

***Construction Law Update ...  
Comparing Contracts-A Review Of The AIA 201 and ConsensusDocs***

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The following summarizes important contract sections and provides bullet pointed analysis of particular issues to consider from the AIA 201 (1997 and 2007 versions) and the ConsensusDocs. It is not intended to be all inclusive, but provides a summary comparison of the various documents.

**Key Contract Issues**

- Financial Assurances
- Design Risk
- Project Management/Contract Administration
- Schedule
- Consequential Damages/LDs
- Claims
- Disputes/ADR
- Insurance and Indemnification
- Payment

**Financial Assurances**

- What assurances do you have that the owner can pay for the project?
- General Contractor should have the right to request and obtain proof that the Owner has funding sufficient to pay for the Work. The provision should also provide that the Contractor may terminate the Contract if the Owner refuses to allow a review of funding documents, or should the Contractor reasonably determine that the Owner does not have sufficient funds to pay for the Work.

**Relevant Sections**

- 1997 A201: Section 2.2.1
- 2007 A201: Section 2.2.1
- 2007 ConsensusDocs: Section 4.2

- The 2007 version of the A201 document limits the Contractor’s ability to obtain evidence of the Owner’s financial conditions

### **AIA**

- Section 2.2.1 A201-1997 – “The 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.”
- Section 2.2.1 A201-2007 – “Prior 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.”

### **ConsensusDocs**

Section 4.2: both before and after commencement of the Work, the Owner is required to provide reasonable evidence of sufficient financial arrangements to fulfill its obligations. Further, the Owner must notify the Contractor before any material changes in its funding condition.

### **Design Risk**

#### **Relevant Sections**

- 1997 A201: Section 3.2.1 – 3.2.3
- 2007 A201: Section 3.2.1 – 3.2.4
- 2007 ConsensusDocs: Section 3.15

#### **Sample, Revised A201**

- Section 3.2.1- “...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.”

**Pursuant to the 1997 and 2007 versions of the A201, the Contractor must:**

- carefully study and compare the Contract Documents;
- take field measurements;
- observe site conditions affecting the work;
- Contractor is liable if it fails to perform the obligation mentioned above and the failure to perform these obligations results in damages to the Owner;
- Contractor is **not** required to ascertain whether the Documents are in accordance with applicable law, statute, ordinance, etc.
- **The central difference regarding design risk is the slight difference in wording between the following provisions:**
- Section 3.2.4-2007 – “If the Contractor performs [the designated review], the Contractor shall not be liable to the Owner or Architect for damages resulting from errors.”
- Section 3.2.3-1997 – “The 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.*”
- **Does this change-leaving out the highlighted language-create the potential for negligence claims against the Contractor?**

**ConsensusDocs:**

- There is no obligation to perform field measurements in the ConsensusDocs Lump Sum Contract.
- Section 3.15 – Contractor is not responsible for design criteria specified in the Contract Documents.

**Project Management**

**Relevant Sections**

- 1997 A201: Section 3.9.1
- 2007 A201: Section 3.9.1 – 3.9.3

- 2007 ConsensusDocs: Nothing

### **The Change Between AIA 1997 and 2007:**

- Section 3.9.2 – 2007: “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 ... 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.
- Section 3.9.3 – 2007: “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 be unreasonably withheld or delayed.***”
- Section 3.9.1 remained unchanged.

### **ConsensusDocs**

- The 2007 ConsensusDocs are consistent with Section 3.9.1 of the 1997 and 2007 A201 document, providing for competent superintendence.

### **Contract Administration**

#### **Relevant Sections**

- 1997 A201: Article 4
- 2007 A201: Article 4
- 2007 ConsensusDocs: Not much of any significance.
- In both the 1997 and 2007 A201 Documents, the Architect is the Contract Administrator. The Architect must become generally familiar with and keep the Owner informed about the progress and quality of the Work.
- **Significant differences:**
  - In the new Section 4.2.3, Architect is only required to report “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 ...”

- Architect's timeframe in acting as Administrator is shortened by deletion of language "until final payment is due" and "during the one year period for correction of the Work"-replaced by "during construction until the date the Architect issues the final certificate for payment."
- The fifteen day timeframe within which to respond to RFI's (formerly Section 4.2.11) has been replaced with a requirement that the Architect respond within any time limits agree upon "or otherwise with reasonable promptness."
- **2007 Consensus Documents:**
- The document does not identify the period for which the Architect is authorized to administer the Contract.
- The Contract does not establish the Architect's duties regarding site attendance, inspections, or reporting.
- Additionally, under the ConsensusDocs Contract, the Owner, not the Architect, issues certificates of substantial completion and final completion (Section 9.6 and 9.7).

### Schedule

#### Relevant Sections

- 1997 A201: Section 3.10.1
- 2007 A201: Section 3.10.1
- 2007 ConsensusDocs: Section 6.2.1 – 6.2.2

#### AIA

- Sections 3.10.1 of the 1997 and 2007 A201 Documents remain the same. Contractor must promptly after being awarded the Contract, prepare and submit a construction schedule providing for Work to be completed within the time limits required in the Contract Documents.
- This schedule shall be revised at appropriate intervals.

#### ConsensusDocs:

- Contractor must submit an initial schedule to the Owner only before, "first application for payment" and thereafter on a monthly basis. (Section 6.2.1)
- The Owner is allowed to change the sequences provided in the schedule as long as it does not "unreasonably interfere with the Work." (Section 6.2.2)

### Consequential Damages

- Both the 1997 and 2007 A201 Documents contain a mutual waiver of consequential damages.
- 2007 ConsensusDocs Contract also contains a mutual waiver.
- Is this good for you?
- Is the Owner providing for liquidated damages?

### Claims Process

- Most Contracts contain a claims process and, in such instances, the claims process must be followed, or claims can be waived.
- “A Contractor seeking to recover payment in excess of the Contract price must follow the procedures set out in the Contract.” *Sutton Corp. v. MDC*, 423 Mass. 200, 207 (1996); *Chiappisi, et al. v. Granger Construction Co., Inc., et al*, 352 Mass. 174 (1967).

### AIA

- This is one of the most significant differences between the 1997 and 2007 A201 documents.
- Section 1.1.8 was added to the 2007 A201.
- “The Initial Decision Maker is the person indentified 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.” (Section 1.1.8-A201-2007).
- Both the 1997 and 2007 A201 Documents require Work under protest and that the Contractor must preserve its rights in the event of a denial of its claim.
- The claims process still requires that claims by other parties must be initiated within 21 days after the occurrence of the event giving rise to such claim or within 21 days after the claimant first recognizes a condition giving rise to the claim, whichever is later.
- The Architect is the “default” Initial Decision Maker in the A201-2007 Document.

## ConsensusDocs

- Pursuant to Sections 8.1.1, 8.2.2 and 8.3.3, the following occurs during the claims process:
- The process is similar to the Associated General Contractors Lump Sum General Contract claims order process.
- Change Order can be directed by the Owner or requested by the Contractor.
- If the parties cannot agree upon the Change Order price, an Owner may order an **interim directed change**, allowing the Contractor to bill 50% of its estimated cost within 30 days of the issuance of the interim directed change.
- In the instances where the Owner simply rejects the claim altogether, the Work proceeds as an interim work directive without prejudice to the Owner's right to reimbursement in the event that the Work is later determined to be within the scope of the base Contract.

## Dispute Resolution

### AIA

- The 1997 A201 contains a default provision requiring arbitration.
- The 2007 A201 contains a default provision requiring litigation. Arbitration must be selected as part of the Contract negotiation process if it is going to be required.
- Both the A201 1997 and 2007 documents require mediation before resort to arbitration or litigation, at least in most instances.

## ConsensusDocs

- The ConsensusDocs process is very different from that of the AIA documents.
- As with the A201, the Contractor must continue to work while the dispute is being resolved. (Section 12.1).
- Pursuant to Section 12.2, party representatives with the authority to resolve matters must work to resolve matters within 5 business days. If not resolved within 15 days of first discussion, then matters proceed to dispute resolution.
- Section 12.3 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 will either arbitrate or litigate, depending on which choice they selected as part of negotiating the Contract.

### **Insurance and Indemnification**

#### **AIA**

- Pursuant to Section 3.18.1, the Contractor is required to defend and hold harmless the Owner, the Architect, the Architect's consultants and agents.
- **Beware of indemnifying the Architect or any design professional.**
- The indemnification provision is pro rata – “**but only to the extent caused by the negligent acts or omissions of the Contractor ...**”
- The indemnification provisions did not change between the 1997 and 2007 A201 documents.
- The insurance requirements did not change practically between the 1997 and the 2007 documents. That is, the 2007 version deletes project management liability insurance, which no one carried anyway.

#### **ConsensusDocs**

- Significantly the ConsensusDocs Contract provides **MUTUAL INDEMNIFICATION** language (Section 10.2.2) and only proportional indemnification responsibility.
- Additionally, the ConsensusDocs provide for the recovery of attorney's fees and costs that exceed the percentage of the parties' negligence in causing a loss.
- ConsensusDocs (Section 10.2.2) allows for combining primary and excess coverages to satisfy total limits required under the Contract.
- The document sets the completed operations coverage for one year. This is similar to the 2007 A201, which requires completed operations coverage for the warranty period (typically one year) or longer if specified.

## Payment

- The 2007 and 1997 A201 Documents now differ significantly.
- In the 1997 version, Section 9.6.2 required that, “The Contractor shall promptly pay each Subcontractor upon receipt of payment from the Owner ...”
- The 2007 version provides that, “The Contractor shall pay each Subcontractor no later than 7 days after receipt of payment from the Owner ...”
- This is **not** “Pay when paid” language – “payment to the Subcontractor is to be directly contingent upon the receipt by the General Contractor of payment from the Owner.” This is the pay when paid magic language.
- Significantly, the A201- 2007 version 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 7 days, the Owner has the right to contact Subcontractor directly.
- Pursuant to new Section 9.5.3, if the Contractor fails to properly pay Subcontractors, the Architect can withhold certification for payment and, **“The Owner may ... issue joint checks to the Contractor and any Subcontractor or material or equipment suppliers ...”**
- The ConsensusDocs provide no such rights to the Owner.