be sure to determine whether there is an anti-indemnity statute in the applicable jurisdiction that limits or voids the contract indemnification provision.

Pursuant to AIA A201, Section 3.18.1, the contractor is required to defend and hold harmless the owner, architect, and architect's consultants and agents. The indemnification provision is read as pro rata in at least some jurisdictions—**“but only to the extent caused by** the negligent acts or omissions of the Contractor. . . .” This provision did not change between the 1997 and 2007 A201 documents.

Likewise, for all practical purposes, the insurance requirements did not change between the 1997 and 2007 documents. That is, the 2007 edition deletes project management liability insurance, which few carried anyway. Section 11.1.4 requires the contractor to name the owner and architect as additional insureds on the contractor's general liability insurance policy, and Section 11.1.2 requires the contractor to provide completed operations insurance coverage. The contract should be amended to require adding the architect only to the extent of its general (not professional) negligence.

Additionally, AIA A201, Section 11.3.7, requires the owner and contractor to waive all rights against each other, their subcontractors, sub-subcontractors, agents, and employees, each of the other, and the architect and the architect's related entities, if any,

for damages caused by fire or other causes of loss to the extent covered by property insurance. It also contemplates putting the carrier on notice of the waiver. Under this section, contractors who would normally bear the risk of loss before project completion may avoid that risk to the extent the builder's risk or property insurance covers the loss.

Significantly, ConsensusDocs 200, Section 10.2.2, provides **mutual indemnification** and only proportional indemnification responsibility. ConsensusDocs also indicates that waivers of subrogation for claims covered by the constructor's liability insurance policies are generally unacceptable.

Unlike the AIA A201, ConsensusDocs 200, Section 10.5, does not require the constructor to identify the owner as an additional insured on its policy but rather contains an option for the owner to require the constructor to purchase and maintain additional liability coverage, primary to the owner's coverage under Section 10.4.2. Although the owner may require that it be an additional insured on the constructor's commercial general liability policy *to the extent caused by constructor's negligence*, the owner must pay the additional cost pursuant to Section 10.5.2. ConsensusDocs also allows for combining primary and excess coverages to satisfy the total insurance limits required under the Contract. It sets the completed operations coverage for one year. This is similar to the 2007 AIA A201, which requires completed operations coverage for the warranty period (typically one year).

Payment

The 1997 and 2007 A201 documents differ in how they treat payment. In the 1997 edition, for example, Section 9.6.2 requires that, "[t]he Contractor shall promptly pay each Subcontractor upon receipt of payment from the Owner. . . ." The 2007 edition

provides that “[t]he Contractor shall pay each Subcontractor no later than 7 days after receipt of payment from the Owner. . . .” Notably, in some jurisdictions at least, neither of these phrases constitutes “pay if paid” language. For instance, the following is the “pay if paid” magic language in Massachusetts: “payment to the Subcontractor is to be directly contingent upon the receipt by the General Contractor of payment from the Owner.”

Significantly, the 2007 AIA A201 also provides that the owner has the right to request written evidence from the contractor that it has properly paid subcontractors and material suppliers. If the contractor fails to furnish this evidence within seven days, the owner has the right to contact the subcontractor directly. Pursuant to the new Section 9.5.3, if the contractor fails to properly pay the subcontractors, the architect can withhold certification for payment and, “[t]he Owner may ... **issue joint checks to the Contractor and any Subcontractor or material or equipment suppliers**”

Both the AIA and ConsensusDocs allow the owner to withhold payment if a third party files a claim. They differ, however, in the determination of what is sufficient security to require the eventual release of funds. Pursuant to ConsensusDocs 200, Section 9.3.7, the owner may adjust or reject a payment application to the extent that the constructor is responsible under the contract for third party claims involving the constructor or reasonable evidence demonstrating that third party claims are likely to be filed unless and until the constructor furnishes the owner adequate security. Adequate security consists of a surety bond, letter of credit, or other collateral or commitment which would be sufficient to discharge such claims once established.

Conclusion

Owners, architects, and contractors may disagree concerning whether the AIA or ConsensusDocs is biased. What is clear, however, is that there are differences between them, as well as between the newer versions of the AIA A201 and ConsensusDocs 200 and their predecessors. Be aware of the differences and the related risks.