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Troubling Trends in AIA Documents Pose New Risks for Contractors and Owners

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When the AIA, which has produced form construction contracts for over a century, revised its A201 General Conditions document last year, the changes revealed two trends that may be troubling to contractors and owners.

First is the shifting of project risk from the owner to the contractor. Examples of this shift include the following:

- Previous clauses required the owner to furnish evidence of financial arrangements whenever requested by the contractor, as a condition precedent of the contractor commencing or continuing work. In the 2007 document, if the contractor does not request the financial information before work commences, the information is available only under certain limited circumstances, all of which can be the subject of a dispute.

- The architect can reject the contractor's proposed superintendent if the objection is reasonable and timely. Although the architect is supposed to assert the objection within 14 days, if he says he needs more time he can take as long as he likes, which can materially affect project progress.

- While the document reasonably requires the contractor to submit a submittal

▸ *PAGE 2*

From the Chairs

About every 10 years, the American Institute of Architects ("AIA") issues a new set of form contracts. Historically, these forms are the product of the various construction industry groups working together. In October 2007, the AIA issued its new series. This time, however, the Associated General Contractors refused to endorse the forms, but instead, advocated its own forms, re-issued under the name "ConsensusDOCS." What changed in the 2007 AIA forms and how are the ConsensusDOCS forms different?

In this issue, we address these questions. First, Paul Sugar writes about some troubling trends in the new AIA form documents. Next, Eric Radz highlights the significant changes in the AIA forms and how the ConsensusDOCS counterparts deal with the issues. Third, Jay Bernstein examines the new ConsensusDOCS subcontract forms.

We thank our authors for their thoughtful pieces and our editor Jay Bernstein for his good work. We welcome your questions and comments.

Jack Morkan & Joe Kovars
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Troubling Trends… FROM PAGE 1

schedule promptly after being awarded the contract, the failure to do so unreasonably prohibits the contractor from "any increase in Contract Sum or extension of Contract Time based on the time required for review of submittals." The concept of "no harm, no foul" has been abandoned.

- Under certain circumstances, the owner may pay a subcontractor by joint check "if the Contractor failed to make payment for Work properly performed." The provision is silent on how a dispute between the contractor and its subcontractor may affect whether payment is owed.

- Significant increased risks are imposed on the contractor for handling hazardous materials. Although the owner is responsible for hazardous materials required by the contract documents, the contractor is liable if it handles specified materials negligently, and must indemnify the owner for resulting costs.

These provisions have led the Association of General Contractors for the first time not to endorse the General Conditions. Instead, the AGC and other industry organizations have endorsed ConsensusDocs, which they contend are the result of a collaborative effort to produce agreements that are balanced and reflect how projects are designed and constructed.

The second troubling trend is the architect's retreat from its historic role in performing contract administration duties, along with increased protection from liability for architects. This retreat is so stark that the title of Article 4 of the General Conditions was changed from "Administration of the Contract" to "Architect."

> *"An architect can reject a contractor's proposed superintendent if the objection is reasonable and timely. While the architect is supposed to assert the objection within 14 days, if he says he needs more time, he can take as long as he likes, which can materially affect project progress."*

Traditionally, the architect was the owner's representative who visited the site to guard the owner against defects and deficiencies in the work. This is no longer the case. Instead, the architect's visits to the site are now limited to becoming generally familiar with the progress and quality of work, and determining generally if the work observed will be completed in accordance with the contract.

The architect's representation to the owner in the certificate for payment has also been watered down. Previously, the certificate represented that the work had progressed to the point indicated. Now, the architect certifies only that the work has progressed to the point indicated "to the best of his knowledge, information and belief."

Another example of the architect's retreat from performing contract administration duties relates to disputes resolution. Traditionally, the architect resolved claims and disputes through a complicated review process. Although much of that review process remains, the parties may now select an "Initial Decision Maker" to resolve claims and disputes. That individiual may be someone other than the architect.

These trends are troubling for both contractors and owners. Contractors must be wary of increased risk, and owners may have to look to and hire representatives other than the architect to protect their interests during construction. The increased risk and reduced services can be addressed during contract negotiations, but only if the contractor and owner are aware of the key changes to the 2007 General Conditions. ■

The New Forms: Comparing the Clauses

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Like mechanics working on a vintage automobile, the new AIA forms and ConsensusDOCS have overhauled the classic owner-contractor document and contractor-subcontractor document. In this article, we look under the hood of some of the new forms to see how key contract clauses have been changed and to note similarities and differences between the AIA and ConsensusDOCS forms.

One of the most important changes in the new AIA forms relates to the dispute resolution process. Previous AIA forms provided for an architect's decision, followed by mandatory mediation and arbitration. The new forms contain a check box for the parties to choose whether (following the architect's decision, and mediation which may be requested by either party) the dispute is to be resolved by arbitration, litigation or "other." If no box is checked, litigation is the default choice.

The ConsensusDOCS forms take a similar approach. The parties are directed to first engage in direct discussions and good faith negotiations, followed by the use of either (a) a previously selected project neutral or dispute review board, or (b) mediation. If neither of these measures is successful, the dispute is either arbitrated or litigated, depending on the box checked by the parties.

The new AIA documents now allow for the consolidation of arbitrations and for the joinder of parties (owner, contractor, architect and subcontractors). The ConsensusDOCS forms are also written broadly to allow joinder of all parties necessary to resolve a matter.

Another significant change to the AIA document is in risk management. The AIA form requires that the owner, architect and architect's consultant be added by the contractor as additional insureds for liability arising out of the contractor's negligent acts or omissions during operations, and for the owner to be named as an additional insured for liability arising out of the contractor's negligent acts or omissions during completed operations. The ConsensusDOCS version does not make this mandatory but gives the owner the option of requiring the contractor to purchase additional insurance coverage.

The AIA has also revised the time limits on claims and the statute of limitations. Prior AIA forms contemplated an internal contractual statute of limitations predicated upon either substantial completion, final completion, or the date that warranty work is completed. The new forms require that claims be pursued within the period specified by applicable state law but in any case within ten years of substantial completion. The ConsensusDOCS agreements do not specify a time limit on claims; consequently, the limitations period established by the applicable law of the state in which the project is located will govern.

> *"The AIA has revised the time limits on claims and the statute of limitations. The new forms require that claims be pursued within the period specified by applicable state law but in any case within ten years of substantial completion, while the ConsensusDOCS agreements do not specify a time limit on claims."*

Finally, the new AIA forms retain a controversial clause (first added in 1997) that waives each party's right to recover consequential damages. Such damages are generally those that do not result directly from the breach, such as losses of use, income, profit, financing and reputation. The ConsensusDOCS agreement contains a limited mutual waiver of consequential damages which allows the owner and contractor to agree on items of damages that are specifically excluded from the waiver. ■

Highlights of the New Subcontract Form

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The American General Contractors did not overlook subcontractors when, in September of 2007, it released seventy standard form construction contracts, known as ConsensusDOCS. The new forms include ConsensusDOCS 750, "Standard Form Agreement between Contractor and Subcontractor," which in several important ways differs from the prior version, AGC Document No. 650.

ConsensusDOC 750 lowers the standard of care applicable to the subcontractor's work. In place of the language in AGC 650 that required the subcontractor to furnish "its best skill and judgment," the new clause requires the subcontractor's "diligent efforts and judgment." Contractors who are held to a higher standard in the general contract with the owner should consider modifying this subcontract provision to reflect that higher standard.

Typical "pay when paid" and "pay if paid" clauses condition the obligation of the contractor to pay the subcontractor on the owner paying the contractor. AGC 650 required that the contractor pay the subcontractor no later than seven days after receipt by the contractor of payment from the owner, and absent such payment from the owner, to pay the subcontractor "within a reasonable time."

While ConsensusDOCS 750 retains the same language as AGC 650, it provides the option of adding a contingent payment clause which states:

"Receipt of payment by the Contractor from the Owner for the Subcontract Work is a condition precedent to payment by the Contractor to the Subcontractor. The Subcontractor hereby acknowledges that it relies on the credit of the Owner, not the Contractor for payment of Subcontract Work."

"ConsensusDOCS 750 states that if an owner requires documents to be exchanged electronically, a written protocol should be agreed to by the owner, architect and contractor which, among other things, defines what documents are to be transmitted electronically, acceptable transmission formats, and privacy and security requirements."

It should be noted that under Maryland law, condition precedent clauses cannot affect the right of a subcontractor to sue on a payment bond. Therefore, a subcontract's inclusion of the alternate, condition precedent provision of ConsensusDOCS 750 will not foreclose a subcontractor from filing suit against the contractor and its surety to recover unpaid amounts, notwithstanding the failure of the owner to pay the contractor. Conditional precedent clauses also do not afford a defense to suits under a Miller Act payment bond.

While liquidated damages were not addressed in AGC 650, they are in ConsensusDOCS 750. Assuming that the prime contract provides for liquidated damages for failure to complete by the date in the subcontract, and that the subcontract is otherwise silent as to liquidated damages, the contractor is authorized to "assess a share of the damages against the Subcontractor in proportion to the Subcontractor's share of the responsibility for the damages." The liquidated damages assessment may not exceed the amount assessed against the contractor, and does not limit the subcontractor's liability to the contractor for actual damages caused by the subcontractor. ▸ PAGE 5

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New Subcontract Form

FROM PAGE 4

In Maryland, as in most other jurisdictions, liquidated damages clauses such as the new provision in ConsensusDOCS 750 are permitted if the amount assessed is a reasonable forecast of the damages that would result from the breach of contract, and the actual damages are difficult to accurately estimate. However, if the amount of liquidated damages is grossly excessive and out of proportion to the damages that might reasonably be expected to result from the breach, the amount is considered to be a "penalty," and will not be enforced.

Another issue not addressed in AGC 650 but now included in Consensus DOCS 750 is the handling of electronic communications. The new clause states that if the owner requires documents to be exchanged electronically, a written protocol should be agreed to by the owner, architect and contractor which, among other things, defines what documents are to be transmitted electronically, acceptable transmission formats, and privacy and security requirements. The subcontractor is bound by the requirements of the protocol and must bear its own costs of doing so.

These and other changes to the AGC 650 should be carefully considered by both contractors and subcontractors before entering into any agreements based upon new ConsensusDOCS 750. ■

In Print

Paul Sugar's *and* ***Michael Schollaert's*** *"When Bids Are Binding" appeared in the February 2008 issue of* Building Baltimore, *a publication of Associated Builders & Contractors of Baltimore.*

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