

CAPITAL

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Issue No. 4 - Winter 2009

Construction Contracts - AIA v. ConsensusDOCS, An Owner's Perspective

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Any construction project involves a number of contract documents between various parties including the owner, architect, and contractor. The American Institute of Architects (AIA) has promulgated a set of standard documents that have historically been those most frequently used in complex construction transactions. Recently, owners, contractors, sureties, and others collaborated to design an alternate set of standard construction documents called ConsensusDOCS. The AIA declined to participate in the drafting project. The drafters describe the ConsensusDOCS as "contract documents based on best practices and proper risk allocation, for the benefit of organization members and the construction industry at large." Owners were represented at the ConsensusDOCS drafting table, but it is unclear whether the new documents truly favor owners more than the AIA document set.

Outside of the specific contract language differences, there are some key advantages and disadvantages to the two sets of documents:

- ▶ Sixteen editions of AIA documents have been available since 1911 resulting in frequent and longstanding court interpretation of the terms used in those documents. Thus, a court's interpretation of a given provision is somewhat predictable, whereas a court's interpretation of the ConsensusDOCS may be less certain.
- ▶ Most attorneys have developed their own set of suggested revisions to the standard AIA documents. When initially using the ConsensusDOCS, attorneys will need to develop a new set of standard revisions, potentially adding time and cost to the negotiation process. ConsensusDOCS developers argue the documents actually require fewer revisions because of their balanced approach and "check-the-box," pre-drafted alternative language.
- ▶ Some contractors, architects, and other industry professionals may be reluctant to use a new set of documents when they are already familiar and comfortable with the AIA documents they have been using for years.

The Construction Owners Association of America (COAA) has endorsed the ConsensusDOCS based on its determination that the forms are more owner-friendly than other industry forms, including the AIA's. They have identified several hot button provisions in the ConsensusDOCS that favor the Owner:

- **Delay Damages** – The ConsensusDOCS limit a contractor's damages for an owner-caused delay to direct costs only and prevent their recovery of "loss of business, loss of financing, principle office overhead and expenses, loss of profits not related to this Project, lost of bonding capacity, loss of reputation or insolvency." The AIA documents do not contain a similar waiver, though the AIA's mutual waiver of consequential damages may waive such losses.
- **Liquidated Damages** – The ConsensusDOCS provide a framework for liquidated damages. Parties must insert their own provision into the AIA form to include liquidated damages.
- **Ownership of Plans** – The ConsensusDOCS specify that the owner owns the design documents, except for their copyright, which it can opt to purchase. The AIA documents only allow the owner a non-exclusive license to use the design documents.

- *Consequential Damages* – The ConsensusDOCS itemize categories of consequential damages that can be waived rather than including a blanket waiver, as is done in the AIA documents.

- *Dispute Resolution* – The ConsensusDOCS contemplate the owner and contractor communicating with each other directly when there is a dispute, while the AIA documents insert the architect or another third party into communication between those two parties.

Several other provisions that may favor the contractor, however, balance these potentially advantageous provisions. For example:

- *Indemnification* – The AIA documents require the contractor to indemnify the owner for the contractor's negligence regardless of whether the owner was contributorily negligent. The ConsensusDOCS provide for mutual indemnifications for each party's negligence.

- *Error Reporting* – The AIA documents require the contractor to report any errors in the construction documents that it discovers or that are made known to it and if it fails to do so, it is liable for extra costs that would have been avoided if it had reported such errors as required. In contrast, the ConsensusDOCS only require the contractor to report those errors that it discovers and it is only liable for those it "knowingly fails" to report.

- *Mitigation of Damages* – In the event that the contractor breaches the construction agreement, the ConsensusDOCS require that the owner take steps to mitigate its damages while the AIA documents do not impose this obligation.

- *Retainage* – The ConsensusDOCS provide the disbursement of retainage earlier in the project and no additional money is retained after 50% of the work is complete, while the AIA documents do not provide for retainage disbursement until substantial completion and money is retained throughout the project.

- *Termination* – If the owner wants to terminate the contractor for cause, under the AIA documents it must give the contractor one 7-day notice. The ConsensusDOCS require two notices to the contractor and an opportunity to cure, extending over 21 days.

Despite COAA's endorsement of the ConsensusDOCS there are clearly some provisions that an owner ought to consider modifying. Nevertheless, structurally, the ConsensusDOCS offer an interesting and possibly attractive alternative to the traditional AIA forms. It is important, however, that an owner choose its desired document set before contacting contractors or architects. All documents used on a project should come from one document set because the two sets are incompatible. Additionally, owners should develop a modified form document to send to interested contractors and architects before initially contacting them so later negotiations begin from an owner-friendly stance, initial pricing takes the revised contract terms into account, and there is no misunderstanding of the owner's intent to use a modified form of contract from the onset. ■