

**General Conditions: A Comparison of ConsensusDOCS and the
Revised AIA Documents**

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The backbone of the well-known and widely used American Institute of Architects (AIA) family of form contracts for design and construction is the A201 General Conditions. The A201 General Conditions document is approximately 100 years old. In the first 60 years of its life, it underwent revisions at sporadic intervals. However, since 1976 the AIA has attempted to establish a more predictable cycle of revisions of approximately every ten years. The AIA revised the General Conditions in 1976, 1987, 1997, and most recently, as would be predicted, in late 2007.

In the fall of 2007, almost simultaneously, a new organization, ConsensusDOCS, published a new family of form contracts for the construction industry to compete with the AIA forms. The document in the ConsensusDOCS family most closely corresponding to the AIA A201 General Conditions is the ConsensusDOCS 200, Standard Agreement and General Conditions Between Owner and Contractor (Where the Contract Price is a Lump Sum).

Background

In the past, the AIA has sought input from various players in the construction industry in developing revisions to its A201 General Conditions. In fact, until 1997, the AIA was able to obtain the endorsement of The Associated General Contractors of America. The 1997 edition of the A201 included this quote on the cover page, “This document has been approved and endorsed by The Associated General Contractors of America.” However, in the development of the 1997 edition of the A201 General Conditions, although the AGC ultimately endorsed the 1997 A201 General Conditions, there was a great deal of tension and the AGC was reported to be close to withholding its endorsement. The AGC in the past has had its own family of documents, but that family relied upon the AIA A201 General Conditions, and the AGC recommended the use of the AIA A201 General Conditions. For example, AGC Document 565 (1991 edition) “Standard Form of Agreement Between Owner and Construction Manager Where the Construction Manager is also the Constructor” is the same as AIA A121/CMc (1991 Edition), and the AIA and AGC co-published the document. AGC Document 565 (1991 Edition) provides, “the General Conditions of the Contract shall be the 1987 Edition of AIA Document A201, General Conditions of the Contract for Construction, which is incorporated herein by reference.” The book Guidelines for a Successful Construction Project, published in 1996 (and earlier in 1986, 1989, and 1993) by the AGC, the American Subcontractors Association, Inc., and the Associated Specialty Contractors provides, “AGC, ASA, and ASC recommend the use of the American Institute of Architects’ (AIA) Document A201.” After 1997, things began to change. The AGC was in large part the impetus behind the creation of ConsensusDOCS. In 2007, for the first time in decades, the AGC did not endorse the A201 General Conditions. The AIA did not endorse the ConsensusDOCS forms either.

What’s in a Name: Who Really Has Consensus?

ConsensusDOCS claims that one of its big advantages over the AIA forms is that ConsensusDOCS represents all players in the construction industry. The “DOCS” at the end of the name ConsensusDOCS is supposed to represent Designers, Owners, Contractors, and Sureties. ConsensusDOCS consists of 21 member organizations. These members are the Associated General Contractors of American (AGC), the Construction Owners Association of America (COAA), the National Association of State Facilities Administrators (NASFA), the

Construction Users Roundtable (CURT), the Associated Specialty Contractors, Inc. (ASC), Construction Industry Roundtable (CIRT), American Subcontractors Association, Inc. (ASA), Associated Builders and Contractors, Inc. (ABC), Lean Construction Institute (LCI), Finishing Contractors Association (FCA), Mechanical Contractors Association of America (MCAA), National Electrical Contractors Association (NECA), National Insulation Association (NIA), National Roofing Contractors Association (NRCA), Painting and Decorating Contractors of America (PDCA), Plumbing, Heating, Cooling Contractors Association (PHCC), National Subcontractors Alliance (NSA), Sheet Metal and Air Conditioning Contractors' National Association (SMACNA), National Association of Surety Bond Producers (NASBP), the Surety & Fidelity Association of America (SFAA), Association of Wall and Ceiling Industry (AWCI).

The AIA, on the other hand, is, as its name suggests, primarily an organization of architects. It can be said that ConsensusDOCS has a broader base of sponsoring organizations than the AIA. However, to say that ConsensusDOCS represents a consensus of all players in the construction industry, including designers, is not the full story.

An examination of the member organizations behind ConsensusDOCS shows that none of them are designer organizations. Almost all of the organizations are really organizations of contractors and subcontractors with a handful of organizations that involve owners. The surety organizations, who provide bonds for contractors that obligate the sureties to the contracts signed by the contractors, really have their interests aligned for the most part with contractors. It is fairer to say that ConsensusDOCS are a series of forms developed by two organizations (one of contractors, the AGC, and one of owners, the COAA) in competition with the AIA. As is stated in the introductory paragraph on the "About ConsensusDOCS" page of the ConsensusDOCS' website, "For the first time in the industry, 21 leading construction associations, are uniting to publish a consensus set of contract documents called ConsensusDOCS. To be released September 28, 2007, AGC and COAA are essentially folding their contract documents program into this consensus process." <http://www.consensusdocs.org/about.html>, May 19, 2008.

The development of the AIA A201 General Conditions and the ConsensusDOCS 200 forms both involved several years of development, both organizations sought and received the input of owners, design professionals, contractors, subcontractors, sureties and others, and both then used this input in a cooperative manner in an attempt to provide documents that balanced the interests of the various parties in construction. Barfield, Thomas, Comparing the New AIA A201 and ConsensusDOCS 200 Contract Terms, *The Construction Lawyer*, Vol. 28, No. 2, Spring 2008, 48, 48.

While this paper will highlight many of the important differences between the documents, it should also be borne in mind that there a great number of similarities between these two forms, and it would be easy to lose sight of this fact when focusing on the differences.

The Invisible Differences

One of the most significant differences between the two forms cannot be found by reading them. AIA A201 General Conditions have been around for approximately 100 years. This form has been widely used throughout the construction industry. Participants in the construction industry are already familiar with the document. They have read it and re-read it.

They know where to find provisions dealing with specific issues. Because the document has been around so long, there are hundreds of cases interpreting the various provisions. The numerous cases interpreting the A201 General Conditions language provide precedent and an ability to predict how clauses will be treated by the courts and arbitrators. There are volumes of books providing cites to these cases and abstracts outlining the interpretations of the various provisions organized by section numbers. There are numerous books and treatises explaining the nuances of the various provisions and providing suggested revisions or alternative language depending on the situation or the party.

The parties using the A201 General Conditions have often already developed their own in-house standard revisions to deal with the provisions that they might find objectionable. When using the A201 General Conditions form as the basis for the contract, a party can have a fair degree of confidence that the other party will already be familiar with the language and be willing to sign contracts based on that form.

ConsensusDOCS 200 does not have this advantage. Although it is based on a pre-existing AGC document, it is not a document that was widely used. There is no case law interpreting the ConsensusDOCS form. Although there are already some materials being developed and published regarding the ConsensusDOCS forms, it is very little material compared to the vast amount the material available for the A201 General Conditions.

Document Structure

The AIA designed the AIA A201 General Conditions to be used with various forms of agreement between the owner and contractor. These forms of agreement contain many of the terms that can vary from project to project such as start dates, completion dates, contract price, names of the parties, list of the contract documents, and type of dispute resolution to be used. These forms of agreement are a few pages in length and incorporate a number of other documents into them, including the A201 General Conditions. These forms include from the 2007 editions: A101, Standard Form of Agreement Between Owner and Contractor Where the Basis of Payment is a Stipulated Sum; A102, Standard Form of Agreement Between Owner and Contractor Where the Basis of Payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price; and A103, Standard Form of Agreement Between Owner and Contractor Where the Basis of Payment is the Cost of the Work plus a Fee Without a Guaranteed Maximum Price. ConsensusDOCS 200, in contrast, is a standard contract agreement between owner and contractor where the payment is based on a lump sum price combined with the general conditions. It is really the equivalent of the AIA A101 and A201 combined. (There is a similar but different document, ConsensusDOCS 500, Standard Agreement and General Conditions Between Owner and Construction Manager (where the basis of payment is a guaranteed maximum price with an option for preconstruction services), for use when there is not a lump sum stipulated price. This document is similar to the ConsensusDOCS 200 and is the equivalent of AIA A102 and A201 combined.)

What the Contractor Does

Although the AIA A201 and the ConsensusDOCS 200 use different clauses, “Work” is essentially the same in the two documents. In both the AIA A201 and the ConsensusDOCS 200,

the Work includes the construction and services required by the contract documents, may constitute the whole or a part of the Project, and includes things required by the contract documents as reasonably inferable from the contract documents. See AIA A201 Section 1.1.3, Section 1.2.1; ConsensusDOCS 200, Section 2.4.20, Section 3.1.1. Both documents require the contractor to review the drawings and specifications, not as a designer, but as a contractor, and to report any errors that are noticed. AIA A201, Section 3.2; ConsensusDOCS 200, Section 3.3. Both documents provide that the contractor is not liable to the owner for errors in the documents unless the contractor notices an error and fails to report it. AIA A201 provides that the contractor will be liable to the owner for additional costs incurred by the owner to the extent the contractor failed to comply with these requirements. AIA A201, Section 3.2.

ConsensusDOCS 200 does not have this explicit statement on liability, although an owner might argue that even without an explicit clause the contractor is liable for damages if it breaches ConsensusDOCS 200 Section 3.3. However, the requirements for a contractor in AIA A201 Section 3.2 is the duty to "carefully study and compare the Contract Documents," creating the potential that an owner will argue that although the contractor did not discover a design error, the contractor is nevertheless liable for increased costs from not discovering it because the contractor's review was not "careful" enough. ConsensusDOCS 200 Section 3.3 requires the contractor to "examine and compare" the drawings and specifications, but does not use the word "carefully." Does the omission of the word "carefully" mean that the contractor does not need to use care in examining and comparing? Does the use of the word "carefully" in AIA A201 require more than reasonable care? AIA A201 Section 3.2 requires the contractor to make field measurements. ConsensusDOCS 200 only requires the contractor to take into account whatever field measurements it has made.

AIA A201 Section 3.2 contains a broad explicit statement exonerating the contractor from liability for errors in the design documents, but conditions the exoneration on the contractor's performance of the obligations in Section 3.2. ConsensusDOCS 200 also has an explicit exoneration of the contractor from liability. The ConsensusDOCS 200 exoneration is conditioned only on the contractor reporting design errors it discovers, but the exoneration applies only to design errors discovered by the contractor. Nothing is said in the exoneration clause about design errors the contractor does not discover due to failure to make the required review.

AIA A201 requires that the contractor be lawfully licensed if required by law. AIA A201 Section 3.1.1. ConsensusDOCS 200 does not have a corresponding explicit licensing requirement.

AIA A201 explicitly requires the contractor to comply with applicable laws as well as to give notices required by applicable laws. AIA A201 Section 3.7.2. ConsensusDOCS 200 requires that the contractor provide notices required by law, but does not have a broader statement requiring the contractor to comply with all applicable law. ConsensusDOCS 200 3.17. However, ConsensusDOCS 200 defines contractor default to include "disregarding" the law. ConsensusDOCS 200 Section 11.2. AIA A201 provides that, "if the Contractor performs Work knowing it to be contrary to applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction." AIA 201 Section 3.7.3.

ConsensusDOCS 200 does not have a corresponding requirement. Both ConsensusDOCS 200 and AIA A201 require the contractor to pay all applicable taxes in effect when bids are received or negotiations are concluded. ConsensusDOCS 200 Section 3.17.2; AIA A201 Section 3.6. ConsensusDOCS 200 further provides that the contract price or contract time shall be equitably adjusted by change order for additional cost resulting from any changes in law, including increased taxes. ConsensusDOCS 200 Section 3.17.3. (There is no equivalent AIA provision.) The specific phrase “including increased taxes” does not explicitly limit the increased taxes that would result in a change order to sales or use taxes, creating a potential issue as to whether or not increased income taxes would entitle a contractor to a change order. ConsensusDOCS 200 further provides that if the contractor claims an exemption for taxes at the owner's direction, the owner is required to indemnify and hold the contractor harmless from “any liability, penalty, interest, fine, tax assessment, attorneys fees or other expense or cost incurred by the Contractor as a result of any such action.” ConsensusDOCS 200 Section 3.17.4. AIA A201 does not address this issue.

The two form documents deal with cutting and patching issues somewhat differently. ConsensusDOCS 200 requires, “The Contractor shall perform cutting, fitting and patching necessary to coordinate the various parts of the Work and to prepare its Work for the work of the Owner or Others....Cutting, patching or altering the work of the Owner or Others shall be done with the prior written approval of the Owner. Such approval shall not be unreasonably withheld.” ConsensusDOCS 200 Section 3.18. ConsensusDOCS 200 requires prior written approval of the Owner before the contractor alters the work of the Owner or Others. AIA A201 places somewhat broader obligations on the contractor. “Contractors shall be responsible for cutting, fitting or patching required to complete the Work or to make its parts fit together properly. All areas requiring cutting, fitting and patching shall be restored to the condition existing prior to the cutting, fitting and patching, unless otherwise required by the Contract Documents....The Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or separate contractors by cutting, patching or otherwise altering such construction, or by excavation. The Contractor shall not cut or otherwise alter such construction by the Owner or separate contractor except with written consent of the Owner and of such separate contractor; such consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold from the Owner or separate contractors the Contractor’s consent to cutting or otherwise altering the Work.” AIA A201 Section 3.14.

ConsensusDOCS 200 has a clause providing that the owner and contractor are to perform the contract with integrity. It further provides that conflicts of interest are to be avoided or promptly disclosed to the other party. The owner and contractor warrant to each other that they have not received and will not pay gratuities from or to the other party or its employees, agents, or subcontractors to secure preferential treatment. ConsensusDOCS 200 Section 2.1.4. AIA A201 does not have such provisions.

ConsensusDOCS 200 contains a confidentiality clause requiring the contractor to keep the owner’s confidential information, know-how, discoveries, and production methods confidential. The owner in turn is required to treat the contractor’s estimating systems and historical and parameter cost data as confidential. The ConsensusDOCS 200 further provides, “Owner and the Contractor shall each specify those items to be treated as confidential and shall mark them as ‘Confidential.’ ” ConsensusDOCS 200 Section 3.21 is not clear whether this last

sentence allows the contractor and the owner to designate documents and information confidential in addition to the previously described items or whether it is requiring the contractor and the owner to specifically designate the previously described items that they want to have treated as confidential. AIA A201 does not have a confidentiality provision.

Indemnification

AIA A201 and ConsensusDOCS 200 have comparable clauses requiring the contractor to indemnify the owner for claims for bodily injury and property damage. AIA A201 Section 3.18; ConsensusDOCS 200 Section 10.1.1. Both these clauses limit the indemnification obligation “to the extent caused by the negligent acts or omissions of the Contractor” or others for whom the contractor is responsible. Both forms extend the indemnification obligation to protect the owner, the owners agents and employees, and the architect. AIA A201 also extends the protection to the architect’s consultants and the agents and employees of the architect and the architect’s consultants. ConsensusDOCS 200 extends the indemnification obligation to the protection of the “Others.” According to ConsensusDOCS 200 “Others means other contractors, material suppliers and persons at the Worksite who are not employed by the Contractor or Subcontractors.” ConsensusDOCS 200 2.4.11. “Subcontractors” is defined to be first tier subcontractors of the Contractor. ConsensusDOCS Section 2.4.6. “Sub-subcontractor” is defined to be a person or entity with an agreement with a Subcontractor to perform any portion Subcontractor’s Work. ConsensusDOCS 200 Section 2.4.18. It appears that there could be a stretched argument made that “Others” includes anyone other than the contractor, a first tier subcontractor, or a second tier subcontractor. The definition of others could have included the term “Sub-subcontractor” but it did not.

As to the indemnification for property damage, AIA A201 excludes damage to the Work itself. This is because damage to the Work itself is generally intended to be covered by the builder’s risk insurance. However, because the Work does not necessarily include all of the Project, there could be portions of the Project that are covered by the builder’s risk insurance but are not considered Work. Accordingly, this exclusion from indemnification for property damage might not apply to portions of the project that are covered by the builders risk insurance if they are not part of the Work. ConsensusDOCS 200 addresses this issue by excluding from property damage “the Work itself and other property insured under” the builders risk property insurance.

A major difference between the AIA A201 and ConsensusDOCS 200 indemnification language is the reciprocal indemnification clause in the ConsensusDOCS 200 that requires the owner to indemnify the contractor for bodily injury and property damage with limiting language similar to that contained in the contractor’s indemnification clause discussed above. ConsensusDOCS 200 Section 10.1.2. In addition, the ConsensusDOCS indemnification clauses for both the owner and the contractor provide that the contractor and the owner will be entitled to reimbursement for any defense costs paid above their respective percentage of liability for the underlying claim to the extent provided in the indemnification clause for the other party. These broadly worded provisions may create some issues for owners and contractors. These provisions require reimbursement of “any defense costs paid above” the indemnifying party’s percentage of liability for the underlying claim to the extent provided for under the indemnification clause for the other party. How will the courts and arbitrators apply this provision when the contractor voluntarily assumes and pays defense costs for a claim that is ultimately determined to be

partially attributable to the negligence of the owner? Will the owner be required to pay a percentage of those costs even though they were voluntarily incurred by the Contractor? Even though the owner was also incurring defense costs for the claim and was not 100% liable? Even though the contractor was liable for a significant portion of the claim? Even though the owner provided separate counsel to defend the contractor? Even though the defense costs were incurred by the contractor before the owner even knew about the claim? If both the owner and contractor have a portion of the responsibility for the claim, will the contractor be indemnifying the owner for a portion of the owner's defense costs while the owner indemnifies the contractor for a portion of the contractor's defense costs? Who will end up paying for the attorney's fees incurred for the parties to sort through these issues?

Waiver of Consequential Damages

Both AIA A201 and ConsensusDOCS 200 contain mutual waivers of consequential damages. AIA A201 Section 15.1.6; ConsensusDOCS 200 Section 6.6. Both documents provide that the waiver of consequential damages does not preclude the recovery of liquidated damages. AIA A201 provides that it does not preclude the recovery of liquidated damages in accordance with the Contract Documents. ConsensusDOCS 200 provides that it does not preclude the recovery of the liquidated damages provided in paragraph 6.5 of ConsensusDOCS 200. (Does this mean the waiver does apply to liquidated damage clauses that might be included elsewhere in the contract?) ConsensusDOCS 200 does contain a liquidated damages provision in paragraph 6.5. AIA A201 does not contain a liquidated damage provision. However, the forms of the agreement to be used in conjunction with AIA A201, although they do not contain an explicit liquidated damage clause, do contain a reminder to insert a liquidated damage clause. The ConsensusDOCS 200 liquidated damage clause includes blanks for liquidated damages for substantial completion as well as final completion and a reminder to consider inserting for liquidated damages for other milestones or for performance guaranties. ConsensusDOCS 200 in its waiver of consequential damage provision also excludes from its effect "losses covered by insurance required by the Contract Documents." Thus, presumably the owner or contractor could recover consequential damages to the extent that the other party is required to carry insurance that provides coverage for them. In addition, ConsensusDOCS 200 provides a blank space for the parties to insert additional damages that are excluded from the mutual waiver of consequential damages.

Insurance Provisions

AIA A201 contains general requirements for the contractor to purchase and maintain insurance. AIA A201 Article 11. ConsensusDOCS 200 contains blanks for specific limits of coverage and more detail on the specific types of coverage and policies that are required to be provided. ConsensusDOCS 200 Section 10.2. AIA A201 contemplates that the insurance limits might be specified elsewhere in the contract documents (AIA A201 Section 11.1.2), and AIA A101 has a blank in Article 10 in which to insert those provisions.

AIA A201 requires the contractor to include the owner, the architect and the architect's consultants as additional insureds on the contractor's commercial liability coverage for claims caused in whole or in part by the contractor by some negligent acts or omission during the contractor's operations and the owner as an additional insured for claims caused in whole or in

part by the contractor's negligence or omissions during the contractor's completed operations. AIA A201 Section 11.1.4. ConsensusDOCS 200 provides for an option for additional insured status or for Owners' and Contractors' Protective Liability Insurance (OCP). There are blanks to be checked to determine whether or not such insurance is required. ConsensusDOCS 200 Section 10.5. For additional the insured option, it is the owner only that will be named as an additional insured. ConsensusDOCS provides that this insurance coverage, whether additional insured or OCP, will be primary to the owner's coverage. AIA A201 does not have such a provision. Owners should be aware that OCP insurance policies do not include completed operations coverage. ConsensusDOCS 200 further provides that the contractor will be entitled to recover, in addition to the contract sum, any documented additional cost in the form of a surcharge associated with procuring the additional liability coverage whether as an additional insured or under an OCP policy. Thus, the owner will be subject to unspecified and uncapped potential additional charges for requiring additional insured status or OCP coverage.

Both forms require the owner to purchase and maintain builders risk insurance. AIA A201 Section 11.3; ConsensusDOCS 200 Section 10.3. ConsensusDOCS 200 requires that the builders risk insurance name the contractor, subcontractors, sub-subcontractors, material suppliers, and the architect as insureds. AIA A201 requires that this insurance "include interests of the Owner, Contractor, Subcontractors and Sub-subcontractors in the Project." This is potentially inferior coverage. Both forms require the owner to cover deductibles. Both forms contain a mutual waiver of claims with regard to builders risk insurance. ConsensusDOCS 200's waiver extends to "damages caused by risks covered by the property insurance." AIA A201's waiver extends to "damages caused by fire or other causes of loss to the extent covered by property insurance [obtained pursuant to this section] or other property insurance applicable to Work." AIA A201 extends the protection of this waiver of subrogation to property at or adjacent to the project that the owner may also insure and to other property insurance that the owner may have in addition to the builder's risk policy. ConsensusDOCS 200 provides that the contractor, to the extent of the limits of its CGL insurance or a set number of dollars to be filled in a blank, whichever is more, shall indemnify and hold harmless the owner as to damages in connection with or arising out of damage to any of owner's existing adjacent property that may arise from the performance of the work to the extent caused by negligent acts or omissions of the contractor. ConsensusDOCS 200 Section 10.3.4. ConsensusDOCS 200 also contains an explicit risk of loss clause that provides that the risk of loss, except to the extent covered by applicable insurance, is on the contractor until the date of substantial completion. AIA A201 has an explicit requirement for the owner to buy boiler and machinery insurance and also has provisions dealing with the owner's settlement of losses covered by the builders risk insurance. AIA A201 has a specific clause providing that if after a loss covered by builders risk insurance the owner wants to proceed with the work, there shall be a change order. AIA A201 Section 11.3.9. There are no corresponding similar provisions in ConsensusDOCS 200.

Force Majeure

Both ConsensusDOCS 200 and AIA A201 provide that the contractor is to obtain an extension of time for delays beyond the contractor's control. AIA A201 Section 8.3; ConsensusDOCS 200 Section 6.3. ConsensusDOCS 200 has a list of specific examples longer than AIA A201. Both documents require the contractor to submit requests for equitable extensions of contract time in accordance with the change order provisions. Both provisions

extend the force majeure relief only to the contractor. AIA A201 provides that the force majeure clause does not preclude the recovery by the contractor of additional costs for delay the other provisions of the contract documents. ConsensusDOCS 200 specifically provides that the contractor is to obtain an equitable adjustment in the contract price if the delay is caused by acts or omissions of the owner or the architect/engineer or others, changes in the work, decisions of the owner that impact time, hazardous materials, or concealed or unknown conditions, delay authorized by the owner pending dispute resolution, or suspension by the owner as permitted by the contract. This equitable adjustment right is made specifically subject to the waiver of consequential damage provision. ConsensusDOCS 200 Section 6.4 requires that if the contractor requests an equitable adjustment in the contract time or the contract price as a result of a delay discussed above, the contractor is required to give written notice to the Owner “in accordance with Paragraph 8.4. Paragraph 8.4 requires that the contractor provide written notice of the claim within 14 days after the occurrence giving rise to the claim or within 14 days after the contractor first recognizes the condition, whichever is later. However, paragraph 8.4 only applies “Except as provided in...Paragraph 6.4 for any claim for an increase in the Contract Price or the Contract Time.” Thus, it appears that ConsensusDOCS 200 paragraph 6.4 requires the contractor to give notice as required under paragraph 8.4, and paragraph 8.4 requires notice except as provided in paragraph 6.4. Pursuant to AIA A201, for force majeure and delay caused by the owner, the contract time shall be extended for such reasonable time as the architect may determine. AIA A201 Section 8.3.1. ConsensusDOCS 200 provides the time will be adjusted as negotiated by the owner and the contractor. ConsensusDOCS 200 Section 8.1.2.

Changes

The owner’s right to order changes in the work appears in both AIA A201 and ConsensusDOCS 200. AIA A201 Article 7; ConsensusDOCS 200 Article 8. Pursuant to AIA A201, the architect has a significant role in the change order process. A change order requires agreement among the owner, contractor and architect; a construction change directive (an order for a change that the contractor has not yet agreed to) still requires an agreement by the owner and the architect even though it is not agreed to by the contractor, and an order for a minor change not affecting price or time may be issued by the architect alone. AIA A201 Section 7.1.2. ConsensusDOCS 200 does not involve the architect in the change order process. To deal with changes pending agreement resolution of the cost impacts, AIA A201 provides, “Pending final determination of the total cost of a Construction Change Directive to the Owner, the Contractor may request payment for Work completed under the Construction Change Directive in Applications for Payment. The Architect will make an interim determination for purposes of monthly certification for payment of those costs and certify for payment the amount that the Architect determines, in the Architect’s professional judgment, to be reasonably justified. The Architect’s interim determination of cost shall adjust the Contract Sum on the same basis as a Change Order.” AIA A201 Section 7.3.9. Thus, the AIA technique for allowing the contractor to be paid pending the final resolution of a more unilateral change is to have the theoretically impartial architect to make an interim determination of the amount the contractor should be paid until the change order is finally resolved. Contractor’s are sometimes concerned that the architect will not be truly impartial because it is being paid by the owner. ConsensusDOCS 200 takes a different approach. A unilateral change by the owner is called an “Interim Directed Change.” “If there is a dispute as to the cost to the Owner [for an Interim Directed Change], the Owner shall pay the Contractor fifty percent (50%) of its estimated cost to perform the work.”

ConsensusDOCS 200 Section 8.2.2. Does this mean that the owner is to pay 50% of the contractor's costs as estimated by the owner or as estimated by the contractor? If this means costs as estimated by the Contractor, what is to protect the owner from a generous estimate by the contractor? On the other hand, if it is the owner's estimate, what is to protect the contractor from a low-ball estimate prepared by the owner?

For change orders, the adjustment to the contract price is determined by a similar method under both AIA A201 and ConsensusDOCS 200. If the parties cannot agree upon unit prices, a lump sum, or another method of calculating costs, the default is for the adjustment to the contract price to be determined by the increase or decrease in costs affected by the change. AIA A201 Section 7.3.7; ConsensusDOCS Section 8.3. AIA A201 has a more specific and detailed list of the costs that can be considered in making the determination. Both provide that for an additive change order, the contractor shall be entitled to include a charge for overhead and profit. AIA A201 does not allow for a decrease of overhead and profit in the case of a deductive change order. ConsensusDOCS 200 allows for an adjustment in the contractor's overhead and profit if 10% or more of the Project is deleted. Presumably, this will be a decrease, but ConsensusDOCS uses the term "adjustment." Since the "Work" can be less than the total Project, what happens if the owner deletes only a small portion of the Work, but almost all of the rest of the Project that is being performed by other contractors resulting in a deletion of more than 10% of the Project? How are we supposed to determine whether 10% or more of the project has been deleted? Do we use square footage, estimated value of the overall Project compared to the estimated savings from the deleted portion, or some other means?

Under AIA A201, the owner has the right to order "a change in the Work." AIA A201 Section 7.1.1, Section 7.3.1. ConsensusDOCS 200 provides that "the Owner may order changes in the Work or the timing or sequencing of the Work." [Emphasis added.] ConsensusDOCS Section 8.1.1. However, after implying that there is a difference between "changes in the Work" and "changes in the timing or sequencing of the Work," thereafter, ConsensusDOCS 200 only refers to "changes in the Work." Does this mean that the subsequent language applies only to "changes in the Work" and not to "changes in the timing or sequencing of the Work," or does it mean that after indicating there is a difference between the two phrases, ConsensusDOCS 200 now considers "changes in the Work," to include the "changes in the timing or sequencing of the Work"?

Claims and Disputes

As discussed above, ConsensusDOCS 200 requires the contractor to give written notice of a claim for cost or time within 14 days after the occurrence or within 14 days after the contractor first recognizes the condition giving rise to the claim, whichever is later. The contractor is subsequently required to provide written documentation of its claim within 21 days after giving the first notice. The owner is then required to respond in writing denying or approving the claim within 14 days "after receipt of the Contractor's claim." It would seem that ConsensusDOCS 200 logically would intend that the owner is responding within 14 days after receipt of the contractor's "written documentation of its claim," which does not arrive until up to 21 days after the notice of claim, and not within 14 days of the submission of the original claim.

AIA A201 requires that claims “be initiated” by written notice to the other party within 21 days after the occurrence of the event giving rise to the claim or within 21 days after the party first recognizes the condition giving rise to the claim, whichever is later. This notice requirement is imposed both on claims of the contractor, and also on claims of the owner. The notice must also go to someone identified as the “Initial Decision Maker.” If the initial decision maker is not the architect, copy of the notice of claim must also be sent to the architect. AIA A201 Section 15.1.2. The initial decision maker reviews the claim and makes an initial decision. If an initial decision maker has not been selected in the agreement form, the architect will serve as the initial decision maker. An initial decision is required as a condition precedent to mediation unless 30 days have passed after the claim was referred to the initial decision maker with no decision having been rendered. Within 10 days after receipt of a claim, the initial decision maker is to request additional information, reject the claim in whole or in part, approve the claim, suggest a compromise, or advise the parties that the initial decision maker is unable to resolve the claim. If initial decision maker asks for more information, the party shall respond within 10 days. Upon receipt, the initial decision maker is to either reject or approve the claim. Apparently the initial decision maker could still also determine it is unable to resolve the claim. The decision of the initial decision maker is to be final and binding on the parties, but subject to mediation and subsequent binding dispute resolution. Either party is entitled to file for mediation of an initial decision at any time. However,

Either party may, within 30 days from the date of an initial decision, demand in writing that the other party file for mediation within 60 days of the initial decision. If such a demand is made and the party receiving the demand fails to file for mediation within the time required, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision.

AIA A201 15.2.6.1. Although on first reading one may think that if one objects to an initial decision, one is required to have the other party demand mediation, this clause is actually intended to give a party satisfied with an initial decision the ability to force the other party to object to the initial decision within 60 days or accept it by not demanding mediation within 60 days. The provision gives the party satisfied with an initial decision a mechanism for starting a 60 day clock running on the time to object to that initial decision. Otherwise, a party unhappy with an initial decision can file for mediation at any time.

Claims and disputes are to be mediated as a condition precedent to binding dispute resolution. Binding dispute resolution can either be in court, by arbitration, or by some other process. The agreement forms have boxes to check to select the method of binding dispute resolution. See, e.g., AIA A101 Section 6.2. If no box is checked, then the default is litigation. If arbitration is selected, arbitration is to be pursuant to the American Arbitration Association’s Construction Industry Arbitration Rules. The old limitation on consolidation or joinder of other parties that used to preclude involvement of the architect without the architect’s consent has been deleted. Now either party may consolidate an arbitration conducted under AIA A201 with any other arbitration to which that party is a party provided the third party involved in that second arbitration is subject to an arbitration agreement that permits the consolidation, the two arbitrations involve common issues of law or fact, and the arbitrations employ materially similar procedural rules. In order to join another person or entity in an arbitration, however, the person

sought to be joined must consent in writing to such joinder. Furthermore, both the owner and the contractor grant any person or entity made a party to an arbitration conducted under AIA A201, whether by consolidation or joinder, the same rights of joinder and consolidation as the owner and contractor have. AIA A201 Article 15.

ConsensusDOCS 200 takes a somewhat different approach. ConsensusDOCS 200 Article 12. If the parties have an unresolved dispute, they are to “endeavor to reach resolution through good faith direct discussions between the Parties’ representatives, who shall possess the necessary authority to resolve such matters and who shall record the date of first discussions. If the Parties’ representatives are not able to resolve such matter within five (5) business Days of the date of first discussion, the Parties’ representatives shall immediately inform senior executives of the Parties in writing that resolution was not effected.” The senior executives are required to meet within five business days. If the dispute remains unresolved after 15 days from the date of the first discussion, the parties are then required to submit the matter to the dispute mitigation and dispute resolution procedures selected in ConsensusDOCS 200. One of the options is for the parties to check a blank at the time the contract is signed to select either a project neutral or a dispute review board. A project neutral or a dispute review board would then issue non-binding findings within five business days of referral of the matter unless good cause is shown. If the matter still remains unresolved following the issuance of the non-binding finding by the project neutral or the dispute review board or they failed to issue findings within five business days, the parties are then required to submit the matter to binding dispute resolution. Although the finding of the project neutral or dispute review board is non-binding, it can be introduced as evidence in the binding dispute resolution proceedings. If a dispute review board or a project neutral has not been selected by checking the appropriate blanks, the unresolved dispute would go to mediation, which is required to be convened within 30 business days of the matter first being discussed and is required to conclude within 45 business days of the matter first being discussed. A decision to terminate the mediation can be made after the first mediation session, but it must be delivered in person by the terminating party to the non-terminating party and to the mediator. If a dispute has not been resolved by the foregoing procedures, it is then resolved by binding dispute resolution. The parties check a blank in the form to designate whether arbitration or litigation will be the method of binding dispute resolution. There is no explicit statement as to what method is used if no blank is checked. If no box is checked, it is possible that a court would determine that either party could later elect arbitration. The costs of any binding dispute are to be born by the none prevailing party as determined by the adjudicator. The venue is to be the location of the project. The parties are required to include appropriate provisions in other contracts relating to the work to provide for joinder or consolidation of a dispute with appropriate parties necessary to resolve a matter.

AIA A201 specifically provides that in the event the dispute is being arbitrated, receipt of a written demand for arbitration constitutes the institutional legal or equitable proceedings for a statute of limitations purposes. AIA A201 Section 15.4.1.1.

Differing Site Conditions

Both form documents contain differing site conditions clauses with similar provisions. Both form documents require the contractor to provide written notice to the owner if it encounters subsurface or other concealed physical conditions that differ materially from those

indicated in the contract documents or unknown physical conditions that are materially different from those ordinarily found to exist and generally recognized as inherent in the work. AIA A201 Section 3.7.4; ConsensusDOCS Section 3.16.2. The AIA A201 conditions are required to be either "subsurface or otherwise concealed physical conditions" or "unknown physical conditions of an unusual nature." Consensus 200 applies to conditions that are "subsurface or other physical conditions" or "unusual or unknown physical conditions." The ConsensusDOCS 200 provisions are broader than the AIA A201 provisions. AIA A201 requires that the "physical conditions" referenced be "unknown." ConsensusDOCS 200 does not. For conditions that are of an unusual nature that differ from those ordinarily found to exist, AIA A201 requires that they be "unknown physical conditions of an unusual nature." Thus the conditions have to be both unknown and unusual to qualify. ConsensusDOCS 200 requires that the conditions be "unusual or unknown." This implies the possibility that ConsensusDOCS 200 will treat conditions as differing site conditions even if they were known, just as long as they are "unusual." Pursuant to AIA A201, when the contractor encounters differing site conditions, it is required promptly to provide notice to both the owner and the architect before the conditions are disturbed and in no event later than 21 days after the first observance of the conditions. ConsensusDOCS 200 requires the contractor to stop work and "give immediate written notice" of the condition to the owner and the architect. Under the AIA A201 differing site condition clause, the architect is then to promptly investigate the conditions and recommend an equitable adjustment in the contract sum or contract time if the architect determines that the conditions differ materially and cause an increase or decrease in the contractor's cost or time. If either party disputes the architect's determination or recommendation, that party is allowed to proceed under the disputes clause in Article 15. The contractor is not allowed to stop work and is required to proceed pending the resolution of any dispute. AIA A201 Section 15.1.3.

There is a different procedure and a different result under the ConsensusDOCS 200. As noted above, the contractor stops work when it claims to have encountered differing site conditions. ConsensusDOCS 200 goes on to provide, "The Contractor shall not be required to perform any work related to the unknown condition without the written mutual agreement of the Parties." Thus, the owner is prohibited from requiring the contractor to proceed until the contractor has signed an agreement with the owner on how to treat the differing site condition. This allows the contractor to hold the progress of the work hostage until the owner has acquiesced to contractor demands. This is in direct conflict with the protection for the owner otherwise built into the change order clause that otherwise allows the owner to direct the contractor to proceed with changes even without the contractor's agreement as to compensation and extensions of time for the change.

The AIA A201 also adds a clause dealing with contractor encounters with archaeological sites, wetlands, or human remains not indicated in the contract documents. AIA A201 Section 3.7.5. Upon such an encounter, the contractor is to immediately suspend operations that would affect those conditions and notify the owner and the architect. Upon such notice, the owner is obligated to take whatever actions are necessary to obtain governmental authorization required to resume the Work. The contractor, although required to continue the suspension until otherwise directed by the owner, is to continue with other work that does not affect those conditions. Adjustments to the contract price and time are to be processed as provided under the disputes provisions of Article 15. There are no corresponding provisions in ConsensusDOCS 200.

Hazardous Materials

Both AIA A201 and ConsensusDOCS 200 have hazardous materials clauses. The AIA A201 document allows for the possibility that the contract documents include dealing with certain hazardous materials as part of the Work. "If the Contractor encounters a hazardous material or substance not addressed in the Contract Documents and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Owner and Architect in writing." AIA A201 seems to provide that if the material or substance is addressed in the contract documents or if reasonable precautions will be adequate to prevent foreseeable bodily injury or death, then the material or substance is not within the parameters of the hazardous materials clause. AIA A201 Section 10.3.1. AIA A201 does not provide a definition of hazardous materials, but does provide that asbestos and PCBs are included within the class of materials to be treated as hazardous materials. AIA A201 does not appear to provide relief to the contractor if the hazardous materials do not entail foreseeable bodily injury or death, but still create exposure to large remediation liabilities or disposal costs. Perhaps such materials are then to be dealt with as differing site conditions.

ConsensusDOCS 200 does define hazardous materials. "A hazardous material is any substance or material identified now or in the future as hazardous under any federal, state or local law or regulation, or any other substance or material that may be considered hazardous or otherwise subject to statutory or regulatory requirements governing handling, disposal or cleanup." ConsensusDOCS 200 Section 3.13.1. This is a very broad definition. It is not required that the material actually be "hazardous." It qualifies if it is "hazardous," but it also qualifies if it is not hazardous, but is "otherwise subject to statutory or regulatory requirement covering handling, disposal, or cleanup." Just about any material, including everyday trash, is at least arguably subject to some statutory or regulatory requirements governing disposal. "The Contractor shall not be obligated to commence or continue work until any Hazardous Material discovered at the Work site has been removed, rendered or determined to be harmless by the Owner as certified by an independent testing laboratory and approved by the appropriate government agency." ConsensusDOCS 200 Section 3.13.1. Note that the contractor is not obligated to stop work, but simply has the right to stop work. Under the AIA A201 provision, the contractor is required to stop, and the owner might have a claim of breach of contract against the contractor if the contractor instead continues and makes dealing with the hazardous material more difficult.

Pursuant to AIA A201, the owner is required to obtain the services of a licensed laboratory to verify the presence or absence of material or substance, and if the material or substance is found to be present, to cause it to be rendered harmless. When the material or substance has been rendered harmless, the contractor is required to resume work in the affected area upon written agreement of the owner and the contractor. AIA A201 Section 10.3.2. Thus, the contractor is not required to continue work until it has agreed on how to handle the situation with the owner. In ConsensusDOCS 200, the contractor is not required to continue work until

any hazardous material has been removed, rendered or determined to be harmless by the owner as certified by an independent testing laboratory and approved by the appropriate government agency. This raises the question about what the owner is to do where no government approval is required or government agency otherwise does not feel it is necessary or required for that government agency to provide some form of approval. In addition, ConsensusDOCS 200 also requires written agreement between the parties after the hazardous material has been removed, similar to AIA A201. ConsensusDOCS 200 Section 3.18.4. In addition, in this separate section, ConsensusDOCS 200 repeats the requirement that the earlier requirement that the material has been removed or rendered harmless and that the approval of the government agency has been obtained, but this time ConsensusDOCS 200 adds the qualification "if necessary."

ConsensusDOCS 200 provides that the contractor is entitled to an equitable adjustment in price and time if the contractor incurs additional cost or delay due to the presence or remediation of hazardous material, as does AIA A201.

Both ConsensusDOCS 200 and AIA A201 require the owner to indemnify the contractor for hazardous materials. Both have an exception to the extent the damage or claim is caused by the negligent acts or omissions of the contractor. ConsensusDOCS 200 Section 3.13.6; AIA A201 Section 10.3.3. ConsensusDOCS provides for broader indemnification. The owner is required to indemnify the contractor "from and against all claims, damages, losses, costs and expenses, including but not limited to reasonable attorneys' fees, costs and expenses incurred in connection with any dispute resolution process, to the extent permitted pursuant to [the waiver of consequential damage clause], arising out of or relating to the performance of the Work in any area affected by Hazardous Material." AIA A201 indemnification is narrowed to those items "arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death...and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself)." AIA A201 Section 10.3.3. AIA A201 also provides that the owner is not responsible for materials or substances the contractor brings to the site unless those materials or substances are required by the contract documents. "The Owner shall be responsible for materials or substances required by the Contract Documents, except to the extent of the Contractor's fault or negligence in the use and handling of such materials or substances." AIA A201 Section 10.3.4. In addition, the contractor is required to "indemnify the owner for the cost and expense the owner incurs (1) for remediation of a material or substance the Contractor brings to the site and negligently handles, or (2) where the Contractor fails to perform its obligation under Section 10.3.1 [the section requiring the contractor to stop work and report hazardous materials], except to the extent that the cost or expense are due to the Owner's fault or negligence." AIA A201 Section 10.3.5. Thus, the owner is entitled to indemnification for materials brought to the site by the contractor that it negligently handles or where the contractor breaches its obligations with respect to existing hazardous materials, except to the extent the cost and expense are due to the owner's fault or negligence. ConsensusDOCS 200 requires the contractor to indemnify the owner, but only for materials and substances brought to the work site by the contractor in accordance with the Contract Documents, and only to the extent caused by the negligent acts or omissions of the Contractor. It does not address indemnification for the contractor's negligence with respect to pre-existing hazardous materials or with respect to hazardous materials that might be brought to

the work site by the contractor not in accordance with the Contract Documents. ConsensusDOCS 200 Section 3.13.7.3.

ConsensusDOCS 200 requires the contractor to maintain required material safety data sheets at the work site and make them available to the owner, subcontractors, and other separate contractors. ConsensusDOCS 200 Section 3.13.7.1. There is no corresponding provision in AIA A201.

AIA A201 provides that the owner will indemnify the contractor for all costs and expenses incurred by the contractor if the contractor is held liable by the government for the costs for remediation of a hazardous material or substance solely by reason of performing the work as required by the contract documents without negligence on the part of the contractor. AIA A201 Section 10.3.6. There is no corresponding provision in ConsensusDOCS 200, although some or all of these costs might be recoverable under the other indemnification clause in any event.

Time Limit on Claims

AIA A201 contains a time limit on claims, albeit substantially modified from what was contained in the 1997 edition. Section 13.7 provides,

The Owner and the Contractor shall commence all claims and causes of action, whether in contract, tort, breach of warranty or otherwise, against the other arising out of or related to the Contract in accordance with the requirements of the final dispute resolution method selected in the Agreement within the time period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and the Contractor waive all claims and causes of action not commenced in accordance with 13.7.

AIA A201 requires the parties to comply with applicable statutes of limitations affecting claims, but creates a contractual statute of repose prohibiting any claims from being brought more than ten years after substantial completion. This is fairly similar to the ten year statute of repose in effect in Minnesota, but somewhat more restrictive. Minn. Stat. § 541.051 requires that claims for defective and unsafe conditions be brought within two years after discovery but that the claim must have been discovered within ten years of Substantial Completion. The AIA A201 provision is more restrictive. The Minnesota statute would allow a claim to be brought up to twelve years after substantial completion if the claim was not discovered until ten years after substantial completion. In addition, the Minnesota statute applies only as to claims for bodily injury, death, or injury for property arising out of defective and unsafe conditions. Although the Minnesota courts have interpreted this broadly, there are presumably some claims that would not be for defective and unsafe conditions, and there are claims for other than bodily injury, death, and injury to property. ConsensusDOCS 200 does not have a similar contractual statute of limitations or repose.

Warranty

Under AIA A201, the contractor warrants "that materials and equipment furnished under the Contract will be of good quality and new" and "that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit." AIA A201 Section 3.5. The ConsensusDOCS contain a similar warranty, except that the contractor warrants "that the Work shall be free from material defects not intrinsic in the design or materials required in the Contract Documents." ConsensusDOCS 200 Section 3.8.1. [Emphasis added.] ConsensusDOCS 200 provides that the contractor's warranty does not commence until substantial completion. AIA A201's warranty is not delayed in commencement.

Both AIA A201 and ConsensusDOCS 200 provide for a one year correction period commencing on the date of substantial completion. ConsensusDOCS 200 Section 3.9; AIA A201 Section 12.2. ConsensusDOCS 200 requires the owner promptly to notify the contractor in writing if it discovers any defective work. There is no such obligation placed on the contractor in AIA A201. ConsensusDOCS 200 specifically provides that if the owner discovers and does not promptly notify the contractor or if the owner does not give the contractor an opportunity to test or correct the defective work as reasonably requested by the contractor, then the owner waives the contractor's obligation to correct the defective work as well as the owner's right to claim a breach of the warranty with respect to that defective work. ConsensusDOCS 200 Section 3.9.1. The owner is required to give notice promptly after discovery of the condition pursuant to AIA A201, and if the owner fails to notify the contractor and give the contractor an opportunity for correction, the owner waives the rights to require correction and to make a claim for breach of warranty. AIA A201 Section 12.2.2.1.

In ConsensusDOCS 200, after the one year correction period has expired, if the owner discovers defective work, the owner is still required to notify the contractor. There is no similar explicit requirement exclusively with respect to defective work in AIA A201. In ConsensusDOCS, even after the one year correction period, the contractor has the option within 14 days of receipt of notice from the owner to correct defective work. If the contractor does not elect the correction option, the owner can then proceed with the correction and charge the costs of the correction to the contractor, and the owner is required to provide the contractor with an accounting of the correction costs. ConsensusDOCS 200 Section 3.9.4. There is not a similar provision in AIA A201.

Both the AIA A201 and ConsensusDOCS 200 provide that the one year correction period does not create a statute of limitations. ConsensusDOCS 200 explicitly allows the owner to elect to accept defective work rather than to require its removal and correction. ConsensusDOCS 200 Section 3.9.7. However, this election is to be exercised prior to final payment.

Takeover of Work, Suspension, and Termination

Under ConsensusDOCS 200, upon a default, the owner is required to give a seven day written notice followed by a three day written notice before the owner can take over the work and backcharge the contractor. ConsensusDOCS 200 Section 11.2. AIA A201 requires the

owner to provide one ten day written notice. AIA A201 Section 2.4. AIA A201 allows the owner to provide this notice if the contractor "defaults or neglects to carry out the Work in accordance with the Contract Documents." However, such action on the part of the owner and the backcharge are both subject to the prior approval of the architect. ConsensusDOCS 200 only allows the notice if "the Contractor persistently refuses or fails to supply enough properly skilled workers, proper materials, or equipment, to maintain the approved Schedule of the Work in accordance with Article 6, or fails to make prompt payment to its workers, Subcontractors, or Material Suppliers, disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or is otherwise guilty of a material breach of a provision of this Agreement." Both AIA A201 and ConsensusDOCS 200 require only that the contractor commence the cure within the notice period and thereafter continue with diligence to complete the cure.

In order to terminate for default, ConsensusDOCS 200 provides for an initial seven day notice to cure from the owner followed by a second fourteen day notice of termination. ConsensusDOCS 200 Section 11.3.1. AIA A201 requires simply one seven day written notice, but the owner also needs the certification of the Initial Decision Maker before sending the notice. AIA A201 Section 14.2.2.

Both AIA A201 and ConsensusDOCS 200 allow the owner to terminate for convenience. ConsensusDOCS 200 Section 11.4; AIA A201 Section 14.4. AIA A201 requires the owner to pay the contractor for work performed, costs incurred by reason of the termination, along with reasonable overhead and profit on the work not executed. ConsensusDOCS 200 similarly requires the owner to pay the contractor for work performed and for demobilization costs and costs incurred as a result of the termination, but instead of paying for overhead and profit on the work not performed, the owner pays an amount based on a schedule that is to be inserted in the termination for convenience clause.

Both forms allow the owner to suspend work for the owner's convenience. AIA A201 Section 14.3; ConsensusDOCS 200 Section 11.1.1.

Both the AIA A201 and ConsensusDOCS 200 give the contractor a right to terminate for cause. AIA A201 Section 14.1; ConsensusDOCS 200 Section 11.5.

Role of Architect

Needless to say, ConsensusDOCS 200 provides for a much more limited role of the architect. Under AIA A201, among other things, the architect certifies applications for payment, acts as initial decision maker if one is not otherwise selected, prepares change orders and construction change directives, certifies whether the owner can terminate the contractor for cause, and provides communications between the owner and the contractor. ConsensusDOCS 200 dispenses with much of the architect's role. In fact, the architect does not even review shop drawings unless requested by the owner.

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