

Who's Ox Is Being Gored?: A Comparison of ConsensusDOCS and AIA Form Construction Contract Agreements¹

In light of the long-used and largely egalitarian American Institute of Architects (“AIA”) form construction contract agreements, the release of the competing form construction contract agreements known as ConsensusDOCS^{TM2} in late 2007 raises several important questions. Are they either unnecessarily duplicative of the AIA documents³ or, if the ConsensusDOCS are not meaninglessly similar, then how do they differ? We will attempt to explore this dichotomy, revealing whether the two sets of documents differ fundamentally. More importantly, if they do differ, who benefits from the differences?

This paper was written for the purpose of stimulating a lively debate at the American Bar Association Forum on the Construction Industry held in Chicago, Illinois on September 11-12, 2008 at a plenary session entitled “DOES THE INDUSTRY NEED ANOTHER SET OF FORM DOCUMENTS: Isn't the AIA Already Doing the Job Just Fine?” Our views on the value, quality and preferrability of the ConsensusDOCS for any given project depend overwhelmingly on the specific circumstances of that project.

We address five questions below:

- I. Was there a need for another set of documents?
- II. Who “Got Consensus”?
- III. How are the documents fundamentally different?
- IV. How do the ConsensusDOCS compare with the pre-existing AGC documents?

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² ConsensusDOCS are published by Consensus Docs LLC.

³ Even if the ConsensusDOCS are duplicative of the AIA documents, there may be some benefit to market competition.

- V. Since the ConsensusDOCS are derived from the AGC documents, are they pro-contractor as compared to the AIA documents?

I. Was there a need for another set of documents?

Before the ConsensusDOCS, there were multiple form documents on the market from a variety of sources⁴. However, the most dominant source for construction form contract documents for a long time has been the AIA. Although individual sectors of the industry have attempted to promote alternative forms to the AIA's, none have been able to compete effectively with what has become essentially the industry standard form of contract documents. Now, the ConsensusDOCS, as the name itself implies, seek to be the AIA's latest contender under the banner that they represent a consensus of all sectors of the construction industry. Not so subtly, the ConsensusDOCS program also suggests that the AIA documents do not represent a consensus view about appropriate risk shifting and service scopes.

The AIA has published form contract documents for over 115 years, starting in 1888. The A201-2007 is the sixteenth revision of the AIA's standardized general conditions for construction. The AIA has adopted a 10-year cycle of revision for its documents in the last several decades, establishing a mechanism by which the now more than 100 contract documents can be periodically reviewed by the construction industry. As the AIA website states, their documents "are recognized throughout the design and construction industry as the benchmark documents for managing transactions and relationships involved in construction projects."⁵

⁴ AIA, Engineers Joint Contract Documents Committee, Associated General Contractors of America, Associated Owners & Developers, and Design-Build Institute of America have all published form agreements for use in construction projects.

⁵ http://www.aia.org/docs_history

Such longevity has the benefit of extensive court interpretation- a significant body of construction contract case law is based primarily on the AIA design and construction standard form agreements. The American Institute of Architects Legal Citator, the editor of which is one of the authors, published by Matthew Bender & Company, Inc., a member of the LexisNexis Group, can be found on many library shelves. The Legal Citator summarizes all of the cases each year that arise from the application and interpretation of specific provisions in the AIA documents. The Citator contains approximately 5,270 cases dating back to 1886, cross-referenced by AIA provision, with digests for all cases decided since 1974. In 2006 alone, there were 15 cases that directly adjudicated AIA contract provisions and another 9 cases that adjudicated similar or analogous language to AIA provisions.⁶ Moreover, the AIA makes an explicit attempt to adjust their documents to court decisions involving their contract provisions in the AIA's revision process,⁷ resulting in documents that reflect the consensus of the judicial community as well as the construction industry.

As indicated on their website, the AIA's regular drafting process is a mechanism by which the AIA seeks to achieve a fair balance among the interested parties affected by its contract documents.⁸ In each of its revisions of the standard conditions, the AIA has solicited feedback from owners, general contractors, engineers, subcontractors, sureties, lawyers, insurers, and others. Through the revisions process, industry participants were ostensibly able to ensure that the AIA published documents that accounted for their interests. Additionally, until the release of the ConsensusDOCS forms, many of those interests also formally endorsed the AIA form agreements. Specifically, the Association of General Contractors of America (AGC), the

⁶ The American Institute of Architects Legal Citator (Stein, Steven G.M. ed., 2008).

⁷ http://www.aia.org/docs_history

⁸ Id.

primary promoter of the ConsensusDOCS, approved the use of the AIA documents for at least 50 years. Thus, historically, the AIA documents had enjoyed what could be deemed to be a consensus of the construction industry.

Naturally, then, the first question that comes to mind is whether a new set of contract documents was needed. The ConsensusDOCS, unlike the AIA documents, admittedly lack such a legendary length of use, regular revision, extensive body of interpretative case law and long-term industry-wide endorsement. The AGC's construction contract form documents from which the ConsensusDOCS are descended, as described more fully below, have not been used frequently, have not been interpreted by courts and have no similar revision process making them conform to industry practice. It would seem that the need for new documents springs from the belief that the AIA documents do not in fact represent a fair allocation of risk, not because the new documents fill a void. Thus, whether the ConsensusDOCS are "needed" really devolves down to a discussion of the appropriateness of the AIA documents' risk allocation.

On the other hand, there is also the spectre that the new set of contract documents will lead to confusion, as both sets are useful for the same projects.

In considering whether the consumers of standard form documents may be confused by the AIA and ConsensusDOCS options, we first posit that unmodified form documents are typically used on smaller projects by relatively unsophisticated parties.⁹ These "off-the-shelf users" are likely not aware of the legal subtleties that differentiate form contract documents or understand the legal consequences of using one form versus the other.¹⁰ For instance, few

⁹ Medium-size projects typically use modified forms or substantial sized supplemental conditions. Large projects for the most part do not use standard form contracts. Generally speaking, the more sophisticated the party, the more likely a customized contract will be used.

¹⁰ This issue stems from the common occurrence that a project will likely have different forms of agreements chosen by various project participants.

consumers of these documents would know that the AIA contract documents and the ConsensusDOCS are not necessarily compatible.¹¹ Therefore, if an AIA design services agreement is utilized, but a ConsensusDOCS construction agreement is also employed, all project participants will find themselves in a quagmire of legal issues none of them anticipated or appreciated. Ironically, the purpose of simplifying the contracting process for unsophisticated market participants may actually be thwarted by providing form agreements that appear to be usable off-the-shelf and interchangeable, but really contain hidden, non-obvious legal pitfalls to the detriment of the very population to whom those form agreements are marketed and by whom they are primarily used. We therefore conclude that consumer confusion may accompany the advancement of the ConsensusDOCS.

II. Who “Got Consensus”?

The ConsensusDOCS website states that their form documents are based on a consensus of Designers, Owners, Contractors and Surety.¹² Thus, the first question concerning the new documents is whether they do represent a consensus.

The ConsensusDOCS are endorsed by twenty-one organizations, listed on the ConsensusDOCS website.¹³ Most ConsensusDOCS endorsers are primarily contractor-related

¹¹ For example, the AIA construction documents are comprised of a basic agreement (e.g. A101) with incorporated general conditions (A201) while the ConsensusDOCS 200 is an agreement and general conditions in one document. This same issue is magnified in the different sets of subcontractor agreements in that the AIA subcontractor agreement (A401) incorporates and provides for precedence in relation to the A201 while the ConsensusDOCS 750 only incorporates terms of the ConsensusDOCS 200 if both forms are used on the same project. For more discussion on the relations between subcontractors and contractor under the different documents, see Section V, below.

¹² In some circles the “S” is thought to stand for “Subcontractors,” *but see* <http://www.consensusdocs.org/>.

¹³ See http://www.consensusdocs.org/about_member-organizations.html. The 21 members are National Association of State Facilities Administrators, Construction Users Roundtable, Commercial Owners Assoc. of America, Associated General Contractors of America, Associated Specialty Contractors, Construction Industry Round Table,

organizations. While some of the member organizations can claim to represent design services professionals, such as the Commercial Owners Association of America, the National Association of State Facilities Administrators and the Construction Industry Round Table, such representation is incidental to the primary interests of those organizations. Moreover, as of the writing of this article, the Engineers Joint Contract Documents Committee has not endorsed the ConsensusDOCS. Additionally, the AIA did not participate in the ConsensusDOCS discussions.¹⁴ Thus, the “consensus” of the ConsensusDOCS appears to lack support from some of the major voices of the design community.

AIA, at least historically, involved Owners and Contractors in the process of revising its documents.¹⁵ These included the Associated Specialty Contractors, Associated Builders and Contractors, American Subcontractors Association and AGC.

The AGC even endorsed the AIA documents during the past century of their use, up until the AIA’s release of its 2007 document revisions. The AGC’s abstention from endorsing the A201-2007 is most commonly thought to be based on a belief that the A201 now “unreasonably shifts risk to the Contractor.” While a thorough examination of the changes to the A201’s 2007

American Subcontractors Association, Associated Builders and Contractors, Lean Construction Institute, Finishing Contractors Association, Mechanical Contractors Association of America, National Electrical Contractors Association, National Insulation Association, National Roofing Contractors Association, Painting and Decorating Contractors of America, Plumbing Heating Cooling Contractors Association, National Subcontractors Alliance, Sheet Metal and Air Conditioning Contractors’ National Association, National Association of Surety Bond Producers, The Surety & Fidelity Association of America, and the Association of the Wall and Ceiling Industry.

¹⁴ Besides the obvious effect of undermining its own documents through participation in the ConsensusDOCS development, the AIA has also indicated a belief that the industry is better served by having a choice in standard form documents. *Introducing, ConsensusDOCS: A Standardized Construction Contracts Catalog*, WASHINGTON CONTRACTOR, Winter 2008, available at <http://www.agcofdc.org/content/public/WCM/Winter%202008.pdf>.

¹⁵ ABA Forum on the Construction Industry Divisions 2, 3 and 12, AIA Knowledge Communities, American College of Construction Lawyers, Associated Specialty Contractors, American Subcontractors Association, Associated Builders and Contractors, Associated General Contractors, Commercial Owners Assoc. of America, Council of American Structural Engineers, National Association of State Facilities Administrators. Admittedly, Division 12 of the ABA Forum was created to provide Owners a greater role in the AIA revision process following the 1997 document revisions.

revision reveals that little differs substantively to the disadvantage of the Contractor from the 1997 documents, which the AGC did endorse, some changes to the A201 do affect the Contractor's interests negatively.¹⁶

Perhaps most importantly to any organization's claim of having a "consensus" in promulgating contract documents is the question of whether such is actually achievable in an industry in which project participants have oftentimes strikingly adverse interests. We think that achieving true consensus in the promulgation of contract documents is unlikely. At best, what an organization publishing form agreements can achieve is compromise containing inherent underlying dissatisfactions. Such dissatisfactions will in turn lead to fragmentations. Indeed, several of the ConsensusDOCS endorsing groups have their own standard recommended changes in separate Guidebooks.¹⁷ Such standard recommended changes published simultaneously with the base agreements make those endorsements somewhat qualified.

III. How are the documents fundamentally different?

The roles and responsibilities of the various project participants- Architect, Owner, and Contractor- are different in a ConsensusDOCS-run project than in a project governed by the AIA

¹⁶ The most susceptible to the AGC's generalized criticism are the AIA's addition of "or made known to the Contractor" to the Contractor's study and compare obligations in A201-2007 3.2.2 and the addition of a requirement for the Contractor to name the Owner as an additional insured on its general commercial liability insurance and completed operations policy under A201-2007 11.1.4. However, these changes do not dramatically alter the Contractor's risk as the AGC's withdrawal of its endorsement would indicate. *See* http://www.aia.org/SiteObjects/files/Condocs_A201Compare.pdf for further analysis concerning any increased risk to the Contractor caused by the 2007 AIA revisions.

¹⁷ *See* <http://www.consensusdocs.org/downloads/All%20associations%20Guidebook0408.pdf> and http://www.consensusdocs.org/information_product-commentary.html.

form agreements.¹⁸ As far as substance, the primary philosophical difference between the two sets of documents is that the ConsensusDOCS agreements provide for an immensely diminished role for the Architect in project execution. The Architect has very few formal responsibilities in the Owner-Contractor legal relationship under the ConsensusDOCS. Thus, under the ConsensusDOCS, the Architect is conceived more as the Owner’s consultant rather than the integral project administrator and facilitator as established by the AIA agreements.

A. Architect’s Role

This exclusion of the Architect from the execution phase of the project is demonstrated most dramatically in the complete absence of any provision in the ConsensusDOCS 200 Standard Agreement and General Conditions Between Owner and Contractor (“CD 200”) similar to Article 4 of the AIA Document A201™-2007 General Conditions of the Contract for Construction (“A201”), entitled “Architect”.¹⁹ Almost as obvious are the different protocols for the Owner and Contractor established by the respective contract documents; the Owner and Contractor are to communicate with each other through the Architect under the A201 while the CD 200 contemplates far greater dialogue between the Owner and Contractor and only requires the Contractor to communicate with the Architect at all “if directed.”²⁰

¹⁸ Such differences could be said to be themselves an important reason for another set of agreements.

¹⁹ Part of the explanation for the lack of an article in the CD 200 addressing the Architect’s role is that the ConsensusDOCS agreements do not use the agreement-plus-general-conditions structure of the AIA documents. Thus, the Architect’s role is addressed almost exclusively by the ConsensusDOCS 240 Standard Form of Agreement Between Owner and Architect/Engineer (“CD 240”).

²⁰ Compare §4.2.4 of the A201 and §5.10 of the B101 requiring the Contractor to communicate with the Owner through the Architect to the limited subjects on which the Architect has even an opportunity to receive communications from the Contractor, “if directed” in the CD200: ¶3.14.1 (Submittals), ¶9.6.1 (Substantial Completion) and ¶9.8.5 (Consent of Surety).

The A201 provides for the Architect's traditional involvement in project execution as both a necessary design services provider and as a key player in contract administration. Under the A201, the Architect has substantial, although limited, authority to administer the contract (§4.2.1). Such authority includes inspecting (without responsibility for means, methods or for quality) (§4.2.2), making reports to the Owner on project progression (§4.2.3), reviewing and making recommendations on applications for payment (§4.2.5), rejecting nonconforming work (§4.2.6), reviewing and approving submittals (§4.2.7), preparing Change Orders and Directives (§4.2.8), authorizing minor changes in the work (§7.4), preparing substantial and final completion certificates (§4.2.9), responding to Requests for Information ("RFIs") (§4.2.14), ordering additional testing (§13.5.2), and objecting to Contractor's superintendent, if warranted (§3.9.2). In the ConsensusDOCS family of agreements, most of these responsibilities become the Owner's, with the assistance and recommendations of the Architect.²¹ The only approval or review authority the Architect has directly involved with the Contractor's construction activities under the ConsensusDOCS is to certify pay applications (CD 200 ¶9.2.1 and CD 240 ¶3.2.8.5). . Otherwise, the Architect is only assisting and advising the Owner through such activities as reviewing and advising the Owner regarding the schedule of values (CD 240 ¶3.2.8(1), coordinating the Project Schedule with the Schedule of the Work (CD 240 ¶3.2.8(2), responding to Contractor requests for information (CD 240 ¶3.2.8(4)), and reviewing the Contractor's submittals (CD 240 ¶3.2.8.1). Under the ConsensusDOCS agreements, the Owner has far greater responsibility for administering the contract with the Contractor.

Additionally, the Architect under the AIA documents serves as the arbitrator and initial decision maker, unless the Owner and Contractor specifically provide for another entity to fulfill

²¹ The CD 240 requires the Architect to "assist" and "make appropriate recommendations" as part of the Architect's construction phase services provided for in CD 240 ¶3.2.8.

that role. In the AIA agreements, the Architect is the arbiter of Contract document interpretation §4.2.11, Change disputed amounts §7.3.7, §7.3.9, Delays §8.3.1, Payment withholding §9.5.1, and Claims §15.2.1. Under the CD 200, the parties may optionally provide for a third-party mitigation facilitator at the time of contracting, or, as the default, retain all contractual and project-related interpretations and determinations equally between the Owner and Contractor.

The consequence of the ConsensusDOCS' diminished role for the architect in project administration will be felt most keenly by the Owner. Owners, particularly on typical design-bid-build projects, depend heavily on an independent architect to provide assessment services, opinions and managerial support for which the Owner lacks capacity. The Architect is the Owner's most important professional resource for resolving construction and design issues. Thus, the absence of the Architect in an active role under the ConsensusDOCS puts the Owner in a difficult position, especially concerning resources.

B. Owner's Role

The Owner's role in project execution is more robust under the CD 200, requiring the Owner to be more involved and active in the prosecution and decision-making during the project. The Owner must provide for a Representative (§4.7), who is presumably to manage all of the communications that under the A201 would be routed through the Architect.²² More importantly, the Owner under the CD 200 must make almost all of the decisions that under the A201 would be made by the Architect, even where such decisions have critical design-related

²² For example, the CD 200 requires the Owner to prepare Change Orders (§8.1.1) and Interim Directed Changes (§8.2.1), which are the responsibility of the Architect under A201 §4.2.8. Additionally, the Owner is to review and approve all submittals under CD 200 §3.14.2, whereas the Architect reviews and approves submittals under A201 §4.2.7.

components that bear directly on design conformance.²³ Consequently, the Owner is much more intimately involved in the decision making and, therefore, is forced to be much closer to the line between design-related decisions and design responsibility.

In addition to these administrative responsibilities, the Owner is subjected to different risks under the CD 200. The Owner does not enjoy completed operations coverage as part of the Contractor's insurance requirements, and the Owner is not automatically entitled to be named as an additional insured under the Contractor's general commercial liability policy.²⁴ Additionally, the CD 200 provides for a mutual indemnification, wherein the Owner indemnifies the Contractor to the extent of the Owner's negligence, while the A201 only requires the Contractor to indemnify the Owner for the Contractor's negligence regardless of the contributing negligence of the Owner.²⁵

Finally, the Owner is required by the CD 200 to negotiate with the Contractor in dispute situations rather than having the Architect as a moderator and arbitrator of disputes as is the arrangement under the A201. Under the AIA dispute resolution process in A201 §15.2, the Architect makes initial decisions, which are then subject to mediation and then either arbitration or litigation. The CD 200 provides in ¶12.2 that the Owner and Contractor are to negotiate disputes directly first, then the parties have the option of mitigation or mediation, followed by either arbitration or litigation.

²³ For example, rejecting nonconforming work (A201 §4.2.6- Architect, CD 200 ¶9.3.4- Owner), substantial and final completion certificates (A201 §4.2.9- Architect, CD 200 ¶¶9.6.1 and 9.8.1- Owner), and testing (A201 §13.5.2- Architect, CD 200 ¶3.7.1- Owner).

²⁴ *See, e.g.*, A201 §11.1.4 (Owner, Architect and consultants are to be named on Contractor's GCL and Owner to be named as additional insured for completed operations) and CD 200 ¶10.5 (Owner only can be named as additional insured on Contractor's GCL upon negotiated terms and at Owner's expense).

²⁵ A201 §3.18.1 compared to CD 200 ¶10.1.2. Additionally, both parties have the right to be reimbursed for defense costs attributable to the negligence of the other party under CD 200 ¶¶10.1.1 and 10.1.2. One criticism of the mutual indemnification system of the CD 200 is that there are potentially other damages and losses caused by 3rd parties such as vandals and other unforeseeable causes that are not provided for in the mutual indemnifications.

C. Contractor's Role

Under the CD 200, the Contractor has more control over the project.²⁶ In addition to enjoying direct communication with the Owner under the CD 200 as discussed above, the Contractor also has stronger grasp on the project funding flow under the CD 200 than the A201.²⁷ The Contractor has an ongoing, unlimited entitlement to the Owner's project financing information under the CD 200, while the A201 provides that the Owner is only under an absolute requirement to provide financial information to the Contractor prior to the start of work.²⁸ More importantly, the ability of the Contractor to require financial information from the Owner at any point during the life of the project under the CD 200 is a far greater entitlement than the limited circumstances under which a Contractor is entitled to financial information from the Owner under the A201.²⁹ Under the CD 200, the Contractor is entitled at any point during the project to discontinue work until the Owner provides the financial information requested.

²⁶ One notable example is that the Owner has diminished access to the project site for its own use under the CD 200. The Owner's right to partial occupancy is subject to substantial completion under CD 200 ¶9.7.1, whereas the Owner has the ability for partial occupancy at any point upon arrangements for remaining responsibilities with the Contractor under A201 §9.9.

²⁷ The Contractor is entitled to 50% of its estimate of the cost of changes when there is a dispute regarding the cost of changed work under CD 200 ¶¶8.3.1.4 and 8.3.3 as opposed to the Architect's determination of the Contractor's entitlement under A201 §7.3 using the contractually set criteria of 7.3.7. There is no retainage after the work is 50% complete under CD 200 ¶9.2.4.2 while the A201 does not abrogate the Owner's right to retain the same percentage throughout the prosecution of the project. While negotiating for no retainage after 50% completion may be standard practice for savvy Contractors, providing for such in a standard form of agreement nonetheless favors the Contractor.

²⁸ Compare A201 §§2.2.1 and 14.1.1.4 to CD 200 ¶¶4.2 and 11.5.2.1. The two documents use slightly different language to describe the Contractor's entitlement to the Owner's financial information: "reasonable evidence" of the Owner's ability to fulfill its financial obligations under the contract under the A201 and "evidence of Project financing" under the CD 200.

²⁹ *Id.* Contractors, especially on large, expensive projects, clearly have a bona fide interest in maintaining access to project financing information when changes to the contract cause increases to the contract sum.

For the correction of work under the CD 200 ¶3.9.4, the Owner must afford the Contractor the opportunity to correct work outside of the 1-year correction of work period but inside the statutory warranty period. Under the A201 §12.2.2.1, the Owner is free to arrange for the correction of work at its own convenience between the expiration of the contractual correction of work period and the applicable statutory warranty period.³⁰

Several of the other pro-Contractor provisions and arrangements of the CD 200 are described more fully below.

IV. How do the ConsensusDOCS compare with the pre-existing AGC documents?

From a comparison of the ConsensusDOCS agreements to the AGC's now discontinued line of form agreements, it becomes fairly apparent that the ConsensusDOCS are updated, revised versions of the AGC documents.³¹

Like the similarly titled AGC Document No. 200 Standard Form of Agreement and General Conditions Between Owner and Contractor (“AGC 200”), the CD 200 is a unitary agreement and general conditions document.³² In addition to having the same form number, the AGC 200 and CD 200 have the same exact format in terms of article numbering and content. Additionally, the CD 200 continues to use the same terminology and concepts as the AGC 200.³³

³⁰ Under both sets of documents, the Owner would then be able to recover the costs of the correction from the Contractor. *See* CD 200 ¶3.9.4 and A201 §12.2.5.

³¹ A fair analogy might be that the degree of differences and similarities between the CD 200 and AGC 200 are akin to the scope and nature of revisions made to the A201-1997 by the A201-2007.

³² As opposed to the AIA construction contract, which is comprised of a separate agreement (A101) and general conditions (A201).

³³ *See e.g.*, CD 200 or AGC 200 ¶8.2 Interim Directed Change.

While there are some differences between the AGC and the ConsensusDOCS family of documents as a whole,³⁴ they are overwhelmingly more similar than different.

By far the majority of provisions in the CD 200 are word-for-word copies of the same numbered and titled provisions in the AGC 200. Of the 279 numbered provisions in the CD 200, 207 of them are identical word-for-word copies of provisions from the AGC 200. Of the other 72 provisions that are different in the CD 200, thirty-one were added to the CD 200 that were not contained in the AGC 200. Of the remaining 41 provisions that were changed from the AGC 200, 23 of the CD 200 provisions are substantially changed, wherein a substantial portion or material term of an AGC 200 provision is modified in the CD 200. Additionally, 18 of the other 72 CD 200 provisions are identical to their AGC counterparts except for immaterial minor changes, e.g. the word “diligent” being changed to “best” in 2.1.1 describing the Contractor’s efforts to perform the Work. Only 4 provisions from the AGC 200 were removed in the CD 200.

Of the revisions to the AGC 200 contained in the CD 200, many can be considered to be either cosmetic or party-neutral. For example, the dispute resolution options from which the parties were to select were contained in the AGC Exhibit 1 as a sort of “menu.” The CD 200 contains no Exhibit 1, but instead provides the parties with the choice of arbitration or litigation in ¶12.5. Additionally, the CD 200 added the mitigation dispute resolution option in ¶12.3 that was not contained in the AGC 200.

V. Since the ConsensusDOCS are derived from the AGC documents, are they pro-contractor as compared to the AIA documents?

A. AGC 200 and CD 200 Compared to the A201

³⁴ For example, the agreement between the Contractor and Subcontractor was AGC 650 while the CD 750 is the ConsensusDOCS subcontractor agreement. Additionally, the AGC 200 used a dual column format while the CD 200 text is laid out in a single column.

Many substantive provisions contained in both the AGC 200 and CD 200 provide benefits to the Contractor not granted by the A201. The following discussion highlights several of these AGC 200 provisions.

The Owner's right to assign the contract to a lender providing financing on the project is absolute under A201 §13.2.2 while the Owner can only assign to a lender under CD 200 ¶13.1 as long as the assignment is no less favorable to the Contractor. The Contractor's reporting requirements of errors and omissions in the contract documents is less stringent under the CD 200 than A201.³⁵ As described above, the Contractor is entitled to financial information from the Owner throughout the life of the project and can stop work if that information is not provided.³⁶ Additionally, the Owner has greater access to use of the project prior to substantial completion under the A201.³⁷

The Contractor's rights are more favorable in the event of a termination under the ConsensusDOCS. To terminate for default, the Owner must provide a 7-day notice with the Architect's certification under A201 §14.2.2, while the Owner must provide the Contractor with a 7-day cure opportunity before issuing a 14-day termination notice under CD 200 ¶11.3.1. In the event of a termination for convenience, the Contractor receives a pre-negotiated premium under CD 200 ¶11.4.2.3 as opposed to overhead and profit on work not executed under A201 §14.4.3. As described above, the Owner is required to mitigate its damages for the Contractor's breach of the contract under CD 200 ¶11.3.4, while the A201 places no such obligation on the Owner.

³⁵ Compare the CD 200 ¶3.3.3 "knowingly fails" standard to the A201 §3.2.2 "or made known to the Contractor" additional Contractor responsibility.

³⁶ See A201 §2.2.1 and CD ¶200 4.2.

³⁷ Compare CD 200 ¶9.7.1 with A201 §9.9.

In the event of an Owner takeover/termination, the Owner may use the Contractor's materials, equipment and tools under both agreements, however, the Owner explicitly is required to return them in good condition once the work is complete under the ConsensusDOCS.³⁸ The Contractor's right to payment under A201 §14.2.3 is suspended while the Owner completes the work following a termination for default, while the ConsensusDOCS do not explicitly provide the Owner with such a mechanism to preserve project funds following the Contractor's default.

Under A201 §9.8.5, the Contractor is paid all retained funds at substantial completion while CD 200 ¶9.2.4.1 allows early finishing subcontractors to receive their retention prior to substantial completion and the project has no retainage after the work is 50% complete under CD 200 ¶9.2.4.2. Additionally, the CD 200 contains a prohibition on unconditional lien waivers for amounts in excess of actual progress payment amounts at ¶9.2.3.1. Finally, the Contractor has less onerous requirements for final payment that arguably provide less protection to the Owner under the CD 200.³⁹

The CD 200 further advantages the Contractor at the Owner's expense by providing in ¶6.3.1 that the Contractor is entitled to an extension of time for any delay beyond the control of the Contractor. By comparison, the A201 expressly limits the causes for delay that give rise to an extension of time in §8.3.1.⁴⁰ Thus, the Contractor under the CD 200 has far greater claims to time extensions than under the A201.⁴¹

³⁸ See, e.g., A201 §14.2.2.1 and CD 200 ¶11.3.2.

³⁹ A201 §9.10.2 requires final lien waivers or a bond before final payment while CD 200 ¶9.8.4 requires only that the Contractor attest that its subcontractors will be paid.

⁴⁰ A201 §8.3.1 also allows the Contractor extensions for other, justifiable delays, but this catch-all is far less broad than the CD 200's delay allowance.

⁴¹ Contractors could even argue under CD 200 ¶6.3.1 that subcontractors' poor performance is a justification for a time extension, a very adverse consequence for an Owner.

Subcontractors are also impacted by the ConsensusDOCS form agreements. The A201 affords the Owner the option of issuing joint checks to the Contractor and subs under §9.5.3 and provides that the Owner's payment to the Contractor for subcontractor work is in the nature of a trust obligation in §9.6.7. More importantly, the A201 allows the Owner to verify the Contractor's payment to its subcontractors under A201 §9.6.4. The CD 200 contains no such provisions.

One way in which subcontractors benefit under the AIA documents is through the incorporation of the A201 into the A401 subcontractor agreement. The ConsensusDOCS 200, being a unitary agreement and general conditions, does not allow for such ease of use as an incorporated set of conditions on the independent use of the CD 750, the subcontractor form of agreement. Thus, the CD 750 only provides for the flow-through of the retainage release benefits in CD 200 ¶9.2.4.3 if the Contractor's agreement with the Owner is made using a CD 200 form. Moreover, §1.2 of the A401 also provides that the terms of the A401 control when there is a conflict between them and the A201. In this way, the independent mutual consequential damages waiver in A401 §15.4 supersedes any modifications to the Owner-Contractor consequential damages waiver that may have been negotiated in that agreement. Under CD 750 ¶5.4.1, the subcontractor is bound to whatever consequential damage waiver has been negotiated by the Contractor with the Owner under their CD 200, leaving the subcontractor unable to negotiate its own independent consequential damage waiver terms with the Contractor.

There are several ways in which subcontractors would be better situated under the AIA documents than the ConsensusDOCS agreements. A201 §9.3.1.2 prohibits the Contractor from including amounts in its payment applications that it does not intend to pay to its subcontractors. Also, the Contractor is not permitted to withhold a higher percentage from its payments to

subcontractors than what the Owner withholds from the Contractor for the subs' work under A201 §9.6.2. On the other hand, CD 750 ¶8.2.4 requires Owner approval for onsite material storage payment even though such approval is not required for the Contractor's entitlement for stored materials payment under the CD 200. Finally, the CD 750 contains no mutual indemnification like that in CD 200 ¶10.1, so that the subcontractor does not receive the same rights relative to the Contractor as the Contractor enjoys relative to the Owner.

B. CD 200 Revisions Favoring the Contractor

While there are some changes to the AGC 200 that make the CD 200 minutely more Owner-friendly,⁴² the majority of revisions to the AGC 200 make the CD 200 even more squarely a contractor's form agreement.

In the revision of the AGC 200 to the CD 200, the CD 200 added the right of each party to be reimbursed for its defense costs for that above its percentage of liability under the mutual indemnities of ¶10.1. The CD 200 added an explicit liquidated damages clause in ¶6.5 that was not contained in the AGC 200. Finally, the duty to defend was eliminated from the mutual indemnity provisions in ¶10.1.

The AGC 200 contained at ¶3.8.2 a provision that the warranty on work performed after substantial completion runs from the work's completion, which was removed from CD 200 ¶3.8. Going beyond the entitlement to an extension of time for delays not caused by the Contractor in ¶6.3.1, the AGC 200 ¶6.3.2 contractor damages limitation for delay caused by force majeure events was replaced by an explicit entitlement by the contractor to an equitable adjustment for

⁴² For example, the contribution waiver for Hazardous Material indemnity of the Contractor by the Owner in AGC ¶3.13.6 was removed from the CD 200.

delays caused by the Owner, Architect, changes in the work and other causes in CD 200 ¶6.3.2.⁴³ Another advantageous addition to the Contractor in the CD 200 is the obligation of the Owner to mitigate its damages caused by the Contractor's default added in ¶11.3.4. The CD 200 removed the AGC 200 ¶3.13.7.3 contribution waiver for the indemnity the Contractor provides for materials brought to the worksite. The CD 200 imposes an additional 3-day notice by the Owner following the initial 7-day takeover notice in ¶11.2. Additionally, CD 200 ¶9.2.2 removed the Owner approval required for payment for materials stored onsite from the AGC 200. Finally, the requirement on the Contractor to add the Owner as an additional insured on the Contractor's CGL policy in AGC 200 ¶10.3.1 was changed to the optional Additional Liability Coverage the Owner may pay the Contractor to obtain in CD 200 ¶10.5.

C. CD 200 Provisions Favoring the Owner or Providing Advantage to Both Parties

The CD 200 does contain some provisions that either benefit both parties by giving greater specificity to their relationship or that benefit the Owner as compared to the A201.

The CD 200 handles digital data transfer protocol with greater detail than the A201 does. CD ¶4.6.1 both requires the Owner and Contractor to execute a CD 200.2, the form agreement for the parties' exchange of digital data, and specifies what terms must be addressed in such agreement. The A201, by contrast, only requires the parties to "endeavor to establish" digital data transmission protocols in §1.6. The AIA does provide in the E201 a form agreement that the parties can use to establish such protocols, however, it contains less direction and guidance for the parties than the corollary CD 200 ¶4.6.1 and CD 200.2 do.

⁴³ This addition undermines the Contractor's portion of the mutual waiver of consequential damages in ¶6.6. The effect of the two provisions results in the Owner waiving more than the Contractor in terms of damages recoverable for a breach of the contract. See Acret, James, "Viewpoint: ConsensusDOCS Shortchanges Owners," ENR McGraw-Hill Construction, Nov. 9, 2007 (http://enr.ecnext.com/coms2/article_opviar071109).

The CD 200 further benefits the Owner by defining overhead in ¶2.4.12. By specifying a definition for what potentially could be the source of a Contractor claim, the Owner has greater protection against any attempt by the Contractor to augment its costs based on an over-inclusive, expansive definition of overhead costs.

Finally, the CD 200 imposes no contractual statute of repose like A201 §13.7.1. The CD 200 allows the law governing the agreement to determine the limitations on undiscovered actions, which in some jurisdictions can be longer than the 10 years the A201 allows. In such jurisdictions, the CD 200 clearly favors the Owner in this regard.

VI. Conclusion

The very name “ConsensusDOCS” implies that these new agreements enjoy an industry consensus that their competitor AIA agreements do not when it appears that both have achieved some form of consensus in their genesis. The real contest between the document sets is not which one enjoys “true” consensus, as neither does, but which one achieves the fairest risk allocation. This is something that is purely “in the eye of the beholder,” and is itself perhaps the most poignant indicator of whether another set of documents was needed.