January 2010
Volume 1, Issue 1

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What Contractors Need To Know About The New 2007 AIA 201 And AGC Contract Forms

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The American Institute of Architects ("AIA") drafts standard forms of contracts to be used in construction projects, including contracts to be used between owners and contractors, known as the AIA 201 form. These forms are typically used as the general conditions containing "standard boiler plate" terms. The AIA has just completed a set of revisions to all of its basic forms, including the promulgation of a revised 2007 AIA 201 form. The Association of General Contractors ("AGC") created its own new contract form set, the ConsensusDOCS set. The AGC argues that its set represents a consensus of the contracting industry, incorporating the points of view of the owner, the general contractor, and subcontractors. The most prominent of these forms is the AGC, Owner-General Contractor form, ConsensusDOCS 200.

We recognize that contractors often do not have an opportunity to chose which contract forms are to be used or change the language within the forms. Often contractors respond to invitations to bid with little opportunity to negotiate the general conditions. Even so, the contractor should be aware that the new forms propose some fundamental changes on how projects are to be structured. If the contractor *does* have the opportunity to help select the forms, or is willing to consider which form is being used as a part of its consideration in deciding on whether to bid a project, the relative merits of the forms should be considered.

PART I

DIFFERING IDEAS IN THE AIA AND THE AGC FORMS

The AGC ConsensusDOCS and the AIA present differing visions of how a construction project operates and how a construction contract should be structured. The AIA has historically conceived the architect as playing an intermediary role between the Owner and Contractor during the course of construction by carrying out site visits, reviewing applications for payments, certifying

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2009 has been a quiet year for New Jersey legislation impacting the construction industry. The state, however, did enact several new laws designed to encourage alternate energy sources. The Residential Development Solar Energy Systems Act requires "where technically feasible," as determined by the Board of Public Utilities, any person who offers to, or constructs new residential construction of 25 or more units, to offer a solar energy system, such as solar panels or photoelectric cells. The price and benefits of such a system must be included in its advertising. Another enactment mandated that municipalities which have industrial zones must allow any owner of 20 or more contiguous acres to establish a "renewable energy facility", such as a windmill or solar energy farm as a permitted industrial use in that zone.

The Department of Transportation ("DOT") has proposed revising its regulations for bidding on NJDOT projects. Bidding will now take place through the internet. Bidders must still be pre-qualified by submitting financial data and other information. The DOT proposes to drop its maximum and aggregate ratings for the amount of work allowed and, instead, are employing a new "financial capability" test. Financial capability

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would measure a contractor's financial capacity as demonstrated in their financial statements. The new regulations would not limit the amount of work that can be outstanding at the time of bid. Currently, the rule uses two formulas; one for contractors with DOT experience and one for contractors without DOT experience to calculate a contractor's limit on work. There would now be a single formula for calculating a contractor's financial capability based on net working capital or net worth, net book value of construction equipment and unsecured lines of credit.

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completion of the project and administering the contract. This role includes the requirement and expectation that the architect will weigh on contract interpretation, choice of superintendent, change order pricing, the termination of the contractor and determining when the project is complete.

The AIA forms also take a bureaucratic and somewhat legalistic approach to contract administration. The 201 General Conditions, for instance, have always had elaborate provisions which specify not only the relative responsibilities of the owner and contractor on a myriad of issues, but deadlines for when each must act. As will be seen, the 2007 AIA 201 form revisions have increased, rather than simplified this procedural complexity.

In contrast, the ConsensusDOCS 200 simply indicates that parties should act promptly and within "reasonable" times. This is part of the AGC's overall philosophy that the parties can be trusted and have the obligation to deal with each other in a fair manner, without extensive "administration" by the Architect/Engineer or onerous and complex contract provisions which create traps for the unwary.

The AGC claims that ConsensusDOCS agreements were developed to promote "the best interest of the project" among Owners, General Contractors and Subcontractors with the goal of ultimately providing "owner satisfaction." The AGC ConsensusDOCS 200 integrates the general conditions and contract documents, such as specifications in one document and the very first general condition states:

> "Relationship of the Parties: The Owner and the Contractor agree to proceed with the Project on the basis of mutual trust, good faith and fair dealing."

The ConsensusDOCs 200 stresses the desirability of direct communications between the owner and the contractor on such issues as change order applications; requests for corrective work, and notices of substantial completion. In addition, the AGC contract rejects the notion that a contract should serve to "shift risk" between parties by, for instance, making the Contractor bear the costs of concealed conditions or permit delays it did not cause.

These philosophies permeate the details of the 2007 AIA documents and the AGC ConsensusDOCS as seen below. They also figure prominently in the extent to which the 2007 AIA forms depart from the 1997 AIA forms.

PART II

INNOVATIONS FOUND IN BOTH THE NEW AIA AND THE NEW AGC

The ConsensusDOCS and the new AIA documents both introduce four major changes:

(1) they both allow for the introduction of a new party to the construction project; a "neutral" to make a preliminary ruling, rather than the architect;[8]

(2) they both require payment of subcontractors within a short period after receiving payment;

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(3) they both provide for the parties to elect between arbitration and litigation, instead of mandating an agreement to arbitrate, as in previous documents; and

(4) they both provide optional side agreements designed to govern electronic communications and the use of electronic drawings and building information modeling systems on the project.

I. New party to solve on-the-job disputes: The Initial Decision Maker (IDM)

A. The 2007 AIA 201 Initial Decision Maker

Contractors often complain that when an Architect makes initial determinations of disputes, he does not do so using an independent judgment, but bears in mind it is the owner who has hired him. In some cases, the Architect actively conceives his role as a decider as an obligation to protect the owner. In instances when the dispute centers on whether the Architect's own plans were adequate or sufficient, the Architect is hardly neutral, however, he conceives his role.

Both the 2007 AIA 201 form and the ConsensusDOCS have optional provisions in which another consultant may be brought in to decide claims and disputes on the job site before the parties submit to formal mediation and then some form of litigation. However, this option is structured differently in the two contracts.

The 2007 AIA 201 form has no terms to cover what qualifications the "Initial Decision Maker" ("IDM") needs to possess, although presumably, the person, or consulting agency, must have sufficient judgment to evaluate a contractor, review pay applications, and evaluate construction plans. Nor does the 2007 AIA 201 form explain who is to pay for the IDM's services. If the owner is to pay, the issues of bias re-appear. If the contractor is to pay, then the opposite issue of bias arises. If the parties do not elect to have a separate IDM, then the architect acts as the IDM.

The 2007 AIA 201 form does not assign every type of claim to the IDM in the first instance. The architect still decides claims for time extensions, whether to Certify Payment Requisitions, and renders the original decision on claims relating to concealed site conditions and on the pricing of work done under extra work directives. The 2007 AIA 201 form also deleted requests for the interpretation of the contract from the definition of claim, so it is unclear if such disputes would ever be submitted to the IDM. The IDM does make the important decision on whether to certify that the owner is justified in terminating the architect.

The 2007 AIA 201 form has a schedule for submissions to the IDM of 20 to 30 days. There is no time limit on how long the IDM has to consider the dispute. If the IDM has no familiarity with the project, prior to being called upon to resolve the claim, it may take some time for him to analyze the claim. In some cases, this may not create problems, but when the issue requires a decision on a critical path item, or on whether termination of the contractor is justified, the project might shut down while the decision is pending. Furthermore, the IDM has the option of issuing a decision that he or she has not been able to resolve the issues.

The ConsensusDOCS have a provision for a "Project Neutral" who is similar to the AIA's IDM, but has more clearly defined the role and structured its place in the construction project in a way that resolves many of the problems under the AIA contract. The ConsensusDOCS 200 allows the parties to designate in their original contract that they will use a "Mitigation Procedure" for disputes, which would use either a "Project Neutral" or a Dispute Review Board (a procedure used on large public jobs). The Project Neutral is to be mutually selected and appointed by the parties and paid by each. The "Project Neutral," does not wait until a dispute arises to become involved in the project, but is to make regular site visits "so as to maintain an up-to-date understanding of the Project," even before a claim is made or it is consulted.

Rather than defining certain types of project claims as to be heard by the architect, at least in the first instance, and others to be heard by the "Project Neutral," the ConsensusDOCS simply provides that the parties submit disputes to the Project Neutral, once discussions among the parties have failed to resolve the issue. The Project Neutral has five days to issue a decision, unless good cause is shown.

Certainly, it is easy to imagine, in some circumstances, the time and money saved in resolving disputes during the project justify the extra expense and complexity. Furthermore, since either party could appeal the initial decision, either through a formal arbitration or to the court, it is also possible that the initial decision will not resolve the disputes. Therefore, unless the parties can identify or hire a Project Neutral, they both respect, and unless the project is of significant size to justify the additional fees, the parties are best off without a Project Neutral.

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II. Subcontractor Payment Obligations Under The New Forms And The New Jersey Prompt Payment Act

Both the 2007 AIA 201 form and the AGC ConsensusDOCS set require that the general contractor distribute the payments down to subcontractors promptly after receiving them from the owner. The AIA instituted this requirement in response to a trend by state legislators requiring such payment, and sometimes holding the owner responsible, when it has failed to insure such distribution. The AGC had previously included such provision in its proposed subcontract form and has repeated such provisions in its new subcontract form.

A. 2007 AIA 201 Changes in the Subcontractor Payment Provisions

The 2007 AIA 201 form prohibits the General Contractor from including in "Applications for Payments" amounts that the contractor does intend to pay to a subcontractor or a material supplier. It allows the owner to demand written evidence from the contractor that the contractor has properly paid subcontractors and suppliers. If the contractor fails to furnish such evidence within seven days, the owner has the right to contact subcontractors and suppliers directly to determine whether they have been paid. If the architect withholds certification of payment to the contractor on the basis that previous payments were not properly distributed to subcontractors or suppliers, the owner has the option, but not the obligation, to issue joint checks. If the owner does issue such joint checks, the notice must be provided to the architect to be reflected on the next Certificate for Payment. The 2007 AIA 201 form says that notwithstanding the owner's right to issue joint checks, the owner still does not "have an obligation to pay or to ensure to the payment of money to a subcontractor, except as otherwise be required by law." The New Jersey Construction Trust Fund Act, and numerous cases in New Jersey, do impose a requirement that public construction funds only be used to pay contractors, subcontractors, suppliers and laborers for the work on the project. Therefore, at least with respect to public jobs, it would seem that once an owner knows a contractor has failed to pay its subcontractors, it would have an obligation to take steps to ensure payments be made to them before disbursing future payments.

B. Payments To Subcontractors Under The ConsensusDOCS

ConsensusDOCS set Number 750 is a new subcontract form and it provides protections to Subcontractors that extend beyond the AIA document set. ConsensusDOCS 750 contains a term, drawn from the previous version of the subcontract (AGC 650), which entitles subcontractors to be paid by the general contractor within seven days of that contractor receiving payment. It also continues to limit withholding payment to subcontractors by clearly stating that a general contractors' obligation to subs is independent of whether the General Contractors have themselves received payments from the Owners. However, the Associate General Counsel has also provided a recommendation for modifying the ConsensusDOCS 750 to render the subcontractor's right to payment, conditional upon whether a general contractor has been paid:

Under the general contract form, ConsensusDOCS 200, the General Contractor's failure to pay subcontractors "following receipt of such payment from the Owner" justifies the Owner's nullification, rejection or withholding of funds from the General Contractors' payment application. Such failure to forward payment is also defined as a material default, which authorizes the Owner to withhold payment, and can even be a basis for termination.

C. Comparing The 2007 AIA 200 Form And The ConsensusDOCS Terms To The New Jersey Prompt Payment Act

New Jersey, like many states, has adopted "prompt payment" acts which require contractors to pay funds down to subcontractors with minimal delay. However, the New Jersey Prompt Payment Act's terms are "default" terms; they are read into contracts which make no provisions on when payment is to be transmitted down to subcontractors and whether interest accrues on unpaid amounts. If the contract does have terms addressing these issues, those agreed upon terms "trump" the Prompt Payment Act.

III. New Provisions About Arbitration

Both the AIA and the AGC have undergone a major policy shift by changing, from standard language electing arbitration before the American Arbitration Association ("AAA"), as the mandatory way of "litigating" claims and disputes, to forms in which

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parties elect either litigation or arbitration.

Traditionally, the AIA had required contractors and owners to try any claims which remained in arbitration before the AAA, instead of trying a claim in Court, but the AIA forms precluded or limited other key parties (such as the architect) from being joined inside of the arbitration. The 2007 AIA forms substantially reverse these preferences. The basic contract document, the A101, provides a check-off for the parties to select either litigation or arbitration and presumes the parties chose litigation, if arbitration is not checked off.

The ConsensusDOCS similarly has a check off for the parties to elect arbitration or litigation. It does not address consolidation. Unlike the 2007 AIA 201 form, it does not specify the arbitration take place under the AAA, but leaves the parties to designate the arbitrator or administrator. The ConsensusDOCS does specify the current Construction Industry Rules of the AAA Rules apply, but only if the parties do not agree to another set of rules.

IV. Using and Saving Electronic Data

Both the AIA and the ConsensusDOCS have issued separate documents which are designed to establish protocols for electronic and computer data and communications.

The AIA has proposed separate documents to deal with electronic data. These are primarily designed to address the transmittal of CAD drawings and it is an attempt by the Architects to assure that electronic drawings used on the project will not be commercially used without their permission. However, their language arguably would also apply to electronic data, such as scheduling data bases or cost estimating. The form contract allows the parties to designate to whom electronic data may be transmitted, and require those who receive it as confidential. From a contractors point of view, it wants to be certain that the "Digital Licensing Agreement" allow it, and its subcontractors, and sub-subcontractors to distribute drawings and specifications to whomever they may want to receive quotes or bids, as well as to any attorneys, engineers, or consultants they may need for the project or for litigation thereafter. The notion that an architect or engineer can keep its plans confidential is illusory in New Jersey. Such plans must be filed with the construction official and are generally open for inspection under the Open Public Records Act.

In contrast, the ConsensusDOCS contemplates the contract will include an "Electronic Communications Protocol Addendum," which specifies hardware, software, document formats, email addresses, and agreements on computer security, data archiving and access. Beyond these additional set up issues, the Electronic Communications Protocol Addendum sets upon the IT Management Team, which is composed of the designated IT Administrators from each party to the contract. Section 7.0 allows the parties to specify how they can revise documents capable of being revised after they are originally created and shared, and how they will keep track of those revisions. Some software programs allow for detailed metadata to be generated that automatically tracks changes and the party generating them. Where this is not the case, an express transmittal record confirming Version Control Information, as provided in Section 7.2, will be extremely important or limits should be placed on each party's ability to revise others' documents and data. Under Section 8.0, each party is responsible for complying with the System Parameters and for the accuracy of data and documents furnished as part of their own Electronic Communications.

PART III

HANDLING CLAIMS AND DISPUTES

The AGC ConsensusDOCS 200 and the 2007 AIA 201 form each introduce sets of procedures for resolving disputes and preserving claims. As indicated above, they each provide for the parties in the contracts to make basic elections on who will decide disputes at the outset: whether to retain a third party consultant to make a preliminary interim decision on claims and whether to submit unresolved claims to arbitration or litigation. This section of the paper will address other procedures on the job which occur, once a dispute has arisen including claim provisions; claims for differing site provisions; back charge provisions and the rights of the owner or contractor to terminate the contract because of the breeches of the other.

A. The Owner's Right To Carry Out Work and Backcharges

Both the 2007 AIA 201 and the 1997 AIA 201 allow an Owner to give the Contractor written notice of a deficiency or failure to perform work and, then, if the Contractor fails to correct the work, the Owner may carry it out through other forces and backcharge the Contractor. The 2007 AIA 201 form streamlines this process. Rather than requiring the

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Owner to give written request to the contractor to repair the deficiency, and then an additional notice three days before undertaking the work itself, the 2007 AIA 201 form now allows the owner to issue one notice. If the work is not corrected after ten days, the Owner may undertake its own corrections and back charges after giving notice to the Contractor of the deficiency before carrying out the work itself.

The ConsensusDOCS 200 also establishes a double notice procedure for most deficiencies and backcharges. However, if the Contractors at the site are refusing to clean up or refusing to confine their material to their own work area, the Owner only has to give two days notice before arranging for a clean-up and allocating the cost among the sloppy Contractors.

B. Differing Site Conditions and Other Formal Claims

The 2007 AIA 201 form has the most complex set of dispute and claim provisions and the method of making and preserving claims varies, depending upon the nature of the claim. To a certain extent, the AIA has always had different procedures for resolving different types of disputes, depending on the nature of the dispute. The procedures for modifying the Contract relating to additional work, for instance, vary depending upon whether the Owner has issued a Directive for additional Work, which can require Work be carried out before a price is agreed upon, or whether the Contractor has asserted that certain "work" would be an extra, in which case the Contractor must await an agreed upon change order. However, because the 2007 AIA 201 form contemplates that sometimes the initial consideration of a dispute will be heard by the IDM, and sometimes by the Architect and then the IDM, the 2007 AIA 201's dispute provisions depend both on the nature of the claim and upon whether the parties have chosen to appoint an IDM.

Requests for extension of time are to be decided by the Architect in the first instance, who is to grant an extension if the Contractor is delayed, due to neglect by the Owner or Architect, a separate contract to the Owner, a change ordered in the work, labor disputes, fire, unusual delays in deliveries or other causes unavoidable by the contractor by delay authorized by the Owner pending mediation or arbitration.

However, since claims must be made within 21 days of the occurrence giving rise to the claim, it is recommended that the Contractor not try to guess, as to whether an issue is covered within the claims definition and make claims when in doubt. The claim must be made in writing to the independent decision maker (IDM) (if there is one), owner and architect. Once again, if the Contractor has any doubt about whether an issue may constitute a claim, it is recommended that the IDM and the architect be copied on the correspondence.

The ConsensusDOCS 200 claims procedures evince less of a concern for procedure and more of an interest in promoting discussions among the parties for resolving the claims. Claims resolutions begin with an obligation of the parties' representatives to enter into "good faith discussions" to resolve the claim. If, after five days, the dispute is not resolved, the party representatives are each obligated to advise the respective senior executives at their organizations of the dispute. This gives the parties an opportunity to have more experienced (and perhaps less inflamed job site confrontations) personnel weigh in and try to resolve the dispute before it becomes a costly, formal claim. The senior executives are to meet within five days to try to resolve the problem. Only if it is unresolved fifteen days after that first meeting, should the parties proceed to the dispute resolution procedures.

If the parties have decided to hire a so-called "Neutral," or if the project is set up to have a Dispute Review Board, the parties are to submit their dispute to this body. The Neutral or Dispute Review Board is to issue a ruling within five days. If the parties have not selected to have either a Project Neutral or Dispute Review Board, or if they are unhappy with the ruling of such a neutral, or five days have elapsed or no decision has been made, the parties are to proceed to mediation. The mediation shall convene within 2-30 days and may last only up to 45 days. If the matter is still unresolved, then the unhappy party may proceed to arbitration or litigation, as previously elected. The ConsensusDOCS provides for consolidation of claims, regardless of whether the dispute is to be decided in litigation or arbitration.