

**NINETEENTH ANNUAL
NORTHEAST SURETY AND FIDELITY
CLAIMS CONFERENCE**

SEPTEMBER 18th and 19th, 2008

**THE NEW CONTRACTS ARE HERE:
A REVIEW OF THE NEW CONSENSUS DOCS AND AIA
DOCUMENTS**

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The New Contracts are Here: A Review of the New ConsensusDOCS and AIA Documents

In the Fall of 2007, two new sets of documents became available to those involved in the construction industry. One was the 2007 revisions to the American Institute of Architects' standard contract documents. The other was a new set of documents called ConsensusDOCS, published by ConsensusDOCS, LLC. This article will discuss the differences in the new set of AIA documents as compared to the 1997 versions, as well as explore the new ConsensusDOCS and compare them to the most current edition of the AIA documents. Finally, we will examine the new performance and payment bonds in the ConsensusDOCS.

I. AIA DOCUMENTS

The American Institute of Architects (AIA) has been issuing a set of standard contract documents since 1888. Typically, every ten years the AIA will go through and review these documents and work on revisions to them. The review and revisions are based on trends in the construction industry, as well as complaints or criticism the documents have received from professionals in the industry. The reviewing committee is made up of volunteer architects who prepare drafts containing new language and provisions. The reviewing committee will meet with others, such as AIA in-house counsel, outside attorneys, and representatives from the construction industry, such as engineers, contractors and owners, in order to gain their perspective on the proposed revisions.

The AIA has been working on revisions to the 1997 set of documents for a number of years, and the newest version came out in the latter half of 2007. There were many changes to the documents, but the focus of the changes centered around issues pertaining to dispute resolution, access to financial information of the owner and contractor, and creating documents to address the exchange of electronic information. We discuss each of these in detail below.

A. ISSUES INVOLVING DISPUTES AND DISPUTE RESOLUTION

Several changes were made to provisions concerning dispute resolution. Some of these changes are contained in the A201 General Conditions to the Contract, which is incorporated into many of the contract forms in the AIA family of construction documents, and some are contained in the B101, which is the agreement between the Owner and the Architect on the construction project.

1. Decision Making

The AIA documents have traditionally designated the need for a decision maker on the jobsite because as a dispute arises on the project, it is beneficial to be able to look to one neutral person to resolve the dispute. Then all parties are to follow the decision of that decision maker and have the option to appeal it through the appeal process set out by the contract. The purpose of this is to keep the project moving forward without delay or disruption.

Historically, the role has been filled by the Architect.¹ However, debates have swirled over whether the Architect is the best person to fill this role. Some concerns center around whether the Architect, who is hired by and paid by the Owner, can in reality be neutral in a dispute. Another concern is whether the Architect can remain impartial when a dispute arises that calls into question the plans and drawings of the Architect. Further, some owners may not want the Architect to be a neutral, preferring that the Architect instead be an advocate on behalf of the Owner.

In response to such concerns, the AIA has created the role of an Initial Decision Maker (IDM), which can be a third party neutral.² This permits the parties to agree on a third party who will work to resolve the dispute; however, there may be issues with this, such as educating the IDM on the status of the project and also the cost of hiring a third party to fill this role. Time and money may be saved by retaining the Architect as the resolver of disputes, simply for the fact that the Architect is familiar with the project. Also note that by appointing a Third-Party Neutral, the Architect is not completely out of the process. Where there is a dispute involving, for example, a differing site condition, the Architect will presumably be involved in the process; however the Third-Party Neutral IDM will be making the final decision. If a Third-Party Neutral is not appointed, the Architect remains the default resolver of job disputes.³

There are a few things to point out about the binding effect of the decision of the IDM. The decision of the IDM is still to be followed by the parties unless appealed through the dispute process designated in the contract. However, the 1997 versions stated that the decision would become binding unless a demand for arbitration was filed within 30 days from the date of the initial decision.⁴ This may have caused problems for parties who did not want to arbitrate or mediate right away. Therefore, in the 2007 revisions, there is not a stated time period after which the initial decision becomes final and binding. Rather, it is upon one of the parties to move to have the initial decision to become binding within 30 days of the initial decision.⁵ The moving party does so by notifying the other party that the decision will become binding unless that party files for mediation or arbitration within 60 days of the demand.⁶

2. Arbitration

Ever since the first owner-contractor agreement was created in 1888, the AIA documents have set forth mandatory arbitration between the parties.⁷ In a huge shift from this belief, the 2007 documents have made arbitration optional.⁸

¹ A201-1997 § 4.4.1.

² A201-2007 § 15.2.1.

³ A201-2007 § 15.2.1; B101-2007 § 3.6.2.5.

⁴ A201-1997 § 4.4.6.

⁵ A201-2007 § 15.2.6.1.

⁶ *Id.*

⁷ See A201-1997 § 4.6.1.

⁸ A201-2007 § 15.4.1.

The 2007 owner-contractor agreement and the owner-architect agreement have a “check the box” format where the contracting parties are asked to check the box for arbitration, litigation or other. Where no box is checked, the default is litigation.⁹ To have the option is important because many people have different views on the various forums for binding dispute resolution. Advocates of arbitration cite some of the following reasons why it is preferred: lower cost; more expeditious dispute resolution; not having to explain the construction process and design principles to judges and juries; more limited discovery rules and motion practices; parties are able to select arbitrators who have knowledge of the construction industry; and finality of the judgment. Advocates for litigation, on the other hand, counter that the time frame for getting through an arbitration is becoming more level with that of litigation, especially with multi-party arbitrations. Moreover, the costs of arbitration are beginning to meet or exceed that of a trial. Finally, appeals from arbitration are very difficult to obtain. Therefore the AIA has recognized the differences of giving the parties the option and has permitted the parties to choose which method of dispute resolution they would prefer. However, as in the 1997 documents, mediation is still a condition precedent to the selected choice of binding resolution.

There has also been a change in the statement of the rules that will govern an arbitrated dispute. The Commentary to the 1997 documents stated that the American Arbitration Association’s (AAA) rules in place *at the time of the dispute* would govern.¹⁰ However the 2007 documents now state that the rules in effect *on the date of the agreement* will govern the arbitration.¹¹ This permits the parties to have a sense of certainty as to what rules will be in place, which is comforting to the parties, especially because they typically have no control over what changes take place in the AAA rules. On the other hand, since the passage of time that may occur between the execution of the contract documents and arbitration may be a number of years, it is important for parties and their counsel to be cognizant of this change, get their hands on the rules applicable when the contract documents were executed and bring to the attention of the arbitrator the governing rules.

The final change discussed herein in the AIA documents pertaining to arbitration involves the decision to permit the consolidation of arbitrations in the 2007 documents. At issue was the consolidation of a claim between an architect and/or its consultant, with a claim of an owner, contractor, or any other party.¹² Consolidation traditionally was not permitted for various reasons, some of which include the variance of standards of care that could be involved and the likelihood that consolidation would result in a much longer arbitration process where there are multiple parties and multiple issues. However the new documents permit the owner or contractor to consolidate an arbitration with any other arbitration to which it is a party, so long as these three conditions are met: (1) The other arbitration agreement must permit consolidation; (2) The arbitrations must involve substantially common issues of law or fact; and (3) The arbitrations must have materially similar procedural rules and methods for selecting arbitrators.¹³ In addition to these requirements being met to consolidate the initial arbitration

⁹ A101-2007 § 6.2; A401-2007 § 6.2.1.

¹⁰ See <http://www.aia.org/SiteObjects/files/A201-1997Commentary.pdf> (emphasis added).

¹¹ A201-2007 § 15.4.1 (emphasis added).

¹² A201-1997 § 4.6.4.

¹³ A201-2007 § 15.4.4.1; B101-2007 §§ 8.3.3.1, 8.3.3.2.

into another, these three requirements must be met in order to consolidate any subsequent matters into that arbitration as well.¹⁴ Therefore, with the new A201 family of documents, the potential exists for there to be a single arbitration that includes the owner, the architect, the consultant, the contractor, the subcontractors, as well as other parties (such as sureties) in one multi-party arbitration. Note however, that because of the third requirement, higher-tier contracting parties may be well advised to have a flow-down provision to make sure that all lower-tier contracts include language of similar procedural rules and methods. Otherwise, consolidation may not be permitted.

3. Statutes of Limitation

The new AIA documents attempt to clarify the matter of the time frame in which a party may bring a claim. The 1997 documents specified dates on which causes of action commenced for owner or contractor claims,¹⁵ which caused problems in states that follow the discovery rule. To eliminate these differences among the states, the new documents have deleted the definitions for commencement of suit and refer the parties to the requirements of the dispute resolution clause in the contract and applicable law. However it does state that suit must be brought by the Owner or Contractor not later than ten (10) years after the date of substantial completion of the project.¹⁶

4. Consequential Damages

The 2007 documents contain the traditional mutual waiver of consequential damages. This is an important provision for parties to the contract to prevent liability for unknowns. Contractors typically cannot estimate the types and extent of losses the owner may suffer. In addition, contractors' profits typically pale in comparison to what an owner might claim. The mutual waiver also allows parties to plan accordingly when something goes wrong because they know that consequential damages are not available.

The only change that appears in the 2007 documents is the elimination of the word "direct" as referred to in the 1997 documents as "liquidated 'direct' damages".¹⁷ The insertion of the word "direct" caused confusion amongst industry professionals and lawyers. What remains is the notion that the Owner and Contractor waive claims against each other for all consequential damages, and that waiver does not preclude the award of liquidated damages.¹⁸ Also, as was the case in the 1997 version, the 2007 revisions do not expressly define consequential damages or liquidated damages; therefore litigants will have to look to applicable case law for this determination.

¹⁴ *Id.*

¹⁵ A201-1997 § 13.7.1.

¹⁶ A201-2007 § 13.7.

¹⁷ A201-1997 § 4.3.10.

¹⁸ A201-2007 § 15.1.6.

5. Additional Insured Provisions

The notion of the contractor holding insurance for the project has been a longstanding requirement in the documents, often included in the section on indemnity.¹⁹ The basic purpose of such is to protect the contractor if there is physical injury, property damage, or death on the jobsite as a result of the way things are being managed on the site. However various state laws arose concerning the enforceability of such provisions in the indemnity section.

The 1997 edition of the documents attempted to remedy this by stating that the Owner, at its option, could require the Contractor to purchase and maintain “Project Management Protective Liability Insurance.”²⁰ For whatever reason, it appeared that such policies were not being used by industry professionals, and the AIA discovered that professionals instead were naming certain parties to the contract as “additional insureds” under the general contractor’s general liability policy. Adding this endorsement is typically at little or no cost to the contractor. Therefore, the 2007 revisions have reflected this industry trend and have deleted the option for furnishing Project Management Protective Liability Insurance.²¹ The revisions require that, during operations, the Contractor add the Owner, the Architect and the Architect’s consultants as additional insureds for claims caused in whole or in part by the Contractor’s negligent acts or omissions.²² For completed operations, it also requires that the Owner be added as an additional insured for negligent acts or omissions of the Contractor.²³ Note that the insurer is not required to provide coverage on claims arising solely out of acts or omissions of the Owner or Architect. However the “Professional Liability Exclusion” found in most general liability policies will likely apply to design professionals where the claims arose from that person’s professional duties.

6. Notice of Default and Right of Owner to Correct

Where the Contractor has defaulted or has failed to carry out the work on the project pursuant to the terms of the contract, the Owner has a right to carry out and correct the Contractor’s work, but only after giving the Contractor the appropriate notice. The 1997 forms required two notices, the first being a seven-day written notice informing the Contractor to commence and continue correction of the default, followed by an additional written notice informing the Contractor to cure within three days.²⁴ The 2007 forms have simplified this by requiring a single written notice informing the Contractor to commence and continue correction of the deficiency with diligence and promptness, within 10 days after receipt of such notice.²⁵

¹⁹ See A201-1997 § 3.18.1.

²⁰ A201-1997 § 11.3.1.

²¹ A201-2007.

²² A201-2007 § 11.1.4.

²³ *Id.*

²⁴ A201-1997 § 2.4.1.

²⁵ A201-2007 § 2.4.

7. Additional Provision Regarding Site Conditions

There was an additional provision added to the A201-2007 document pertaining to concealed or unknown conditions on the site, the need of which is perplexing. We set forth the full text of the section below:

If, in the course of the Work, the Contractor encounters human remains or recognizes the existence of burial markers, archeological sites or wetlands not indicated in the Contract Documents, the Contractor shall immediately suspend any operations that would affect them and shall notify the Owner and Architect. Upon receipt of such notice, the Owner shall promptly take any action necessary to obtain governmental authorization required to resume the operations. The Contractor shall continue to suspend such operations until otherwise instructed by the Owner but shall continue with all other operations that do not affect those remains or features. Request for adjustments in the Contract Sum and Contract Time arising from the existence of such remains or features may be made as provided in Article 15.²⁶

Presumably the encounters addressed above (human remains, burial markers, archeological sites or wetlands) could have been dealt with under the provisions set forth in the following provisions: A201-2007 § 3.7.4 (Concealed or unknown conditions); A-201-2007 § 3.13 (Contractor's use of the site); A201-2007 § 14.1.1 (Contractor's right to terminate the contract when the work is suspended); or A201-2007 § 2.2.2 (Owner's obligation to provide the physical of the site). This new provision may call into question the standard of care the contractor has to recognize such conditions. Also, what about the liability of the architect who may have missed these sites in the drawings? However, at least this provision spells out that the contractor can ask for an extension in time and money when these issues arise.²⁷

B. ISSUES INVOLVING FINANCES AND PAYMENT

There are multiple changes to provisions that pertain to financial information, financial assurances and payment issues that are peppered throughout the new 2007 documents. While we will not delve into all of them here, we have selected a few key provisions that stand out in the new documents.

1. Contractor to Obtain Financial Assurances from Owner

All parties to a construction contract are concerned with receiving payment and funding issues. To address some of these concerns, the 1997 documents granted the contractor the right, throughout the course of the project, to request evidence of financial sustainability from the Owner.²⁸ Owners complained of being harassed and bothered by the constant requests from contractors during the course of the project, and the effect it had on the timeline of the job where the Contractor would stop work until given reasonable evidence of financial viability.

²⁶ A201-2007 § 3.7.5.

²⁷ A201-2007 § 3.7.5.

²⁸ A201-1997 § 2.2.1.

Therefore, the 2007 revisions have attempted to rein in the contractor's right to such information. The contractor still has the right, prior to commencement of the work, to obtain reasonable evidence of the owner's financial arrangements as a condition precedent to beginning the work.²⁹ And as with the 1997 forms, the owner still needs to inform the contractor of any material change in the financing arrangements. Once the work has commenced, however, the new documents set parameters for the contractor to obtain follow-up information concerning the owners' financial arrangements. Such information can only be obtained once work has commenced where: (1) The Owner has failed to make payments to the Contractor pursuant to the terms of the contract documents; or (2) There was a change in the work that materially changes the contract sum; or (3) The Contractor states in writing a reasonable concern regarding the Owner's ability to make payment when due.³⁰

These provisions, while narrowed a bit from the 1997 forms, are still largely beneficial to contractors who have legitimate concerns over being paid, such as statutory lien rights and agreements with sureties on payment bonds. However, disputes may still arise surrounding the language in this new provision. Lists of a few questions that may arise are: What is a "material" change in the contract sum? Does it include both an increase and a decrease? What is a "material" change in financing? What is a "reasonable concern" regarding the owner's ability to pay? Is something a "change" or was it arguably considered part of the original scope of the work? How much notice must the owner give the contractor of a change in financing arrangements? How should that notice be given? These questions will surely arise throughout the coming years.

2. Payments to Subcontractors

The 2007 revisions contain some important provisions to help protect payment to subcontractors. First, there was some ambiguity in the 1997 documents relating to the timing of payment from contractors to subcontractors. The only guidance given was that payments were to be made "promptly" to each subcontractor upon receipt of payment from the owner.³¹ Many states have developed case law and statutes to deal with prompt payment issues in construction contracts, and now the 2007 revisions have addressed the issue as well. Accordingly, the contractor is required to pay each subcontractor no later than seven (7) days after receipt of payment from the Owner.³²

A second provision that may aide in enforcing payment to subcontractors is that the Owners now have a right to obtain verification of payments to subcontractors.³³ While this is certainly an assurance to Owners who worry about lien rights and the like, it nonetheless may assist in the overall process of preventing the contractor from walking off the job without paying the subcontractors. Under the new provision, the owner can demand written evidence from the Contractor that subcontractors and suppliers have been properly paid.³⁴ Should the

²⁹ A201-2007 § 2.2.1.

³⁰ A201-2007 § 2.2.1.

³¹ A201-1997 § 9.6.2.

³² A201-2007 § 9.6.2.

³³ A201-2007 § 9.6.4.

³⁴ *Id.*

Contractor fail to answer within seven (7) days, the Owner has the right to contact the subcontractors and suppliers directly to inquire as to their payments.³⁵

Finally, a third provision that is new to the 2007 documents is the right of the owner to issue joint checks, made payable to the contractor and the subcontractor or supplier, in the event the contractor has failed to pay the lower tier contractors.³⁶ Granted, this decision is solely up to the Owner, and the subcontractors cannot force it upon them, however it could be effective when used to eliminate lien claimants to the property. However, some contractors will seek to eliminate this provision from contracts because there are times when subcontractors may not be due the full amount they claim to be due. And Owners may want to approach this option with caution, because liability may arise for the owner to be liable to the contractor for monies improperly paid.

C. KEY CHANGES TO THE B101 – AGREEMENT BETWEEN OWNER AND ARCHITECT

The B101 Standard Form Agreement Between the Owner and the Architect has been created to replace the B141-1997 and the B151-1997. Both 1997 documents are consolidated into this single document, which should make the process of contracting run more smoothly.³⁷ In addition to consolidating those two documents into one, several changes were made to the language as well.

1. Architect's Standard of Care Stated

The old documents contained a vague reference to the Architect's standard of care, stating: "[T]he Architect's services shall be performed as expeditiously as is consistent with professional skill and care and the orderly progress of the project."³⁸ The AIA sought to revise this definition to be flexible enough to adapt to each state's case law as it has developed interpreting the standard of care. The new language states:

The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.³⁹

It will be interesting to follow whether setting forth this standard of care will affect architects' insurability. It may be that some insurance companies will choose not to insure an

³⁵ *Id.*

³⁶ A201-2007 § 9.5.3.

³⁷ Note that for specialist architects or an architect who wants to provide services for a special scope of work, the AIA has divided the B201-2007 into two parts: The B102-2007 is the agreement portion, which is akin to B141-1997 Part 1; and B201-2007 is the services portion, which is akin to B141-1997 Part 2.

³⁸ B141-1997 § 1.2.3.2; B151-1997 § 1.2.

³⁹ B101-2007 § 2.2.

architect who enters into a contract that sets out the standard of care by contract, or companies may not be used to insuring against such language in a standard of care. However, it is likely that the standard of care set forth in this new document is similar to what companies and parties are used to.

2. Architect to Maintain Insurance

Under the new B101-2007, the architect is required to maintain a minimum level or type of insurance.⁴⁰ The form allows the parties to list the types and limits the architect is to maintain, and where such requirement exceeds what the architect normally maintains, the owner is required to reimburse the architect for the cost of getting such excess insurance.⁴¹ This provision will not likely affect most architects, as most typically carry insurance policies already.

3. Basic and Additional Services

The B101-2007 includes a fill-in-the-blank section for the parties to quantify the number of times the architect has agreed to perform certain “basic services” before those services become chargeable as “additional services”.⁴² While it is nice to be able to quantify those amounts, it may be difficult to determine at the time of contracting just how many site visits or inspections, for example, a project will need. What if something goes wrong because of the Architect’s negligence, should a visit to the site to correct that be counted against the agreed upon number? Perhaps it would be advisable to ask for a “reasonable” number of site visits; however, then the parties may dicker over what is or is not reasonable. What separates the 2007 provision from its 1997 counterpart is that now the Architect must notify the owner once the threshold of “basic services” has been met.

4. Addressing Sustainable Design

The AIA expresses the desire to promote architects to be environmentally responsible in designing and following-through with their work and to promote the use of the earth’s resources.⁴³ In accordance with that goal, the B101-2007 requires the architect to discuss the feasibility of incorporating environmentally responsible design approaches with the owner as a part of its basic services during the design phase.⁴⁴ The ultimate decision of the use of such approaches is up to the owner. However this is a step in towards the AIA’s stated goal that, “Architects must be environmentally responsible and advocate for the sustainable use of those [the earth’s] resources.”⁴⁵

⁴⁰ B101-2007 § 2.5.

⁴¹ Note that the B141-1997 and B151-1997 had a similar requirement regarding reimbursement of excess insurance coverage; however they did not have an express minimum level or type of insurance to be carried.

⁴² There was a similar provision in B141-1997.

⁴³ See AIA AIA Board of Directors, *Directory of Public Policies and Position Statements*, 2005 Am. Inst. of Architects 16 at http://www.aia.org/SiteObjects/files/Public_Policy_Directory_revised_1205.pdf.

⁴⁴ B101-2007 §§ 3.2.2, 3.2.5.1.

⁴⁵ AIA AIA Board of Directors, *Directory of Public Policies and Position Statements*, 2005 Am. Inst. of Architects 16 at http://www.aia.org/SiteObjects/files/Public_Policy_Directory_revised_1205.pdf.

5. Ownership of Architect's Instruments of Service

Issues arose surrounding the ownership and use of the Architect's design elements and instruments of service, where the architect is no longer on the project. In the old documents, the architect had to be adjudged in default before the owner could use the instruments of service to complete the project, so changes were needed to allow the owner more flexibility to maintain, alter or add to the project.

Under the new documents, the Owner has a nonexclusive license to use the Instruments of Service solely and exclusively for the purpose of constructing, using, maintaining, altering and adding to the Project.⁴⁶ If the Architect terminates the contract for cause, the license granted is terminated.⁴⁷ And also, if the Architect terminates after a 90-day suspension, the Owner must pay a licensing fee for continued use. The Architect is not permitted to terminate for convenience under B101. If the Owner terminates for cause, the non-exclusive license appears to continue, however it is not stated specifically in the provision. If the Owner terminates the architect for convenience, the owner can use the instruments without liability to complete, use and maintain the Project; however the Owner will have to pay a licensing fee to the Architect.⁴⁸

As for the Architect's liability where the Owner uses the instruments after the Architect is off the project, there is a separate indemnity paragraph in B101-2007 to protect the architect from claims by third parties and the owner in such circumstances.⁴⁹

D. PREPARING AGREEMENTS FOR DIGITAL DATA TRANSMISSION

Ever since the advent of the computer, the manners in which documents and data are exchanged and stored has been constantly changing. The AIA recognized that documents were not merely being written and exchanged by hand anymore, rather documents are being sent via facsimile and email, posted on FTP sites or extranets, and stored on CDs, DVDs and jump drives. Not only has the way information is stored and exchanged changed, but also the creation of drawings and plans by architects have changed. In the 1997 documents, the AIA began referencing electronic data and digital data, however more was needed.⁵⁰ Therefore the AIA has created two important documents, the E201-2007 and the C106-2007, which will be discussed respectively below.

The purpose of the digital data documents is to allow parties to exchange electronic design information and to control its use. "Digital data" is defined in both documents as "information, communications, drawings or designs, created or stored for the Project in digital

⁴⁶ B101-2007 § 7.3.

⁴⁷ B101-2007 § 7.3.

⁴⁸ B101-2007 § 11.9.

⁴⁹ B101-2007 § 7.3.1.

⁵⁰ B141-1997 § 1.3.2.4.

form;⁵¹ however, this definition can be limited in E201-2007. Both documents provide that the receiving party will agree to indemnify and defend the transmitting party with respect to any modifications or unlicensed use of the digital data.⁵² However neither requires the receiving party to bear all risk relating to the use of the data or indemnification arising out of the use of the data or information. Both also state that the transmitting party can designate the information as “confidential.”⁵³

1. E201-2007: Digital Data Protocol Exhibit

The E201-2007 is the standard form created to cover the exchange of electronic files. The parties are identified on the first page and the document is incorporated by reference into any other agreement or contract on the project.⁵⁴ Where there is a conflict, E201 governs over the agreement into which it is incorporated.⁵⁵ It states that communications transmitted electronically are “presumed received,”⁵⁶ and that electronic signatures are valid to the extent permitted by law.⁵⁷

As mentioned above, the parties are permitted to limit the types of documents to which this exhibit applies. Such limitation takes place in the “Project Protocol Table” where the parties can specify data format, transmission method and permitted uses of documents, as well as adding or subtracting documents from the Table.⁵⁸ The parties can modify this Table throughout the project as new parties come on to the project. However the parties must keep on top of this to make sure that all parties who are privy to this Table are agreeing to the fully developed Project Protocol Table as it changes.

E201-2007 does not create a license for use of the data, because it states that the data may be subject to a license already. But, like the C106-2007, it states that the transmission of digital data “constitutes a warranty by the transmitting party” that it is the copyright owner of the digital data, or that it has permission from the copyright owner to transmit the digital data.⁵⁹

2. C106-2007: Digital Data Licensing Agreement

This is a separate licensing agreement that can be added as a separate agreement to other form contracts in the AIA family. Because it is a separate agreement, there are no

⁵¹ E201-2007 § 1.1.1; C106-2007 § 1.3.

⁵² E201-2007 § 2.5; C106-2007 § 2.4.

⁵³ E201-2007 §§ 1.2.2, 2.2; C106-2007 §§ 1.3.1, 2.5.

⁵⁴ E201-2007 § 1.1.1.

⁵⁵ E201-2007 § 1.1.

⁵⁶ E201-2007 § 1.2.3.

⁵⁷ E201-2007 § 1.1.2.

⁵⁸ E201-2007 § 3.1.

⁵⁹ E201-2007 § 2.1, C106-2007 § 2.2.

incorporation clauses or conflict-ruling provisions because the C106-2007 is the entire integrated agreement between the parties.⁶⁰ The parties to this agreement are designated differently than in the E201-2007. Here they are termed “transmitting party” and “receiving party” and the agreement is only concerned with transmissions from the former to the latter.⁶¹

The agreement creates a “non-exclusive limited license to use the Digital Data for project purposes as set forth in Article 3 [Licensing conditions]”.⁶² Like the E201-2007, it states that the transmission of digital data “constitutes a warranty by the transmitting party that it is the copyright owner of the digital data, or that it has permission from the copyright owner to transmit the digital data.”⁶³

3. New Drafting Technology

Computer Assisted Design, or CAD, has been in use by architects for a number of years in the creation of drawings on a project. A new technology is emerging however, called Building Information Modeling, or BIM, that adds new dimensions to design. Rather than being only a drafting tool, like CAD, BIM allows other dimensions of the project to be calculated into the design and can be used in managing the project as well. Architects who are using BIM should list it in the Project Protocol Table of the E201-2007 or in the Licensing Conditions of the C106-2007. There are many more implications with this new technology and we expect to see more references to BIM methods of exchanging information in the next revisions of the AIA documents, especially since the AIA has issued a guide that discusses BIM.⁶⁴

II. ConsensusDOCS:

The ConsensusDOCS have been in the making for a few years and are partly an adaptation of the former AGC documents that were developed in 2000. The documents reflect a collaboration of many parties in the construction industry, with “DOCS” standing for Designers, Owners, Contractors and Sureties.⁶⁵ While the AIA declined to endorse the documents, there are presently 21 entities that have given their endorsement of the documents.⁶⁶ Among the endorsing organizations were the National Association of Surety Bond Producers and the Surety and Fidelity Association of America.

With the AIA documents being the most prevalently used documents in the construction industry presently, we first seek to compare select provisions of the ConsensusDOCS with the

⁶⁰ C106-2007 § 1.2.

⁶¹ C106-2007 § 1.1.

⁶² C106-2007 § 2.1.

⁶³ E201-2007 § 2.1, C106-2007 § 2.2.

⁶⁴ “Integrated Project Delivery: A Guide” available at www.aia.org/ipdg.

⁶⁵ www.consensusdocs.org.

⁶⁶ Endorsing organizations are shown on the first page of the ConsensusDOCS form, which can be found at www.consensusdocs.org. Also note that not all 21 entities endorse every document, so reference the first page of each form to identify endorsing entities for that form.

AIA counterparts. Finally, we discuss the various surety bond forms that are introduced in the new set of documents.

A. Comparison with AIA Documents

As an initial matter, one of the great benefits of the AIA documents is that the A201 – General Conditions is incorporated by reference into other contracts in the AIA family, unless the A201 language conflicts with a specific term of that agreement.⁶⁷ Notably missing from the ConsensusDOCS family of documents is a separate form setting out general conditions. Instead, the general conditions are combined with the separate contracts, such as ConsensusDOCS 200 “Standard Agreement *and General Conditions* Between Owner and Contractor” (emphasis added). Subcontractors should beware that, as it turns out; the general conditions set forth in ConsensusDOCS 200 are not incorporated into the subcontractor’s agreement (ConsensusDOCS 750) unless the two documents are used together.⁶⁸ Aside from that main difference, ConsensusDOCS 200 sets forth the general terms and conditions that we will be using to compare and contrast with the AIA A201 General Conditions.

1. Decision Making:

As discussed above, the AIA documents plan for the role of an Initial Decision Maker on the project.⁶⁹ ConsensusDOCS does not create such a role, and instead calls for good faith direct discussions between the parties’ authorized representatives for up to five (5) business days.⁷⁰ If the matter is still not resolved, then the authorized representatives are to notify the “senior representatives” of the parties in writing, after which the senior representatives are to meet within five (5) business days.⁷¹ If, after fifteen (15) days, the matter is still unresolved, the parties may go to a nonbinding dispute mitigation/resolution process.⁷² The contract states that all parties are to remain working and paying in accordance with the contract throughout this process.⁷³

2. Arbitration:

Both sets of documents permit the parties to choose whether they prefer arbitration or litigation as the method of final binding resolution. But while A201 designates a default in the event neither is selected, ConsensusDOCS is silent on the matter.⁷⁴ This could be fertile ground for dispute, but the only issue is, where will it be disputed? The answer, absent agreement to the contrary, would be litigation.

⁶⁷ See A401-2007 (Subcontractor agreement).

⁶⁸ ConsensusDOCS 750 § 2.3.

⁶⁹ See Section I.A.1 *supra*.

⁷⁰ ConsensusDOCS 200 § 12.2.

⁷¹ *Id.*

⁷² *Id.*

⁷³ ConsensusDOCS 200 § 12.1.

⁷⁴ A101-2007 § 6.2; A401-2007 § 6.2.1.

Where the parties select arbitration as the method of binding dispute resolution, the rules to govern under the ConsensusDOCS differ from those under the AIA documents. Under ConsensusDOCS 200, the AAA rules in effect *at the time of the arbitration hearing* are to govern, unless otherwise agreed.⁷⁵ This is, of course, in contrast with A201-2007, which declares the AAA rules in effect at the time of contracting are to govern.⁷⁶ In addition, ConsensusDOCS permits complete consolidation and joinder of parties to an arbitration who are “necessary to resolve the matter,”⁷⁷ whereas A201-2007 only permits consolidation where certain criteria are met.⁷⁸

3. Consequential damages:

ConsensusDOCS 200 contains a similar provision regarding a mutual waiver of consequential damages as appears in the A201 document;⁷⁹ however, there are a few differences. ConsensusDOCS 200 expressly waives damages from insolvency, whereas insolvency is not mentioned in A201.⁸⁰ Also, ConsensusDOCS 200 allows for recovery for loss of consequential damages covered by required insurance. Accordingly, the mutual waiver of liability does not apply to losses that would be covered by required insurance,⁸¹ whereas the A201-2007 does not have this language.⁸² In addition, the form leaves a blank space for the parties to fill in other items of consequential damages that would be permitted, whereas A201-2007 does not allow for such modification.

Note that there is some concern for subcontractors, in that under the ConsensusDOCS 750 subcontract agreement, when it comes to consequential damages, the subcontractor is bound to the same extent as is stated in the Prime Contract.⁸³ Therefore, it is arguable that subcontractors may be more protected from consequential damages under the AIA documents because the mutual waiver is contained in the A201-2007, the A401 incorporates the A201 language by reference, and the A401 itself contain a mutual waiver of consequential damages.⁸⁴

⁷⁵ ConsensusDOCS 200 § 12.5 (emphasis added).

⁷⁶ A201-2007 § 15.4.1.

⁷⁷ ConsensusDOCS 200 § 12.6.

⁷⁸ See Section I.A.4 supra.

⁷⁹ ConsensusDOCS 200 § 6.6.

⁸⁰ *Id.*

⁸¹ ConsensusDOCS 200 § 6.6.

⁸² A201-2007 § 15.1.6.

⁸³ ConsensusDOCS 750 § 5.4.1.

⁸⁴ A401-2007 §§ 1.2, 15.4.

4. Insurance and Indemnity:

ConsensusDOCS 200 makes it optional for the owner to require the contractor to list the owner and architect as additional insureds under the contractor's general liability insurance policy.⁸⁵ This is unlike A201-2007, which makes it a requirement.

In addition, both the AIA documents and the ConsensusDOCS have "hold-harmless" provisions under the indemnity sections of the respective contracts, which call for comparative fault allocation of losses and other generally similar language. Where they differ is in the number of indemnifications. A201-2007 has a single indemnification by the contractor.⁸⁶ In contrast, ConsensusDOCS 200 has a mutual indemnification by the contractor and the owner⁸⁷; however, the subcontractor agreement only has a single indemnification provision.⁸⁸

5. Notice of Default and Right of Owner to Correct

While the AIA made a switch in its 2007 revisions to a single 10-day notice provision prior to stepping in and completing work after default of the contractor, ConsensusDOCS requires a two-step notice of seven days followed by three days.⁸⁹

6. Contractor to Obtain Financial Assurances from Owner

Both sets of documents require that the Owner give adequate information as to its financial arrangements prior to commencement of the work, that providing such information is a condition precedent to commencing the work, that the contractor can terminate the contract if not given adequate evidence, and that the contractor must be notified when there is a material change in financing.⁹⁰ The difference between the two documents is that ConsensusDOCS gives the contractor an unfettered right to seek that information throughout the project, whereas the AIA documents only permit request of that information when certain situations arise.⁹¹

7. Delays and Changes:

The two sets of documents differ slightly when it comes to change orders. Under the AIA documents, there must be an agreement between the owner, contractor and the architect

⁸⁵ ConsensusDOCS 200 § 10.5.

⁸⁶ A201-2007 § 3.18.1.

⁸⁷ ConsensusDOCS 200 §§ 10.1.1, 10.1.2, 2.4.11

⁸⁸ ConsensusDOCS 750 § 9.1.1.

⁸⁹ ConsensusDOCS 200 § 11.2.

⁹⁰ A201-2007 §§ 2.2.1, 14.1.1.4; ConsensusDOCS 200 §§ 4.2, 11.5.2.1.

⁹¹ See section I.B.1. *supra*.

for each change order,⁹² whereas under ConsensusDOCS, a change order need only be negotiated between the owner and contractor.⁹³

8. Digital Protocol:

Like the AIA documents, ConsensusDOCS seeks to have the parties establish digital protocols for transmitting and dealing with digital data. While the AIA has generated two new forms for use, ConsensusDOCS 200.2 gives a set of criteria to use as an aid in creating such protocol.

B. A Look at the Surety Bond Forms

Similar to the AIA family of documents, ConsensusDOCS has a number of bond forms for use; however unlike the AIA bond forms, some of these are specifically for use with particular contract forms in the ConsensusDOCS family.

There are eleven (11) total bond forms in the ConsensusDOCS:

1. ConsensusDOCS 260: Performance Bond⁹⁴
2. ConsensusDOCS 261: Payment Bond⁹⁵
3. ConsensusDOCS 262: Bid Bond
4. ConsensusDOCS 263: Warranty Bond
5. ConsensusDOCS 470: Design-Build Performance Bond (Surety Liable for Design Costs)
6. ConsensusDOCS 471: Design-Build Performance Bond (Surety NOT Liable for Design Costs)
7. ConsensusDOCS 472: Design-Build Payment Bond (Surety Liable for Design Costs)
8. ConsensusDOCS 473: Design-Build Payment Bond (Surety NOT Liable for Design Costs)
9. ConsensusDOCS 706: Subcontract Performance Bond
10. ConsensusDOCS 707: Subcontract Payment Bond
11. ConsensusDOCS 760: Subcontract Bid Bond

1. Comparison of the Bid Bonds

We first explore the ConsensusDOCS 262 Bid Bond and its AIA counterpart, the AIA Document A310-1970 Bid Bond. Both of these documents are very short and simple, and although they are formatted differently, they ultimately contain the same provisions. Both documents state that the surety's obligation under the bond is null and void if the obligee accepts the contractor's bid, the contractor enters into a contract/agreement with the obligee in accordance with the bid terms, and the contractor obtains the bonds required by the contract

⁹² A201-2007 § 7.2.1.

⁹³ ConsensusDOCS 200 § 8.1.2.

⁹⁴ This form is for use with ConsensusDOCS 200 (Agreement between owner and contractor with a lump sum price); and ConsensusDOCS 250 (Agreement between contractor and subcontractor).

⁹⁵ *Id.*

documents and makes prompt payment of the labor and materials used in the project.⁹⁶ Furthermore, both documents state that if the contractor fails to enter into the contract and provide the required bonds, the contractor will have to pay the obligee the difference between the amount of the contractor's bond and the amount for which the obligee in good faith contracts with another party.⁹⁷ The only real difference between the ConsensusDOCS 262 Bid Bond and the A310-1970 Bid Bond is that the ConsensusDOCS 262 includes a space for the Architect/Engineer of the project.

2. Comparison of the Performance Bonds

We next explore the similarities and differences between the ConsensusDOCS 260 Performance Bond and the AIA Document A312-1984 Performance Bond, which is in use in the industry. Both bonds incorporate by reference the underlying contract and state that the Contractor and Surety are to be held jointly and severally liable.⁹⁸

The first two sentences of the "General Conditions" section of the ConsensusDOCS 260 form state the standard surety obligations, which are similarly reflected in the A312-1984 Performance Bond,⁹⁹ stating the general premise that if the contractor performs, the surety has no obligations under the bond, and if the contractor does not perform, the surety's obligations are still in force. The third sentence of the General Conditions contains a waiver of notices to changes in the contract, which is similar to the A312-1984 provision.¹⁰⁰ However the ConsensusDOCS language is much more narrow, by providing a waiver only to "alterations or extensions of time made by the Owner in the Contract,"¹⁰¹ whereas the A312-1984 provides a waiver to notice of "any change, including changes of time, to the Construction Contract or to related subcontracts, purchase orders and other obligations."¹⁰²

The final sentence in the General Conditions of the ConsensusDOCS 260 sets forth the action of the owner upon making demand on the bond. Unlike A312-1984,¹⁰³ ConsensusDOCS 260 does not require the owner to notify the contractor and surety of its intent to declare the contractor in default, nor does it require the owner to arrange a meeting with the contractor and surety to discuss the performance of the contract and possible ways to fulfill the contract terms. Not only does A312-1984 require the owner to arrange such meeting, but it requires the meeting to take place within fifteen days of giving the contractor and surety notice of possible default. A312-1984 also allows for the owner, contractor and surety to agree

⁹⁶ A310-1970 Bid Bond; ConsensusDOCS 262 § 1, 2.

⁹⁷ A310-1970 Bid Bond; ConsensusDOCS 262 § 3.

⁹⁸ A312-1984 Performance Bond § 1; ConsensusDOCS 260 Preamble.

⁹⁹ ConsensusDOCS 260 § 1; A312-1984 Performance Bond §§ 2, 3.

¹⁰⁰ ConsensusDOCS 260 § 1; A312-1984 Performance Bond § 8.

¹⁰¹ ConsensusDOCS 260 § 1.

¹⁰² A312-1984 Performance Bond § 8.

¹⁰³ A312-1984 Performance Bond § 3.1.

on a “reasonable time” to perform the contract without waiving the owner’s right to declare a contractor default;¹⁰⁴ ConsensusDOCS 260 does not include a like provision. Furthermore, since ConsensusDOCS 260 does not include a notice provision, it does not include a time limitation of how long after providing notice the owner must wait to declare a contractor default.¹⁰⁵ Nonetheless, it is advisable for the Surety to be notified when the Owner plans to deem the contractor in default, such that provisions can be made earlier to remedy the situation. Finally, the language of ConsensusDOCS 260 differs from the A312-1984 in regards to payment of the contract balance. ConsensusDOCS 260 states that “...the Owner shall make the Contract Balance...available to the Surety for completion of the Work,”¹⁰⁶ while A312-1984 states that the “Owner has agreed to pay the Balance of the Contract Price to the Surety in accordance with the terms of the Construction Contract...”¹⁰⁷ It would appear that sureties would prefer the language in the ConsensusDOCS 260 bond over the terms of the A312 bond, as the former makes payment of the balance seem mandatory.

The next section of the ConsensusDOCS 260 bond is titled “Surety Obligations.” Under this section, ConsensusDOCS 260 provides the surety with three options when a contractor is declared to be in default. Option one is to complete the work with the owner’s consent.¹⁰⁸ Option two is to arrange for completion of the work through another contractor, acceptable to the owner, secured through the bond.¹⁰⁹ The third option is to waive completion entirely and reimburse the owner for its “reasonable” costs of completion.¹¹⁰ While A312-1984 essentially provides the same three options to sureties, there are some distinctions. First A312-1984 does not require the owner to approve the contractor where the surety elects to complete the contract itself, using its own agents or independent contractors.¹¹¹ Second, A312-1984 is more detailed than option two of ConsensusDOCS 260, in that it specially requires creation of a new contract between the owner and a contractor that is acceptable to the owner.¹¹² Third, unlike ConsensusDOCS 260, A312-1984 also provides the surety with a fourth option to “[d]eny liability in whole or in part and notify the Owner citing reasons therefor.” Finally, A312-1984 further requires a surety to proceed with one of the options with “reasonable promptness,” yet, the surety cannot be deemed in default until fifteen days after the owner provides additional written notice to the surety demanding the surety to perform its obligations.¹¹³ In contrast, ConsensusDOCS 260 does not include any provision addressing when an owner can declare a surety to be in default.

¹⁰⁴ *Id.*

¹⁰⁵ A312-1984 Performance Bond § 3.2 does not allow an owner to declare a contractor default “earlier than twenty days after the Contractor and the Surety have received notice.”

¹⁰⁶ ConsensusDOCS 260 § 1.

¹⁰⁷ A312-1984 Performance Bond § 3.3.

¹⁰⁸ ConsensusDOCS 260 § 2.a, which is similar to A312-1984 Performance Bond § 4.1.

¹⁰⁹ ConsensusDOCS 260 § 2.b, which is similar to A312-1984 Performance Bond § 4.3.

¹¹⁰ ConsensusDOCS 260 § 2.c, which is similar to A312-1984 Performance Bond § 4.4.

¹¹¹ A 312-1984 Performance Bond § 4.2.

¹¹² *Id.* at § 4.3.

¹¹³ *Id.* at § 5.

The final section of the ConsensusDOCS 260 Performance Bond pertains to “Dispute Resolution.” While both ConsensusDOCS 260 and A312-1984 denote a two-year statute of limitations for disputes under each bond, there are some slight differences between the two. A312-1984 provides that the two years begins running at the earlier of: (a) when the Contractor defaulted; (b) when the Contractor ceased working; or (c) when the Surety refused or failed to perform its obligation under the Bond.¹¹⁴ In contrast, the statute of limitations under ConsensusDOCS 260 begins running at the earlier of: (a) default of the Contractor; or (b) Substantial completion of the work.¹¹⁵

In addition to the above-noted differences, A312-1984 includes some additional provisions that are not addressed or contained in ConsensusDOCS 260. A312-1984 specifically states that when the surety elects to complete the construction contract, the surety is obligated for: (1) correction of defective work;¹¹⁶ (2) additional legal, design professional and delay costs that resulted from the contractor’s default or the surety’s actions;¹¹⁷ and (3) any liquidated or actual damages caused by the contractor’s delay or non-performance.¹¹⁸ A312-1984 limits action on the bond to “the Owner or its heirs, executors, administrators, or successors,” and it also states that the surety is not liable to the owner for obligations of the contractor that are not related to the contract covered by the bond.¹¹⁹ Finally, A312-1984 also includes definitions for several terms that are used throughout the bond.¹²⁰

3. Comparison of Payment Bonds

The ConsensusDOCS 261 Payment Bond has many similarities to the A312 Payment Bond. Both bonds incorporate by reference the underlying contract and state that the Contractor and Surety are to be held jointly and severally liable.¹²¹ Much like the Performance Bond discussed above, both bond forms set out the traditional obligations of the surety,¹²² stating that the bond is null and void if the contractor makes all necessary payments on the project.¹²³ A312-1984 goes one step further than the ConsensusDOCS 261, stating that the surety’s obligation is also null and void if the surety defends/indemnifies the owner from any claims “for the payment for labor, materials, or equipment”, so long as the owner has provided

¹¹⁴ *Id.* at § 9.

¹¹⁵ ConsensusDOCS 260 § 3.

¹¹⁶ A312-1984 Performance Bond § 6.1.

¹¹⁷ *Id.* at § 6.2.

¹¹⁸ *Id.* at § 6.3.

¹¹⁹ *Id.* at § 7.

¹²⁰ *Id.* at § 12.

¹²¹ A312-1984 Payment Bond § 1; ConsensusDOCS 261 Preamble

¹²² A312-1984 Payment Bond §§ 2, 3; ConsensusDOCS 261 § 1

¹²³ *Id.*

the surety notice of any such claims and tendered the defense of such claims to the contractor.¹²⁴

The second section of the ConsensusDOCS 261 Payment Bond sets forth the “Surety Obligations,” which, when read together with the third section, “Limitation of Action”, is somewhat similar to the provisions set forth in the A312-1984 Payment Bond. Both bond forms differentiate between claimants who have direct contract with the contractor, and those who do not; however, the effects of each are different.

Under the A312-1984 Payment Bond, Claimants having direct contact with the contractor must give notice of their claims to the Surety and send a copy to the Owner, stating the amount of the claim with substantial accuracy.¹²⁵ Claimants who do not have direct contact with the Contractor must: (a) give written notice to the Contractor and Owner within ninety (90) days of last performing work or providing materials, stating the amount of the claim with substantial accuracy and the name of the party to whom the materials were supplied or for whom the labor was performed; and (b) must receive a rejection from the Contractor, or if not received, then wait thirty (30) days to receive any communication from the Contractor; and (c) after not having been paid within the thirty (30) days, must send written notice to the Surety, with copy to the Owner, enclosing the previous notice sent to the Contractor.¹²⁶

The process is much more simplified in ConsensusDOCS 261. Under it, claimants who are not in direct contact with the Contractor must give written notice to the Contractor, the Owner and the Surety within ninety (90) days after the Claimant: (a) provided or performed the last of the work or labor; or (b) furnished the last of the materials for which said claim is made, stating with substantial accuracy the amount claimed and designating the party to whom the materials were furnished or for whom the labor was provided.¹²⁷

Unlike the ConsensusDOCS 261, the A312-1984 Payment Bond also sets forth the surety’s obligations after a claimant has accurately made a claim.¹²⁸ A surety is required to send an answer to a claimant within 45 days of receiving a claim which states any amounts that are undisputed and the basis for challenging any disputed amounts. A surety is also required to arrange payment for any disputed amounts.

Both bond forms set forth a one (1) year statute of limitations for bringing suit under the bond, but the accrual dates are different. ConsensusDOCS 261 begins accrual from the date on which the Claimant last performed labor or furnished materials or equipment on the project,¹²⁹ whereas A312-1984 begins accrual at the earlier of: (a) the date the Claimant gave

¹²⁴ A312-1984 Payment Bond § 2.2.

¹²⁵ *Id.* at § 4.1.

¹²⁶ *Id.* at § 4.2.

¹²⁷ ConsensusDOCS 261 § 3.a.

¹²⁸ A312-1984 Payment Bond § 6.

¹²⁹ ConsensusDOCS 261 § 3.b.

notice pursuant to the provisions in Article 4 of said bond; or (b) the date on which the last labor or service was performed or the last material or equipment were furnished.¹³⁰

Finally, just like the A312-1984 Performance Bond, the A312-1984 Payment includes some additional provisions that are not addressed or contained in the ConsensusDOCS 261. The A312-1984 Payment Bond specifically limits a surety's total obligation to the amount of the bond,¹³¹ it states that amounts owed by the owner to the contractor should be used to perform the contract and satisfy claims,¹³² and it states that the surety is not liable to the owner for obligations of the contractor that are not related to the contract covered by the bond.¹³³ Finally, while the ConsensusDOCS 261 does include a definition for "Claimant"¹³⁴ which is similar to the definition contained in the A312-1984 Payment Bond, the A312-1984 Payment Bond also includes definitions for "Construction Contract" and "Owner Default".¹³⁵

4. The Other ConsensusDOCS Bond Documents

While the AIA bond documents only include the A310-1970 Bid Bond, the A312-1984 Performance Bond, and the A312-1984 Payment Bond, the ConsensusDOCS include a number of other bond documents. The ConsensusDOCS 263 Warranty Bond is used for correction of a defect in the work during the one-year Correction of Work period; it includes a section on General Conditions and the Surety Obligation. The ConsensusDOCS 470 Design-Build Performance Bond and the 471 Design-Build Performance Bond are separate performance bonds that are provided by a design-builder. Under ConsensusDOCS 470 the surety is not liable for any costs or damages arising from any design services under 470, but under ConsensusDOCS 471 the surety is liable for all costs to complete the work, unless damages are covered by the design-builder's liability insurance or professional liability insurance. The ConsensusDOCS 472 Design-Build Payment Bond and the Design-Build ConsensusDOCS 473 Payment Bond serve the same purpose of the ConsensusDOCS 261 Payment Bond, except that they are provided by the design-builder rather than the contractor. Furthermore, just like the Design-Build Performance Bonds, the surety is not liable for any costs or damages arising from any design services under 473, but the surety is liable for all design and construction costs under 472. Finally, the ConsensusDOCS 706 Subcontract Performance Bond, the ConsensusDOCS 707 Subcontract Payment Bond, and the ConsensusDOCS 760 Subcontract Bid Bond mirror the ConsensusDOCS 260 Performance Bond, the ConsensusDOCS 261 Payment Bond, and the ConsensusDOCS 262 Bid Bond, except for the fact that they are provided by subcontractors to the contractor, rather by the contractor to the owner.

¹³⁰ A312-1984 Payment Bond § 11.

¹³¹ *Id.* at § 7.

¹³² *Id.* at § 8.

¹³³ *Id.* at § 9.

¹³⁴ ConsensusDOCS 261 § 4.

¹³⁵ *Id.* at § 15.

III. Conclusion

With the addition of the new 2007 revisions to the AIA family of documents and the addition of the set of ConsensusDOCS, along with other sets of standard form contracts that are in circulation today, all parties involved in the construction industry have a plethora of choices in selecting terms and provisions to their liking. It is also important for those in the fidelity and surety industry to be aware of the differences in the various bond forms that were released in the new ConsensusDOCS.

Biographies

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Mr. Rourke was born in the Bronx, New York. He received his undergraduate degree from the University of Virginia and his law degree from the University of Missouri. Mr. Rourke has received a Chancellor's Certificate in International Trade from the World Trade Center St. Louis/University of Missouri-St. Louis. He now lives in the suburbs of St. Louis with his wife and four children. He is active in community affairs, charitable endeavors and, among other pursuits, plays and coaches ice hockey.

Mr. Rourke is licensed to practice in Missouri and Illinois, as well as the following federal courts: U.S. Supreme Court; U.S. Court of International Trade; U.S. Courts of Appeals for the 5th, 7th and 8th Circuits; U.S. District Courts for the Eastern and Western Districts of Missouri; U.S. District Courts for the Southern and Central Districts of Illinois.

Mr. Rourke is both an arbitrator and mediator and is a panel neutral for: American Arbitration Association (AAA)-National Roster of Neutrals; Pinnacle Arbitration and Mediation Services; United States Council for International Business; U.S. District Court for the Eastern District of Missouri. Mr. Rourke is a Certified Mediator Pursuant to Missouri Supreme Court Rule 17 and has received his AAA Arbitrator I and II Training.

In addition, Mr. Rourke serves as an editor for the Fidelity and Surety Digest (ABA) and as Eighth Circuit Editor for the DRI Daubert Newsletter. Mr. Rourke is a Fellow of the Congress of Fellows, Center for International Legal Studies and serves as a Director on the Board of Directors of World Link for Law. He is a member of the Million Dollar Advocates Forum and is a member of the American Arbitration Association-Construction Law Advisory Committee as well as the Defense Research Institute-Fidelity and Surety Law Steering Committee. He has been selected as a "Missouri & Kansas Super Lawyer" for 2006 and 2007.

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Mr. Rourke has been a presenter, author, co-author, editor and/or contributor for a number of publications and presentations. These include: Fidelity and Surety Digest (ABA; Ed.); "Dispute Resolution Clauses in Mergers and Acquisition Agreements", Center for International Legal Studies, Convocation of Fellows, Montreal, Canada (July 2006); "Remedies", MOBARCLE Contracts Deskbook (2007); "UCC Article 3—Negotiable Instruments", MOBARCLE Commercial Law Deskbook (2006); "The Do's and Don'ts of Construction Contracts", Construction Expo 2008, St. Charles, Missouri; "The Law of Retainage: Legal Constraints on Withholding Payment on Missouri Construction Projects", St. Louis Bar Journal (Spring 2008); "Legal Aspects of Mortgage Broker Bonds", Chicago Surety Claims Association (2008); "The Law of Retainage: Legal Constraints on Withholding Payment on Missouri Construction Projects", Exploring New Forms and Current Construction Topics, Bar Association of Metropolitan St. Louis (2008); "Liability of a Payment Bond Surety for Prompt Payment Act Penalties", For The Defense (DRI 2008); Enforcement of Arbitration Awards around the World: An International Survey, Center for International Legal Studies, Steamboat Springs, Colorado (2007); "Safety Plans and Policies", What to Do When Construction Projects Go Bad, (Lorman 2007); "Mortgage Broker Bonds", Fidelity and Surety News (ABA 2007); "Opening the Door to Discovery of a Surety's Files in Surety and Fidelity Litigation: Relevancy Considerations in Disputes Involving Surety-Specific Claims and Defenses", (NES&FCC 2007); "Twenty First Century Investigation Techniques", (NES&FCC 2006); "The Use and Misuse of the General Indemnity Agreement," (NES&FCC 2005); "Everything You Need to Know About Mechanic's Liens; Architect's, Engineer's and Other Professional Services Mechanic's Liens", (BAMSL CLE 2005); "Issues Affecting Payment", Construction Lien Law in Missouri (Lorman 2007); "Liquidated Damages: Have the Courts Gone Too Far? 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