

DESIGN PROFESSIONAL LEGAL UPDATE

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NEW AIA STANDARD FORM AGREEMENTS versus NEWLY ISSUED "CONSENSUSDOCS"

NEW AIA AGREEMENTS

The following changes have been made to the A201 General Conditions:

Initial Decision Maker. The 1997 General Conditions appointed the Architect as the "initial decision maker" in disputes between Owners and Contractors. The new AIA General Conditions give the Owner and Contractor the option of designating a neutral third party as the "initial decision maker" rather than the Architect. The initial decision remains a condition precedent to proceeding with formal dispute resolution.

Insurance. The new AIA General Conditions require the Architect to maintain insurance.

Dispute Resolution. The new AIA General Conditions no longer specify arbitration as the binding dispute resolution mechanism in the contract. Rather, the parties

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Architects, Engineers and Construction Professionals have long utilized the boilerplate contract forms published by the American Institute of Architects ("AIA"). Owners and general contractors, however, have complained that the AIA documents unreasonably favored architects and engineers. On September 8, 2007, the AIA released its updated AIA Standard Form documents. Some of the changes in the documents were the AIA's attempt to accommodate the concerns voiced by contractors and owners.

At the same time, the Associated General Contractors of America ("AGC") released a set of competing standard form agreements called ConsensusDOCS – which many view as more contractor-centric.

This article will overview some of the significant changes between the 1997 and the 2007 AIA Standard Form agreements, and highlight some of the competing provisions that can be found in the ConsensusDOCS form agreements.

REGISTRATION BOARD CONSIDERS NEW STAMPING RULE AND STRUCTURAL ENGINEER REGISTRATION WAIVERS

LICENSE EXPIRATION DATES

For years, the Washington Board of Registration for Engineers and Land Surveyors required engineers stamping final documents to insert the date that their license was to expire. See WAC 196-23-010.

In November 2006, the Board promulgated changes to WAC

196-23-020 which mandated that engineers "hand write" the expiration date of their license on all stamped final documents. For firms that had adopted digital seals and signatures, as allowed by WAC 196-23-070(2), this presented a serious practical problem. The Board recognized the problem with the 2006 changes and in October 2007,

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CONSENSUSDOCS (cont'd)

can choose their method of dispute resolution. If arbitration is the chosen method of resolution, the new Conditions are much more lenient about joinder of additional parties to the dispute resolution proceeding.

Statute of Limitation. The new AIA General Conditions establish an ultimate limitation for claims, thereby eliminating the state-by-state debate over the application of the discovery rule. Under the new General Conditions, causes of action between the Owner and the Architect must be initiated in accordance with the applicable state statute of limitations, but in no event more than 10 years after substantial completion.

Governing Law. The new AIA General Conditions state that the Agreement is governed by the law of the place the project is located.

There have also been some significant changes to the Standard Form Agreement between Owner and Architect, which is now AIA B101-2007, and replaces AIA B151 and B141. Some of the significant changes are:

Copyright and Licensing. The new Standard Form Agreement B101 grants an initial nonexclusive license to the plans and specifications to the Owner for use as instruments of service during the Project. The Owner may not use the plans for any other purpose without the Architect's consent. The license terminates if the Architect rightfully terminates the contract. If the Owner terminates for convenience, the Owner must pay a licensing fee to continue using the plans and specifications.

Sustainability. The new Standard Form Agreement B101 requires the Architect to discuss the feasibility of incorporating environmentally responsible design into the project with the Owner, and also requires the Architect to consider environmentally responsible design alternatives during the schematic design phase.

Standard of Care. The new Standard Form Agreement B101 defines the standard of care.

The AIA has also attempted to provide form contracts that are better tailored to the size of the project, offering more risk allocation provisions for larger and more complex projects, such as a limitation of liability and indemnification. There are now three optional Standard Form Agreements to choose from based on project size:

B103: Standard Form Agreement between Owner and Architect for a Large or Complex Project.

B104: Standard Form Agreement between Owner and Architect for a Project of Limited Scope.

B105: Standard Form Agreement for a Residential or Small Commercial Project.

NEW CONSENSUSDOCS

The ConsensusDOCS purport to be the result of a collaborative effort of construction industry entities. In reality, the forms reflect a consensus by a small contingent of owner groups, financing entities, and primarily contractor/subcontractor trade associations.

The ConsensusDOCS form agreements are generally organized into six categories: (1) General Contracting Series, (2) Collaborative Agreement, (3) Design Build Series, (4) Consumer Management Series, (5) Subcontracting Series, and (6) Program Management Series.

ConsensusDOCS Form 240 is the Standard Agreement between an Owner and Architect/Engineer within the General Contracting "200" Series. The following provisions in the ConsensusDOCS Form 240 Agreement should be reviewed carefully:

Relationship between Parties. Paragraph 2.2 of ConsensusDOCS Form 240 has fairly vague language describing the relationship between the A/E firm and the owner which could present risks to the A/E firm. This provision states that the A/E "accepts the relationship of trust and confidence established by this Agreement." This language has been used in other states to try to impose fiduciary duties on A/E firms that do not ordinarily exist in arm's length transactions. Unlike the new AIA Standard Form B101, ConsensusDOCS Form 240 does not contain a statement regarding the standard of care. Given that the "trust and confidence" language could be interpreted as modifying the applicable standard of care, you may want to consider either deleting it altogether or editing it to make it clear that the language is not intended to modify or heighten the standard of care owed to the owner.

General Responsibilities. Paragraph 3.1.2 of ConsensusDOCS Form 240 provides that the A/E will modify plans *without additional compensation* if the owner has "reasonable objections," if the contractor deems them to present "constructability problems," or if revisions are necessary to "reflect clarifications and assumptions" on which a guaranteed maximum price is based. This language does not appear to be based on violations of any professional standard of care, and would require the A/E firm to provide services for free simply if the contractor erred in bidding a project.

Coordination. Paragraph 3.2.6 of ConsensusDOCS Form 240 requires the Architect to coordinate all of the ser-

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CONSENSUSDOCS (cont'd)

vices of design consultants on the Project, *including the efforts of those design consultants retained by the Owner*. This provision is a departure from industry practice under which the A/E has no duty to coordinate the efforts of designers with whom it has no contractual relationship. A/E firms confronted with such a request should carefully evaluate the risks of accepting such coordination obligations.

Job Site Safety. Paragraph 3.2.8.4 of ConsensusDOCS Form 240 acknowledges that the A/E firm providing services during construction is not responsible for the contractor's safety programs, but it also affirmatively requires the A/E to give "prompt written notice" of any safety violations of which the A/E has actual knowledge. While this language is consistent with good field practices, the questions inevitably arise: what does "prompt" mean? What liability will fall on the A/E who does not provide "prompt" enough notice? Does this provision create a *de facto* method of assigning site safety responsibilities to the A/E?

Delays. Paragraph 5.2 of ConsensusDOCS Form 240 requires the A/E firm to compensate and indemnify the owner for any delay caused by any "error, inconsistency or omission" of the A/E which violates the applicable standard of care. This provision creates significant economic risk for A/E firms because almost all contractor delay claims involve allegations of design errors or A/E firm delays in reviewing or approving contractor submittals during construction. The provision does not address what happens if the contractor alleges delays caused in part by the A/E firm and in part by the Owner—the most typical situation that arises when a contractor alleges delays.

In addition, the general mutual indemnification provision of Paragraph 5.4 does not limit the exposure created by Paragraph 5.2 because Paragraph 5.4 only applies to claims of bodily injury and personal damage. A/E firms should carefully consider the financial exposure that these delay provisions present before agreeing to them.

Project Personnel. Paragraph 3.7 of ConsensusDOCS Form 240 requires the A/E to designate the key personnel who will staff the project, and requires written consent of the Owner if there are any changes to key personnel.

Owner's Finances. Paragraph 3.8 of ConsensusDOCS Form 240 allows the A/E to request proof that the Owner has the ability to pay for the Architect/Engineer's services.

Indemnification. The approach to indemnification in Paragraph 7.1 of ConsensusDOCS Form 240 appears fairly even-handed. The indemnification clause requires the

A/E to indemnify and hold the owner harmless for any bodily injury or property damage claim arising out of the A/E's work, but only to the extent of the A/E's negligence. There is no explicit duty to defend the owner against such claims.

Similarly, Form 240 requires the owner to indemnify and hold the A/E harmless for claims of bodily injury or property damage arising out of the negligence of the owner or "Others"—defined as persons not employed by the contractor or subcontractors. A/E firms should consider broadening this indemnification to explicitly cover claims arising out of contractor or subcontractor negligence. As with the A/E indemnification, there is no explicit duty to defend the A/E against such claims.

Paragraph 7.1.3 provides that the A/E's duty to indemnify will not be limited by the fact that the A/E may have immunity from suit under worker's compensation laws. Such a waiver is standard in most design professional agreements, but the language is not specific enough to constitute a valid waiver in Washington state. If you are using this document, you need to make sure that counsel has reviewed it to make sure it is valid in the relevant jurisdiction.

Similarly, any waiver of worker's compensation immunity must be mutual. In Washington, if an owner's employee is injured during a construction project and brings a claim against the A/E firm, that A/E firm may not be able to obtain indemnification from the owner without an express waiver of worker's compensation immunity. Again, this is an issue that needs to be addressed jurisdiction by jurisdiction.

Limitation of Liability. ConsensusDOCS Form 240 does not include any limitation of liability provision. While there is a limited waiver of consequential damages in Paragraph 5.4, that provision is not broad enough to cap an A/E firm's exposure to contractor delay claims. Paragraph 5.4 appears to contemplate that parties will modify it to fit particular projects. Adding an express LOL would be an option to consider.

Dispute Resolution. Article 9 of ConsensusDOCS Form 240 calls for the parties to resolve all disputes initially through "good faith direct discussions between the Parties' representatives." If such discussions are unsuccessful, the form agreement is structured so that the parties can select either a "dispute mitigation" procedure by a "project neutral" or a "dispute review board," or mediation through the American Arbitration Association. If either mitigation or mediation is unsuccessful, then the parties can choose between arbitration through AAA or litigation.

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CONSENSUSDOCS (cont'd)

Neither AIA, AFSE, nor and EJDC has endorsed the ConsensusDOCS Form Agreements. Architects and engineers presented with a ConsensusDOCS Standard Form Agreement should carefully review the document for any unlawful, unreasonable or uninsurable terms or conditions. The discussion here is a starting point, but is not an exhaustive analysis.

Regardless whether you opt to use an AIA Standard Form Agreement or are asked to consider a ConsensusDOCS form, we strongly recommend that you consult with counsel in the jurisdiction where the project is situated to ensure that the final agreement adequately addresses and allocates the risks associated with that particular project and meets the laws of the local jurisdiction.

STAMPING REGS AND STRUCTURAL ENGINEER REGISTRATION WAIVERS

proposed amendments to both WAC 196-23-010 and WAC 196-23-020 eliminating the requirement that a licensure expiration date be a part of the engineer's stamp and eliminating the need to hand write that date on final documents.

The Board contemplates adoption of its proposed amendments at a March 21, 2008 meeting. For information on the language under consideration, or to submit written comments to the proposed regulation changes, go to <http://www.dol.wa.gov/business/engineerslandsurveyors/elchanges.html>.

STRUCTURAL REGISTRATION WAIVERS

In 2007, the Washington legislature passed amendments to the Engineer's Registration Act, RCW Ch. 18.43, requiring engineers providing structural engineering services on "significant structures" to be separately registered and licensed by the Board. The legislature authorized the Board to grant a waiver of this registration requirement for engineers licensed before January 1, 2007, who could demon-

strate sufficient experience to warrant a waiver.

The Board has begun the process of developing waiver conditions. It has proposed the promulgation of WAC 196-12-100, entitled "Limited Waiver of the Requirement for Licensure in Structural Engineering to Design Significant Structures." Under this proposed rule, the Board will consider granting a waiver to engineers who can demonstrate at least six years of progressing engineering experience performing analysis and design of seismic forces of significant structures.

The Board has two planned workshops to allow interested individuals to participate in discussions about the scope and content of this regulation. For dates and times of these workshops, go to <http://www.dol.wa.gov/business/engineerslandsurveyors/elnews.html>.

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Recent Skellenger Bender Publications:

William J. Bender and Beth M. Andrus, *What's The Buzz About BIM: Developing a Workable Contractual Structure for BIM Projects*, published in STRUCTURE MAGAZINE, pp. 52-54 (December 2007), available in PDF format at <http://www.structuremag.org/article.aspx?articleID=490>.

Beth M. Andrus and James Gessford P.E., White Paper, *Understanding The Legal Risks Associated With Design and Construction of Engineered Log Jams*, available upon request from Skellenger Bender P.S.