

**Annual AGC Meetings
on
Surety Bonding and Risk Management
2008**

Risk Issues in ConsensusDOCS and AIA A201

| Issue | ConsensusDOCS | AIA |
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| Insurance | <p>¶10.2 Contractor’s Insurance</p> <ul style="list-style-type: none"> • Operations and Completed Operations <p>¶10.2.4</p> <ul style="list-style-type: none"> • Completed operations coverage maintained until one year after acceptance of Work, Substantial Completion of the Project, or time required by Contract Documents, whichever is longer. • Certificates of Insurance, furnished prior to commencement of Work <p>¶10.3 Property Insurance</p> <ul style="list-style-type: none"> • Builder’s Risk Policy or equivalent form; insure at least against listed perils • Terrorism loss <p>¶10.5 Additional Liability Coverage</p> <ul style="list-style-type: none"> • Provision is optional • If option selected, then coverage options: <ul style="list-style-type: none"> ○ Additional Insured <ul style="list-style-type: none"> ▪ Contractor’s CGL policy | <p>§11.1 Contractor’s Liability Insurance</p> <ul style="list-style-type: none"> • Operations and Completed Operations <p>§11.1.2 Completed operations coverage maintained until expiration of correction period or longer period for maintenance of completed operations coverage if required by Contract Documents</p> <p>§11.1.3 Certificates of Insurance</p> <ul style="list-style-type: none"> • 1997 - Recognized Changes in Market Must Allow Flexibility in Certifying Coverage • 2007 - Knowingly Encourages False Certifications <p>§11.1.4 Contractor must procure Additional Insured protection of Owner and Others</p> <ul style="list-style-type: none"> • But the Scope of Coverage Is Limited • Expressly limited to damages “caused by” Contractor’s negligence • The provision is a “contribution” model— vicarious liability |

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| | <ul style="list-style-type: none"> ▪ For operations and completed operations ▪ But only with respect to liability for BI, PD to the extent caused by the negligent acts, omissions of Contractor, subcontractors <ul style="list-style-type: none"> ○ Owner's and Contractor's Protective Liability Insurance (OCP) • Additional cost for surcharge paid by Owner • Certificate of coverage provided prior to commencement of Work. <p>¶10.7 Bonds</p> <ul style="list-style-type: none"> • Increase in Contract Price that exceeds 10% in aggregate requires rider to Bonds increasing penal sums. • Up to 10%, penal sum remains equal to 100% of Contract Price • Contractor endeavors to keep surety advised of changes potentially impacting Time and Price, but surety waives requirement to be notified. | <p>§11.3 Property Insurance</p> <ul style="list-style-type: none"> • Perils v. Policies • AIA opts for perils and all are insurable |
| <p>Indemnification</p> | <p>¶10.1.1 Contractor indemnifies and holds harmless Owner, A/E, others for BI, PD, but only to extend caused by negligent acts or omissions of Contractor, Subcontractors</p> <ul style="list-style-type: none"> • No duty to defend, but • Indemnification includes reasonable attorney's fees, costs and expenses | <p>§3.18 Contractor indemnify and hold harmless Owner, Architect, for bodily injury or property damage, but only to extent of negligent acts or omissions of Contractor, subcontractor</p> |

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| | <ul style="list-style-type: none"> Contractor entitled to reimbursement of defense costs paid above Contractor's percentage of liability to extent provided under ¶10.1.2. <p>¶10.1.2 Owner's indemnification</p> <ul style="list-style-type: none"> Reciprocal provision to ¶10.1.1 | No general Owner indemnification obligation. |
| Consequential Damages | <p>¶6.6 Limited Mutual Waiver of Consequential Damages</p> <ul style="list-style-type: none"> Overall general waiver of types of consequential damages described Waiver does not include agreed upon liquidated damages (¶6.5). Owner and Contractor can agree upon certain items of damages that are excluded from mutual waiver | <p>§15.1.6 Mutual Waiver of Consequential Damages</p> <ul style="list-style-type: none"> "Direct v. indirect damages" Liquidated damages; not "direct" Consequential Damages may include calculated consequential damages Reflects a Current Practice |
| Liquidated Damages | <p>¶6.5 Liquidated Damages</p> <ul style="list-style-type: none"> Optional Substantial Completion Final Completion May also be based on other project milestones, performance requirements | Not Addressed in AIA A201 |
| Dispute Resolution | <p>¶6.4 Notice of Delay Claims</p> <ul style="list-style-type: none"> Written notice per ¶8.4 <p>¶8.4 Claims for Additional Cost or Time</p> <ul style="list-style-type: none"> Written notice within 14 days after occurrence or 14 days after Contractor first recognizes condition giving rise to claim, whichever is later. | <p>§ 1.1.8 Initial Decision Maker (IDM)</p> <ul style="list-style-type: none"> Replaces A/E for some, but not all decisions May or may not review A/E errors No contract for hiring an IDM <p>§15 Claims and Disputes §15.1 Definition of Claim is broad</p> <ul style="list-style-type: none"> Broad enough to encompass claims v. A/E? |

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| | <ul style="list-style-type: none"> • Written documentation of claim within 21 days after giving notice, unless longer period is agreed upon • Owner to deny or approve claim in writing no later than 14 days after receipt of Contractor’s claim. <p>Article 12</p> <p>¶12.1 Work Continuance and Payment</p> <p>¶12.2 Direct discussions</p> <ul style="list-style-type: none"> • Parties’ Representatives • Then senior representatives • Then dispute mitigation or dispute resolution. <p>¶12.3 Mitigation – optional</p> <ul style="list-style-type: none"> • Project Neutral • Dispute Review Board <p>¶12.4 Mediation</p> <p>¶12.5 Binding Dispute Resolution</p> <ul style="list-style-type: none"> • Arbitration • Litigation • Venue is location of Project | <ul style="list-style-type: none"> • Adjustments to Contract price <i>and time</i>? • Concealed conditions? <p>§ 15.1.2 Notice within 21 days</p> <ul style="list-style-type: none"> • Of what? • To whom? <p>§ 15.1.3 Continue Work Through Dispute</p> <ul style="list-style-type: none"> • IDM’s decision may circumvent A/E’s CCD’s and force payment when A/E and Owner dispute claim <p>§15.2 Initial Decision</p> <ul style="list-style-type: none"> • By IDM • A/E is IDM unless otherwise indicated • Except claims relating to: <ul style="list-style-type: none"> ○ Hazardous substances (§ 10.3) ○ Emergencies (§ 10.4) ○ Property Insurance Claims (§§ 11.3.9 & 11.3.10) • Can it render decision v. A/E? <ul style="list-style-type: none"> ○ Claim definition = yes ○ This language = no <p>§15.2.6.1 Appeal of IDM Decision</p> <ul style="list-style-type: none"> • Either Party May Demand that “the Other” file for Mediation of IDM’s Decision • 30 Days runs from date of decision, not receipt • What if Unhappy party Demands that the Other file for Mediation but the Other Party |
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| | | <p>Does not?</p> <ul style="list-style-type: none"> • Do §§ 15.2.5 or 15.2.6.1 allow the unhappy party to file for Mediation? • Mediation Shall Occur Within 60 Days of IDM’s Decision? • Appeals After Unsuccessful Mediation Are Not Necessarily Arbitrated <p>§ 15.4 Arbitration - This is No Longer the Primary Process of Dispute Resolution</p> <ul style="list-style-type: none"> • Default is to Litigation • Contractor Must “check the box” for it <p>§15.4.4 Now Allows Consolidation of Arbitrations and Joinder of Other Parties</p> <ul style="list-style-type: none"> • All Participants Have Arbitration Rights • Common Issues of Law or Fact • Similar Procedural Rules |
| <p style="text-align: center;">Owner Disclosure of Financial Information</p> | <p>¶4.2 Financial Information</p> <ul style="list-style-type: none"> • Prior to commencement of Work and thereafter at written request of Contractor. • Evidence is condition precedent to Contractor commencing or continuing Work • Contractor notified prior to any material change in Project financing. | <p>§2.2 Owner Disclosure of Financial Information</p> <ul style="list-style-type: none"> • Waters Down Contractor’s Right to Know • Early-bird Requests Are Essential • Limited Disclosure Obligation After Work Starts - Three Conditions <ul style="list-style-type: none"> ○ Owner Failure to Pay ○ Material Change in Contract Sum ○ “Reasonable Concern” for Additional Knowledge |
| <p style="text-align: center;">Termination</p> | <p>¶11.3 Owner’s Right to Terminate for Default</p> <ul style="list-style-type: none"> • 7 day notice to cure period under ¶11.2 • 14 days additional notice of termination • Written notice of termination. | <p>§ 14 Termination of Contract</p> <p>§ 14.1 Contractor Terminates:</p> <ul style="list-style-type: none"> • Clarifies Contractor’s right to recover “damages” after terminating the Contract |

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| | <p>¶11.4 Termination by Owner for Convenience</p> <ul style="list-style-type: none"> • Contractor paid for work to date plus overhead and profit on that work • Demobilization costs but not overhead and profit on work not performed • Option for negotiation of premium payment. <p>¶11.5 Contractor’s Right to Terminate</p> <ul style="list-style-type: none"> • Payment for Work executed, any proven loss, cost, expense in connection with Work, demobilization costs plus reasonable overhead and profit on Work not performed. | <ul style="list-style-type: none"> • Recoverable “costs” should mean attorneys’ fees • Damages are still recoverable • Presumably directly arising from the Contractor’s performance, and not indirect consequential damages <p>§ 14.2 Owner Terminates:</p> <ul style="list-style-type: none"> • Upon certification of IDM |
| <p>Contractor Submittals</p> | <p>¶2.4.4 Definition of Contract Documents includes approved submittals.</p> <p>¶3.14 Submittals</p> <ul style="list-style-type: none"> • Contractor responsible for accuracy, conformity to Contract Documents • Contractor required to identify in submittals any changes, deviations, substitutions from Contract Documents • Owner (A/E) approval does not authorize deviations unless express written approval. • Contractor performance strictly in accordance with approved submittals. | <p>§ 3.10.2 Contractor’s Submittal Schedule</p> <ul style="list-style-type: none"> • Contractor Must Submit for A/E’s Approval • A/E May Order Multiple Revisions • A/E May Ignore Entirely • Old Rule Required Submission of Submittals, not a Schedule • New Rule Bars Contractor Claim for REA’s Unless Schedule Submitted • Mechanism for A/E Mischief is Obvious |
| <p>Instruments of Service</p> | <p>ConsensusDOCS 240 Owner-Architect Agreement:</p> <p>¶10.1 Ownership of Tangible Documents</p> <ul style="list-style-type: none"> • Owner shall receive ownership of the | <p>§1.1.7 Instruments of Service</p> <ul style="list-style-type: none"> • Project manual is gone |

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| | <p>property rights, except for copyrights,</p> <ul style="list-style-type: none"> • Upon the making of final payment to Architect/Engineer, or payment in connection with termination. <p>¶10.1.1 Copyright</p> <ul style="list-style-type: none"> • Option to obtain copyright upon payment of agreed upon value <p>¶10.1.2 In event of termination, Owner has right to use, to reproduce, and to make derivative works of the Documents to complete the Project.</p> <p>¶10.1.3 Owner’s use after completion of Project; may reuse, reproduce or make derivative works from the Documents solely for the purposes of maintaining, renovating, remodeling or expanding the Project at the Worksite.</p> <ul style="list-style-type: none"> • Use without Architect/Engineer involvement at Owner’s sole risk • Owner indemnifies <p>¶10.1.4 Architect/Engineer may reuse Documents in its practice, but only in their separate constituent parts and not as a whole.</p> <p>¶10.2 Electronic Documents</p> <ul style="list-style-type: none"> • If exchange in electronic or digital format required, parties agree on written protocol • Ties in with ConsensusDOCS 200.2 | <p>§1.5 Ownership</p> <ul style="list-style-type: none"> • Architect retains all common law, statutory and other reserved rights including copyright. <p>§1.6 Transmission of Data in Digital Form</p> <ul style="list-style-type: none"> • Endeavor to establish necessary protocols regarding transmission. |
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| <p>Changes</p> | <p>¶8.2 Interim Directed Change</p> <ul style="list-style-type: none"> • If dispute as to cost to Owner, Owner pays Contractor 50% of its estimate cost to perform work • Parties reserve rights as to disputed amount per Dispute Resolution provisions. <p>¶8.3 Determination of Cost</p> <ul style="list-style-type: none"> • If increase or decrease cannot be agreed to, costs determined by reasonable actual expense and savings. • If a net increase in Contract Price, Contractor’s Overhead and profit priced accordingly. • If a net decrease, Contractor’s Overhead and profit not adjusted unless 10% or more of Project is deleted. • If disagreement whether work required by Owner is within scope of Work, Contractor furnishes estimate, performs disputed work and Owner pays 50% of estimated cost of disputed work; parties reserve rights. | <p>§ 7.3.7 Construction Change Directives (CCD’s)</p> <ul style="list-style-type: none"> • OLD Rule = Reasonable profit and overhead? • NEW Rule = maybe YES or NO! • Depends on Contract Documents • Percentage of fee • Unit pricing • Contractor may not argue presumptively greater than Contract percent • Payment of “Undisputed Amounts” has been strengthened for Contractor in § 7.3.9 |
| <p>Owner Directed Means and Methods</p> | <p>¶3.1.2 Contractor responsible for means and methods unless Contract Documents give other specific instructions.</p> <ul style="list-style-type: none"> • Contractor not responsible for damages resulting from compliance with instructions unless Contractor recognized and failed to timely report to Owner error, unsafe practice, etc. | <p>§ 3.3.1 Owner Directed Means and Methods</p> <ul style="list-style-type: none"> • OLD Rule = Owner responsible • NEW Rule = Contactor responsible for “shared liability” <ul style="list-style-type: none"> ○ Owner liable only if 100% at fault |

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| <p>Hazardous Materials</p> | <p>¶3.13 Hazardous Materials</p> <ul style="list-style-type: none"> • Broad definition of Hazardous Material • Contractor not required to commence or continue work until Hazardous Material discovered is removed, rendered or determined to be harmless by Owner • Certified by an independent testing laboratory • Contractor entitled to adjustment in Contract Price, Contract Time for additional costs incurred and delays experienced as a result of encountering Hazardous Materials • Owner obligated to indemnify and hold harmless Contractor for all claims, losses arising out of or relating to performance of Work in area affected by Hazardous Material, to the extent not caused by the negligent acts or omissions of Contractor <p>¶3.1.3.7.2 Contractor responsible for proper handling of all materials brought to Worksite by Contractor</p> <p>¶3.13.7.3 Contractor indemnifies Owner for all claims arising from delivery, handing, application, storage, removal and disposal of substances brought to Worksite per Contract Documents.</p> | <p>§ 10 Hazardous Materials</p> <ul style="list-style-type: none"> • General Loosening of the Scope of the Old Provisions • Radical Change of Haz-Mat Provisions <ul style="list-style-type: none"> ○ Old Rule: Whoever was responsible for its presence was singularly liable for its consequence ○ New Rule: Owner may order Contractor to determine how to safely use and hold it jointly liable for consequences |
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| <p style="text-align: center;">Statute of Repose</p> | <p>Not Addressed.</p> | <p>§ 13.7 Statute of Repose</p> <ul style="list-style-type: none"> • Old “Accrual of Action” Provision is Deleted • New Ten year Statute of Repose regarding claims between Owner and Contractor • Consistent with the majority of state’s rules on barring claims arising out of improvements to real property |
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