

NEW CONSTRUCTION DOCUMENTS

The ConsensusDOCS referred to in my last article [05/09 E-News article published for WSPE entitled “ConsensusDOCS, LLC Competes With EJCDC and AIA”] were published in 2007 as an alternative to AIA documents. The Associated General Contractors of America spearheaded the publication of alternative documents that more accurately contain the concerns of contractors of what they considered the self-serving aspects of AIA documents. This dissatisfaction of the construction industry and some parts of the engineering profession with AIA documents has been apparent for many years.

Both the AIA and EJCDC documents refer to the design professional as the owner’s representative. While the relationship between owner and professional designer has always considered the professional designer as the owner’s representative, the dissatisfaction with that designation has been growing within the construction industry. The ConsensusDOCS do not automatically designate the design professional as the owner’s representative. Instead, the ConsensusDOCS provide for the owner selecting a representative. That leaves the design professional somewhat uncertain as to the nature and extent of the designer’s responsibility for reviewing the contractor’s adherence to the design documents. It may leave the major responsibility for the approval of the contractor’s work with the owner rather than with the design professional.

Once the contract exists between the owner and design professional, the ConsensusDOCS, unlike the AIA and EJCDC documents, removes the design professional from the change order process. Under the ConsensusDOCS, either the contractor or the owner initiates a change order.

For decades, the contractor has had the obligation to report field conditions which adversely affect the contractor’s work. Such an obligation may even be implied if it is not expressed in the contract between owner and contractor. The owner cannot be expected to

resolve a problem not brought to its attention. Where the contractor does advise of restraints to its work in the field, the owner's representative (previously the architect) has the obligation to investigate the field conditions and determine whether they justify an increase in contract price or extension of time to perform. Similarly, the EJCDC documents provide for the engineer to investigate differing or obstructing field conditions.

Since the ConsensusDOCS do not expressly provide for the design professional to be the owner's representative, and because the ConsensusDOCS do not place the responsibility upon the architect or engineer for investigating differing site conditions, a legal question will arise as to who has the responsibility to resolve issues involving differing field conditions when notice is given by the contractor to the owner of such problems. If under the ConsensusDOCS the owner has not appointed the architect or engineer as the owner's representative, presumably the responsibility will remain with the owner to resolve issues arising because of differing field conditions.

Under both AIA and EJCDC documents, delays caused the contractor by a variety of project conditions beyond the contractor's control usually entitles the contractor to at least a time extension and in some instances where costs increase as a result of the delay, to additional compensation. As is to be expected, given the history of the ConsensusDOCS, they entitle the contractor to an increase in the time of performance or compensation where the delay, restraint or field impediment is not the fault of the contractor. Many standard contracts provide for an extension of time, but not of compensation. Contractors have long felt that pre-published contracts inadequately provide for entitlement to additional compensation.

The nature and extent of the design professional's responsibilities on a project, the contractor's right to an extension of time or an increase in compensation and the right to recover

consequential damages have been fundamental issues in the past. It is in these areas that claims

most often arise. The ConsensusDOCS provide for changes in the resolution procedure of these and other issues.

Historically, the AIA and EJCDC documents have provided for arbitration as a preferred choice in claims resolutions. Initially, the arbitration provisions found in these contracts prevented joinder of other parties who may be responsible for the economic losses of an aggrieved party. As time went on, the AIA and EJCDC documents became more flexible in regard to the joinder of other parties to accomplish a complete resolution of a dispute among all responsible parties. However, in an effort to avoid the protracted and costly arbitration process, a mediation provision was added to the pre-published documents as a condition precedent to arbitration. As a non-binding process, mediation constituted a more sophisticated negotiation protocol which was to be exhausted before arbitration could be commenced.

The 2007 version of AIA Document A101 contains Article 6, entitled “Disputes Resolution.” That paragraph provides for an “Initial Decision Maker” (the IDM) who need not be the architect if the parties have appointed someone else. Under AIA Document A201, Article 15, the IDM has the responsibility to review the claim and to take action by either seeking additional information, rejecting the claim, sustaining the claim or otherwise refusing to resolve the claim for reasons not altogether clear. This process of requiring an initial decision maker in the resolution of disputes is unlike the historical documents of AIA or EJCDC which delegated that responsibility to the design professional. However, those historical documents did not provide for an alternative procedure if the design professional was regarded as partially responsible for the claim.

While the 2007 documents require mediation, if it is unsuccessful, arbitration is no longer the required disputes resolution procedure. Rather, the parties are to select whether arbitration or litigation or some other procedure to be utilized.

If the IDM is unsuccessful in resolving a dispute, after mediation the claim will go to either arbitration or litigation as the parties choose for the resolution of claims. Under both A201 and the ConsensusDOCS, express provisions waive consequential damages.

There are many other differences between the 2007 editions of the AIA, EJCDC, and ConsensusDOCS which the reader of this article is urged to review and compare. This article is intended only to alert the reader to the ConsensusDOCS as compared to the 2007 editions of the AIA and EJCDC documents. In this writer's opinion, the changes occurring in the 2007 publications of AIA, EJCDC and ConsensusDOCS will make it more difficult and costly to follow an agreed protocol for the resolution of disputes. Perhaps lawyers are the only ones who will benefit from these changes.

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