

THE NEW AIA AND CONSENSUSDOCS: BEWARE OF THE DIFFERENCES—THE PROFESSIONAL SERVICES AGREEMENTS

by Jeffrey L. Alitz, Esquire and Ben N. Dunlap, Esquire

IMPORTANT DIFFERENCES EXIST BETWEEN THE NEW 2007 AIA AND CONSENSUSDOCS STANDARD CONTRACT DOCUMENTS. THIS PAPER IS THE FIRST OF TWO EXPLORATIONS AND ANALYSES OF THE KEY DIFFERENCES BETWEEN THE DOCUMENT FAMILIES, FOCUSING ON OWNER-ARCHITECT AGREEMENTS.

INTRODUCTION

In September 2007, a broad-based consortium of construction “industry” trade and other organizations jointly released a new family of model contract documents—as competitors to the AIA documents—called ConsensusDOCS. Approximately 20 construction associations, including the Associated General Contractors of America (AGC), Associated Builders and Contractors, The American Subcontractors Association, The Construction Users Roundtable, The National Roofing Contractors Association, The Mechanical Contractors Association of America, and the National Plumbing, Heating-Cooling Contractors Association participated in developing the ConsensusDOCS and endorsed them.

Ostensibly, the ConsensusDOCS were designed to favor no one party over another, but rather to take a balanced approach to the rights and obligations—as well as to risk allocations—imposed on participants in the construction

Jeffrey L. Alitz is a shareholder in the Boston office of LeClairRyan. He focuses his practice on litigating claims made against architects, engineers, construction managers, owners, attorneys, accountants and other professionals in jury and non-jury trials, arbitrations and mediations. He has specific experience in litigating these matters throughout New England, especially in Massachusetts and New Hampshire state and federal courts. Mr. Alitz has lectured on Construction Law and Professional Liability in Massachusetts, New Hampshire, Rhode Island, New York, Florida, and Ohio. He is the author of the New Hampshire chapter and co-author of the Massachusetts chapter of the State-By-State Guide to Construction Contracts and Claims, published by Aspen in 2006. Mr. Alitz is a member of the Massachusetts Bar Association, the New Hampshire Bar Association, the Defense Research Institute, and an Honorary Member of the New Hampshire Chapter of the American Institute of Architects. Mr. Alitz is admitted to practice in the state and federal courts of New Hampshire and Massachusetts and the United States Court of Appeals for the First Circuit. He is a 1987 graduate of Boston University School of Law.

Ben N. Dunlap is an associate in Boston office of LeClairRyan. He focuses his practice on insurance defense and professional liability matters. Mr. Dunlap is admitted to practice in the state and federal courts of Massachusetts. He is a 2004 graduate of Boston College Law School.

process. The ConsensusDOCS emphasize communication and collaboration among all project participants from the time of contract negotiation through project completion. The stated goal of the ConsensusDOCS participants and endorsers was to reduce transaction costs and the time required for negotiation of contracts and to reduce the frequency and severity of disputes during the construction process.

The ConsensusDOCS are, to some degree, a reaction to the standard construction contract documents produced for over a century by the American Institute of Architects (AIA), and, indeed, the AIA is notably missing from those entities that participated in and endorsed the ConsensusDOCS. Some have contended that contractors demanded documents that ended a perceived bias in favor of design professionals allegedly inherent in the AIA's A201, the *General Conditions of the Contract for Construction*, most commonly used by owners for their contractors. Others have contended that the most recent revision to the AIA documents excluded the AGC and other trade organizations (more so than in years past when the AIA revision process had arguably been more collaborative).

Still others argue that the ConsensusDOCS arose from contractors' and subcontractors' frustrations with how construction disputes—and the “damages” that may arise from the resolution of such disputes—are addressed and resolved. Lastly, and more simply, the fact that the AGC has long produced its own set of contract documents lent natural support to the creation of a more broadly-based “family” of documents that could compete with the AIA “family” of contract documents.

Meanwhile, in November 2007, only a few months after the ConsensusDOCS' debut, the AIA issued new editions of its standard construction contract documents, replacing the versions of the owner-contractor agreement, and the owner-architect agreement, among others, which were last revised in 1997.¹ The 2007 AIA contracts include several significant changes, notably in the area of dispute resolution.² The AGC and some other organizations representing contractors have voiced concerns that the 2007 AIA documents place too much authority in the architect and unfairly increase risks borne by contractors. For the first time in more than 50 years, the AGC's 600-member board of directors unanimously voted to not endorse the 2007 edition of the AIA's A201.

For now, it appears that the AIA contracts and the ConsensusDOCS are both here to stay. Opposition by the AGC alone is unlikely to end use of AIA documents in construction projects, and the ConsensusDOCS are now part of the construction landscape—if only through the wide media roll-out that accompanied their release in September 2007.

Regardless of any business reasons accounting for the differences of opinion between the AIA and AGC about the relative merits of the 2007 AIA documents and the ConsensusDOCS, there are important differences between the two contract systems that should be understood and appreciated by design professionals, their attorneys, and their insurers. Here, we will focus on the key differences between the two treatments of the standard owner-architect agreement: the 2007 AIA B102 and B201 (formerly the B141, Part 1 and 2) and the new ConsensusDOCS 240.³ Candidly, at least in regard to the

ConsensusDOCS 240, given that few owners and their designers have used this contract, the analysis is more “academic” as opposed to market and experience based.

THE PROFESSIONAL SERVICES AGREEMENT IN THE AIA DOCUMENTS AND CONSENSUSDOCS

Although there are dramatic differences between several aspects of how the AIA contract treats the owner/designer relationship and how the ConsensusDOCS treats that relationship, there are far more similarities between these documents than differences. For example, each contract system provides for a multi-step process for dispute resolution and allows for (if not requires) the participation of all parties. Each provides that the design professional is not responsible for construction means and methods or exhaustive site inspections, and includes a mechanism for processing change orders and requests for information (RFIs). Each limits the extent of the design professional’s representations in certifying payment to the contractor and waives (to some extent) recovery of consequential damages arising out of disputes between the architect and owner. Nevertheless, important differences remain, and we will focus on key distinctions between the AIA and the ConsensusDOCS allocation of rights and responsibilities between the owner and designer in the comparative analysis that follows.

Dispute Resolution

Perhaps the most important distinction between the AIA B102 and ConsensusDOCS 240 is in the area of resolving disputes. Although both contracts provide for a multi-step approach to dispute resolution—placing mediation before arbitration or litigation—and allow the parties to choose whether they will arbitrate or litigate as their method of binding dispute resolution, that is where the similarities end.

Joinder of Parties

As established by its predecessors, the 2007 AIA B102 makes it difficult to join all three parties (the owner, the architect and the contractor) into the same binding dispute resolution forum, because no party may be joined without its consent. Specifically, the AIA B102 provides that:

[e]ither party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder.⁴

This is actually a change from the 1997 version of the AIA owner-architect agreement, which required the consent of all parties, even those already contractually compelled participants in the arbitration forum (“the Owner, Architect, and any other person or entity sought to be joined”). Now, for example, according to the 2007 version the owner may join the contractor in arbitration against the architect’s wishes so long as the contractor gives its consent. Nonetheless, the AIA B102 retains the requirement that no party may be joined without its consent.

In contrast, the ConsensusDOCS 240 explicitly requires joinder of all necessary parties:

The Owner and the Architect/Engineer agree that all parties necessary to resolve a claim shall be parties to the same dispute resolution procedure. Appropriate provisions shall be included in all other contracts relating to the Project to provide for the joinder or consolidation of such dispute resolution procedures.⁵

The question of what entities or persons are necessary to resolve a claim is not made entirely clear by ConsensusDOCS 240. The AIA contract allows for joinder of “persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration. . . .”⁶ Under the ConsensusDOCS 240, the term “all Parties necessary to resolve a claim” is left undefined, thus creating the possibility that parties will be forced to participate in the dispute resolution process simply because they performed work on a project.

There are, of course, pros and cons to the ConsensusDOCS 240 “mandatory joinder” provision. On the one hand, the “mandatory joinder” provision likely provides for a quick—and arguably less expensive—joint forum for the inclusion of all participants (including but not limited to the design professional) during the dispute resolution process. On the other hand, including additional parties (and claims) may overly complicate the resolution process and needlessly require each party to spend time and resources focusing on issues that only affect them indirectly. Further, requiring that the owner and contractor join the architect to the arbitration will undercut the primary defenses that a multi-forum claim adjudication process presents to the architect: *res judicata* and/or collateral estoppel. That is, many architects’ attorneys are able to defend subsequent arbitrations or court claims against their clients (that follow on after the owner/contractor arbitrations) by exploiting the arbitrators’ decisions as well as inconsistent arguments and/or testimony offered during the prior arbitration. The loss of these defenses—as well as the likelihood that claims against the architect will increase—should give the architect (and its counsel) pause before adopting this section of the ConsensusDOCS 240.

The ConsensusDOCS Direct Discussions

The emphasis in the ConsensusDOCS 240 placed on resolving disputes without litigation can be seen in the range and number of steps established in the dispute resolution section. Unlike the AIA B102, which provides only for mediation, arbitration, and litigation, the ConsensusDOCS 240 adopts a more elaborate stepped approach. The process begins with “direct discussions” between the parties:

If the Parties cannot reach resolution on a matter relating to or arising out of the Agreement, the Parties shall endeavor to reach resolution through good faith direct discussions between the Parties’ representatives, who shall possess the necessary authority to resolve such matter and who shall record the date of first discussions. If the Parties’ representatives are not able to resolve such matter within five (5) business Days of the date of first discussion, the Parties’ representatives shall immediately inform senior executives of the Parties in writing that resolution was not affected. Upon receipt of such notice, the senior executives of the Parties shall meet within

five (5) business days to endeavor to reach resolution. If the dispute remains unresolved after fifteen (15) Days from the date of first discussion, the Parties shall submit such matter to the dispute mitigation and dispute resolution procedures selected herein.⁷

Thus, the “direct discussions” provision requires that representatives—and then senior executives—of the parties meet in person (presumably, a telephone conference or written correspondence would not satisfy the requirement that the parties “meet”), and that negotiations proceed quickly toward resolution. If the dispute remains unresolved after only two weeks, it moves to the next phase of resolution as chosen by the parties and reflected in the contract.

The ConsensusDOCS Neutral

After direct discussions, the next phase in the dispute resolution process offered in the ConsensusDOCS 240 is a “mitigation” provision, which allows for the appointment of a project neutral or dispute review board to issue nonbinding findings on disputed project issues. (The use of the neutral is not mandatory, and the owner and/or architect may elect to proceed immediately to the more formal ADR process the parties have chosen by the contract.) The scope of a neutral’s decision-making power is subject to the agreement of the parties, and any decisions made by the neutral are nonbinding. Although it appears that the use of a neutral or review board could substantially reduce the cost of dispute resolution by encouraging parties to reach resolution informally and early on in the process, there may also be significant costs associated with this provision. In particular, the parties must be prepared to share the costs and expenses of the neutral, who must “make regular visits to the Project so as to maintain an up-to-date understanding of the Project progress and issues and to enable the Project Neutral/Review Board to address matters in dispute between the Parties promptly and knowledgeably.”⁸

The AIA Initial Decision Maker

Somewhat similar to the project neutral in the ConsensusDOCS 240, the 2007 edition of the AIA contracts include a new provision for an “Initial Decision Maker” (IDM) to review and decide disputes that arise between the owner and contractor. Claims between owners and contractors will be submitted to the IDM, who then will then have 30 days in which to render a written decision. Upon the IDM’s rendering a written decision or the passage of 30 days without a decision, the owner and contractor may proceed to mediation. Although this initial decision-making role, traditionally performed by the architect, may now be performed by any person who is not a party to the agreement between the owner and contractor. It is expected that the architect will commonly be chosen to be the IDM or will be so designated by default. (The 2007 AIA A201 provides that “[t]he Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement”).⁹ Even if the architect does not serve as the IDM, it is likely that the architect will be asked to provide assistance to the IDM in evaluating claims. The extent to which the architect’s services will be requested by the IDM cannot be predicted, and for that reason the 2007 AIA B201 provides that “assistance to Initial Decision Maker, if other than the Architect” is an additional service entitling the architect

to additional compensation.¹⁰ Unlike the ConsensusDOCS 240 provision for use of a “neutral,” submission of claims to the IDM in the AIA scheme is a mandatory prerequisite for the preservation of claim rights.

Arbitration

The AIA B102 and ConsensusDOCS 240 both allow for binding arbitration to resolve disputes that cannot be resolved through negotiation or mediation. Like previous AIA editions, the 2007 AIA B102 requires mediation before arbitration. Specifically, it requires that “[a] demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation. . . .”¹¹ The ConsensusDOCS 240 also appears to require that the parties either mediate or “mitigate” (through a project neutral or review board, as described above) a dispute before submitting it to binding resolution: “If the matter remains unresolved after submission of the matter to a mitigation procedure or to mediation, the Parties shall submit the matter to the binding dispute resolution procedure selected herein: . . . arbitration [or] litigation.”¹²

As noted, the ConsensusDOCS 240 permits parties to choose between arbitration and litigation at the time they negotiate the contract. Now, the AIA B102 also allows that choice. In perhaps the most significant change in the 2007 edition of the AIA contracts, the AIA B102 eliminates arbitration as the default contractually-stipulated binding dispute resolution procedure. For nearly 100 years, AIA construction documents provided that disputes and claims between parties would be resolved through binding arbitration. However, in the 2007 forms, including the B102, if parties do not expressly designate in the contract that disputes are to be resolved through arbitration, litigation will be the default dispute-resolution procedure. Specifically, it provides:

If the Owner and Architect do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, the dispute will be resolved in a court of competent jurisdiction.¹³

Although both contract systems allow for a choice between arbitration and litigation, the ConsensusDOCS 240 contains one provision that is certain to make parties consider carefully the costs of litigating a dispute. Referring to both arbitration and litigation, the ConsensusDOCS 240 states that “[t]he costs of any binding dispute resolution processes shall be borne by the non-prevailing Party, as determined by the adjudicator of the dispute.”¹⁴ “Costs” are not expressly defined, but it appears that this provision requires that the loser pay the winner’s attorney’s fees.

The Statute of Limitations Provision in AIA B102

The 2007 AIA B102 contains an important change to the statute of limitations provision found in previous AIA editions. Previously, AIA contracts established the accrual date for claims arising under the contract and provided that the applicable statute of limitations would commence to run no later than the date of substantial completion or the date of issuance of the final certificate of payment.¹⁵ The 2007 AIA B102 provides that claims and causes of action must be commenced within the statute of limitations provided by law, but in any case not more than 10 years after the date of substantial completion.¹⁶ This

provision, which applies to arbitration of claims as well as litigation, is especially important in those jurisdictions in which the applicable statute of limitations or statute of repose is longer than 10 years from the date of substantial completion. In those jurisdictions, parties adopting this provision will effectively shorten the statute of limitations to 10 years, and any claims asserted late will be deemed waived.

Conversely, the ConsensusDOCS 240 does not include any provision on the commencement of the statute of limitations or statute of repose.

Standard of Care

The ConsensusDOCS do not include a definition of the standard of care applicable to architectural and engineering services. The drafters of the ConsensusDOCS determined that it would be better for design professionals to be held to a standard imposed on them by their own profession (i.e., one imposed by the standard a court would endorse) rather than one defined by the ConsensusDOCS. The AGC has wisely recommended that the Agreement should not be modified by adding language that would hold a design professional to a standard of care that is above that which is customary and normal for design professionals in the same time and location because such an alteration might result in the unintended consequence of voiding professional liability coverage available to the designer.

In contrast, in a change to the prior language, the AIA B102 provides that “[t]he Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.”¹⁷ Strictly speaking, the AIA provision on the architect’s standard of care is unnecessary. Like all professionals, an architect must perform in a manner consistent with the degree of care and competence generally expected of a reasonably skilled member of the profession. This standard of care applies in any professional activity an architect undertakes regardless of whether the standard of care is stated in the contract. Nonetheless, parties often add standard of care language to contracts, and in many cases the general standard of care is misstated—leading architects to agree to standards of care greater than the standard imposed by law. By including a specific provision defining the standard of care, the 2007 AIA B102 prevents such a problem from arising.

Relationship of the Parties

A ConsensusDOCS provision requires that the architect/engineer accept the relationship of trust and confidence placed in it to exercise its skill and judgment in furthering the interest of the owner and expressly affirms the designer’s representation that it possesses the requisite skill, expertise, and licensing to perform the required services. Specifically, the ConsensusDOCS 240 provides:

The Architect/Engineer accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate and exercise the Architect/Engineer’s skill and judgment in furthering the

interests of the Owner. The Architect/Engineer represents that it possesses the requisite skill, expertise, and licensing to perform the required services. The Owner and Architect/Engineer agree to work together on a basis of mutual trust, good faith and fair dealing, and shall take actions reasonably necessary to enable each other to perform this Agreement in a timely, efficient, and economical manner. The Owner and Architect/Engineer shall endeavor to promote harmony and cooperation among all Project participants.¹⁸

Although this provision does not impose any specific obligations that are not already imposed by law (such as the standard of care or the covenant of good faith and fair dealing), it does place emphasis on the cooperative relationship between the owner and architect.

The AIA contracts do not include any specific provision defining the relationship between the owner and architect, allowing, instead, the rights and obligations otherwise contained in the contract to provide the content for that relationship.

Conflicts of Interest

Unlike the AIA contract, the ConsensusDOCS 240 expressly sets forth the ethical expectations that include the architect/engineer's avoidance of conflict of interest, contingent fees and gratuities from the contractor. Specifically, the ConsensusDOCS 240 provides:

[C]onflicts of interest shall be avoided or disclosed promptly to the other side; and. . .the Architect/Engineer and Owner warrant that they have not and shall not pay nor receive any contingent fees or gratuities to or from the other Party, including their agents, officers and employees, subconsultants or others for whom they may be liable to secure preferential treatment.¹⁹

The AIA B102 provision is more general and does not identify specific types of conflicts of interest. Instead, it simply prohibits the architect's acceptance of "any employment, interest or contribution that would reasonably appear to compromise the Architect's professional judgment with respect to this Project."²⁰

Errors and Omissions

Both the AIA B102 and ConsensusDOCS 240 provide that the construction documents generated by the design professional "set[] forth in detail the quality levels. . .and requirements for construction. . ." ²¹ However, more forcefully than in the AIA B102, the ConsensusDOCS 240 requires that "[t]he construction documents shall completely describe all work necessary to bid and construct the project."²² The language places a higher burden on the design professional to be inclusive in the plans and specifications it prepares and it makes it harder for the designer to later argue that work is "inferred" by the totality of the construction documents. Accordingly, the language may conflict with some states' public construction laws that obligate the general contractor to understand—and deliver a complete project from—the totality of the contract documents.

Insurance Requirements

The 2007 AIA B102 now includes a provision that requires that the parties

specify the types and limits of insurance the architect is required to maintain. Unlike previous AIA editions, which allowed for an insurance provision but did not require one, the 2007 edition, perhaps recognizing that the overwhelming majority of architects already maintain insurance, makes insurance coverage a requirement. Where the insurance requirements set forth in the agreement exceed the types or coverage levels normally maintained by the architect, the owner is required to pay for the excess insurance.

The ConsensusDOCS 240 also makes insurance coverage a required element of the contract. Architects are required to maintain workers compensation, comprehensive general liability, automobile, and professional liability insurance for the project, with the coverage levels to be negotiated and specified by the parties. The owner is required to maintain property insurance for the project naming the design professional as an insured.

“Green” Design

In one respect the 2007 AIA contracts are more “progressive” than the new ConsensusDOCS. The 2007 AIA B102 requires the architect, during the schematic design phase and as part of the basic services, to discuss the feasibility of incorporating environmentally responsible design approaches into the project. The architect must consider environmentally responsible design alternatives, such as building orientation and materials, to the extent such alternatives are consistent with the owner’s goals, schedule, and budget, and are appropriate for the project. “Green” design methods must only be “considered” and their use is not actually a requirement for any project under the AIA B102 provision. Furthermore, extensive design alternatives requested by the owner, such as in-depth research or Leadership in Energy and Environmental Design (LEED) certification, are considered an additional service entitling the architect to additional compensation.

The ConsensusDOCS do not include a provision requiring or encouraging design professionals to consider environmentally responsible alternatives.

Construction Phase Services

The provisions governing the design professional’s construction phase services are substantially similar in the AIA B201 and ConsensusDOCS 240. Both contracts provide that the design professional is not responsible for specifying or reviewing construction means and methods. Both describe similar procedures for preparing change orders and reviewing and responding to RFIs. Most striking is the similarity between the provisions on the design professional’s certification of payments made to the contractor and, in particular, the limitations placed on the certifications made by the design professional.²³

One notable difference between the AIA B201 and ConsensusDOCS 240 in the construction phase provisions is in the design professional’s obligation to make site visits and reports to the owner. Under the AIA B201, the architect is required only to “visit the site at intervals appropriate to the stage of construction. . .to become generally familiar with the progress and quality of the portion of the Work completed, and to determine, in general, if the Work observed is being performed in a manner indicating that the Work, when fully

completed, will be in accordance with the Contract Documents.”²⁴ Furthermore, the architect is obligated only to “keep the Owner reasonably informed about the progress and quality of the portion of the Work completed.”²⁵

In contrast, the ConsensusDOCS 240 contains blanks to be filled in by the parties with a specific number or frequency of site visits by the design professional. The ConsensusDOCS provision also requires that the design professional “promptly provide the Owner with a written report” after each site visit.²⁶

Confidentiality

Both the AIA B102 and the ConsensusDOCS 240 contain provisions to ensure the confidentiality of proprietary information exchanged during a project. Both contracts contain obligations flowing each way, to protect the confidential information of each party. The AIA B102 provides:

If the Architect or Owner receives information specifically designated by the other party as ‘confidential’ or ‘business proprietary,’ the receiving party shall keep such information strictly confidential and shall not disclose it to any other person except to (1) its employees, (2) those who need to know the content of such information in order to perform services or construction solely and exclusively for the Project or (3) its consultants and contractors whose contracts include similar restrictions on the use of the confidential information.²⁷

Similarly, the ConsensusDOCS 240 provides:

The Architect/Engineer shall treat as confidential and not disclose to third parties, except as necessary for the performance of this Agreement or as required by law, or use for its own benefit, any of the Owner’s confidential information, know-how, discoveries, production methods and the like that is so identified in writing and disclosed to the Architect/Engineer or which the Architect/Engineer acquires in performing the Services required by this Agreement. The Owner shall treat as confidential information all design systems. . .that may be disclosed to the Owner in connection with the performance of this Agreement. The Owner and the Architect/Engineer shall each specify those items to be treated as confidential and shall mark them as ‘Confidential.’²⁸

Limited Mutual Waiver of Consequential Damages

Both contracts include similar provisions waiving consequential damages for claims arising out of the agreements, each “waiv[ing]. . .consequential damages for claims, disputes or other matters in question arising out of or relating to this Agreement.”²⁹ The ConsensusDOCS 240 includes a list of damages specifically waived: “the Owner’s loss of use of the Project, any rental expenses incurred, loss of income, profit or financing related to the Project, as well as the loss of business, loss of financing, principal office overhead and expenses, loss of profits not related to this Project, or loss of reputation” and the design professional’s “loss of business, loss of financing, principal office overhead and expenses, loss of profits not related to this Project or loss of reputation.” The ConsensusDOCS 240 waiver also specifically applies to damages arising from the termination of the agreement: “The provisions of this Paragraph shall also apply to the

termination of this Agreement and shall survive such termination.”³⁰

In contrast, the AIA B102 consequential damages provision contains a specific exception for the architect’s damages arising from the termination of the agreement. It provides that “[t]his mutual waiver is applicable, without limitation, to all consequential damages due to either party’s termination of this Agreement, except as specifically provided in Section 5.7.”³¹ Section 5.7 includes “expenses directly attributable to termination for which the Architect is not otherwise compensated, plus an amount for the Architect’s anticipated profit on the value of the services not performed by the Architect.”³² Thus, unlike the ConsensusDOCS 240, the AIA B102 contains additional protection for the design professional in the event of the agreement’s termination.

CONCLUSION

As demonstrated above, despite the many similarities between the 2007 AIA owner-architect agreement and its new counterpart, the ConsensusDOCS 240, there are some important differences, notably in the area of dispute resolution. In particular, the ConsensusDOCS 240 requires joinder of necessary parties to resolve a dispute, whereas the AIA B102 allows joinder only with the consent of the party to be joined. The ConsensusDOCS 240 generally provides a more comprehensive approach to dispute resolution involving multiple steps that must be exhausted before reaching mediation and binding resolution. Among those steps are a series of “direct discussions” between representatives and principals of the parties; “mitigation,” involving a project neutral or review board (which must be paid for regular site visits to maintain familiarity with the project); mediation, and, finally, arbitration or litigation (according to the parties’ preference). The AIA contract also allows parties to choose between arbitration and litigation, but the 2007 edition contains an important change from previous editions. The AIA B102 has eliminated the long-standing provision making arbitration the default mechanism for binding dispute resolution; now, if parties do not specifically choose arbitration when executing the agreement, they will proceed to litigation in the event of a dispute.

Other significant differences between the AIA and ConsensusDOCS contracts include the ConsensusDOCS 240’s heavier burden on design professionals to generate construction documents that “completely describe all work necessary to bid and construct the project,” the ConsensusDOCS 240’s greater emphasis on the frequency of site visits and reporting by the design professional, and the AIA B102’s provision excepting the architect’s termination damages from the general waiver of consequential damages.

These differences between the AIA and ConsensusDOCS contracts may suggest that the AIA contracts are more “architect-friendly” and that the ConsensusDOCS are more favorable to owners and contractors. Notwithstanding that general impression, the two contract systems contain more similarities than differences, and each has virtues that design professionals may wish to adopt. (Particularly, the ConsensusDOCS 240’s emphasis on a stepped, non-binding dispute resolution a process is innovative and likely of great benefit to design professionals and their insurers.) Accordingly, rather than viewing the AIA and ConsensusDOCS contracts as competitors, design

professionals may instead benefit from careful selection of those provisions in each contract that best meet the needs of the project and interests of the parties.~

ENDNOTES

¹The 2007 edition of the AIA contracts replaces the 1997 AIA B141—Part 1 with the 2007 AIA B102 and the 1997 AIA B141—Part 2 with the 2007 AIA B201. This change is part of a comprehensive renumbering system, as outlined below:

The first letter in the contract name represents the “series” of agreements: “A” for Owner/Contractor Agreements; “B” for Owner/Architect Agreements; “C” for other agreements; “D” for miscellaneous; “E” for exhibits; “F” for “unused” and “G” for forms.

The first number represents the “type” of agreements: “1” for Prime Agreements; “2” for Conditions/Scopes; “3” for Bond/Qualifications; “4” for Sub-agreements; “5” for Guides; “6” for “unused”; “7” for Bid/Construction; and “8” for Architect’s Office.

The second number represents the project “delivery” method: “0, 1, 2” for Conventional method – design-bid-build; “3” for CMA, CMc; “4” for Design-build; “5” for Interiors; and “6” for International.

The third number represents the “sequence”: “1, 2, 3. . .”

²The AIA web site provides a line-by-line comparison of previous AIA contract documents with new AIA 2007 contract documents. See http://www.aia.org/docs_free_paperdocuments#comparisons

³Given that the two-part AIA B141 owner-architect scheme (which became the AIA B102 and B201 in the 2007 edition) is the most popular and commonly-used form of owner-architect agreement, we have focused our analysis on the differences between the new ConsensusDOCS 240 and the AIA B102 and B201, rather than the AIA B101, which is not as widespread in its use.

⁴2007 AIA B102 § 4.3.4.2.

⁵ConsensusDOCS 240 § 9.6.

⁶2007 AIA B102 4.3.4.2.

⁷ConsensusDOCS 240 § 9.2.

⁸ConsensusDOCS 240 § 9.3.1.

⁹2007 AIA A201 § 15.2.1.

¹⁰2007 AIA B201 § 3.3.1.11.

¹¹2007 AIA B102 § 4.3.1.1.

¹²ConsensusDOCS 240 § 9.5.

¹³2007 AIA B102 § 4.2.4.

¹⁴ConsensusDOCS 240 § 9.5.1.

¹⁵1997 AIA B141 § 1.3.7.3.

¹⁶2007 AIA B102 § 4.1.1.

¹⁷2007 AIA B102 §1.2.

¹⁸ConsensusDOCS 240 § 2.2.

¹⁹ConsensusDOCS 240 § 2.4.

²⁰2007 AIA B102 § 1.4.

²¹2007 AIA B102 § 2.4.1; ConsensusDOCS 240 §3.2.5.

²²ConsensusDOCS 240 §3.2.5.

²³The AIA B102 provides: “The issuance of a Certificate for Payment shall not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed

construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) ascertained how or for what purpose the Contractor has used money previously paid on account of the Contract Sum." AIA B102 § 2.6.3.2.

In almost identical language, the ConsensusDOCS 240 provides: "The Architect/Engineer's certification for payment shall not be a representation that the Architect/Engineer has: (a) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work; (b) reviewed construction means, methods, techniques, sequences or procedures for the Contractor's Work; (c) reviewed copies of requisitions received from Subcontractors and Material Suppliers and other data requested by the Owner to substantiate the Contractor's right to payment; or (d) ascertained how or for what purpose the Contractor has used money previously paid." ConsensusDOCS 240 § 3.2.8.6.

²⁴2007 AIA B201 § 2.6.2.1.

²⁵2007 AIA B201 § 2.6.2.1.

²⁶ConsensusDOCS 240 § 3.2.8.3.

²⁷2007 AIA B102 § 7.8.

²⁸ConsensusDOCS 240 § 3.10.

²⁹2007 AIA B102 § 4.1.3; ConsensusDOCS 240 § 5.4.1.

³⁰ConsensusDOCS 240 § 5.4.1.

³¹2007 AIA B102 § 4.1.3.

³²2007 AIA B102 § 5.7.