

**ADVANTAGES OF THE CONSENSUSDOCS CONSTRUCTION
CONTRACTS OVER THE AIA DOCUMENT A201-2007 EDITION
GENERAL CONDITIONS**

By: Philip E. Beck, Partner, Smith, Currie & Hancock LLP

**Philip E. Beck, Esq.
Smith, Currie & Hancock LLP
2700 Marquis One Tower
245 Peachtree Center Avenue NE
Atlanta, Georgia 30303-1227
Phone: 404/582-8028
Fax: 404/688-0671
Email: pebeck@smithcurrie.com**



1. The ConsensusDOCS are the result of a collaborative effort by all stakeholders (Contractors, Owners, Designers, Subcontractors & Suppliers), and thus have “buy-in” from all participants; whereas the AIA Documents are created solely by Architects (with limited input from Owners and Contractors, who had no seat at the table), and – in the view of many – for Architects.
2. The ConsensusDOCS allow the Owner to establish a role for the Architect during the construction phase of the project which matches the Owner’s needs and desires; whereas the AIA Documents keep the Architect in the center of everything during the construction phase – a role many Owners no longer wish the design Architect to play.
3. The ConsensusDOCS more fairly allocate risks among the parties and match responsibility and authority; whereas the AIA Documents give the Architect a lot of authority, with little responsibility or accountability (for example, Section 1.1.2 of the A201 says that there is no contractual relationship between the Architect and the Contractor and the Contractor has no recourse against the Architect; but Section 3.9.3 gives the Architect the right to veto the Contractor’s choice for Project Superintendent; Section 1.1.2 also says the Architect is entitled to enforce the Contractor’s obligations under its contract with the Owner; but the Contractor has no reciprocal right to hold the Architect accountable for the performance of its obligations).
4. If there is a genuine dispute as to whether certain work the Contractor is directed to perform constitutes a change to the contract, or a genuine dispute as to the value of a change, the AIA Documents require the Contractor to proceed with the work at its own expense (i.e., finance the work for the Owner), in the hope that it may be reimbursed later (this obligation is triggered by the issuance of a Construction Change Directive); whereas the ConsensusDOCS take a fairer approach by providing that, in this circumstance, the Owner and the Contractor will split the cost of the estimated work, with both parties reserving the right to determine ultimate responsibility later.

5. In the case of a termination for convenience, the AIA A201 is probably overly generous to the Contractor, providing that, if the Owner exercises its right to terminate for convenience, it must pay the Contractor all of the profit the Contractor would have earned on the unperformed work. The ConsensusDOCS recognize that the Contractor may incur costs after the date of termination due to the need to reassign its personnel and equipment, etc., but takes a fairer approach of requiring the parties to negotiate an amount upfront that the Owner would pay the Contractor, in addition to the value of the work performed prior to termination. While the AIA provision is overly generous to the Contractor, it could also work to the detriment of the Contractor because it creates a strong incentive for the Owner to terminate the Contractor for default rather than to terminate for convenience, even though the alleged default may be highly disputed or questionable.
6. The ConsensusDOCS gives the Contractor the right to require the Owner to demonstrate its ability to fund the project – see ConsensusDOCS 200, Paragraph 4.2. This benefits both the Contractor and all of subcontractors, suppliers, etc. By contrast, the AIA has modified Section 2.2.1 of the A201 to limit the Contractor’s right to request financial assurance. The Contractor can now only request financial assurance: (1) prior to the commencement of the work, or (2) after commencement of the work only if (a) the Owner fails to make payments (note that this is plural), (b) the contract price materially changes as a result of changes in the work, or (c) the Contractor “identifies in writing a reasonable concern regarding the Owner’s ability to make payment when due”) (with “reasonable”, of course, being a subjective standard, which is in the eye of the beholder).
7. The AIA Document A201 inhibits, and in fact prohibits, communication between the Owner and Contractor. Amazingly, Section 4.2.4 of the A201 states that “Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized, the Owner and Contractor shall endeavor to communicate with each other through the Architect about matters arising out of or relating to the Contract.” Lack of communication is, in my experience, the major cause of construction disputes and litigation. It is difficult to understand why the parties would want a contract which precludes the parties from talking directly to one another. AIA’s explanation of this provision is that they need to protect the Owner from the Contractor (except for sophisticated Owners, who they expect to delete this provision).
8. Section 11.1.4 of the AIA Document A201 requires the Contractor to name the Owner and the Architect as additional insureds on the Contractor’s General Liability Insurance Policy. This requires the Contractor to be the Owner’s *and the Architect’s* insurance provider, and costs the Contractor money. Section 11.1.2 also requires the Contractor to provide Completed Operations Insurance coverage.
9. Under the AIA family of documents, the A201 General Conditions is intended to be a stand-alone, one-size-fits-all document which is incorporated by reference into the contract itself. This sometimes leads to confusion and inconsistencies between the contract and the General Conditions. Also, many Contractors, and especially subcontractors, never see the General Conditions. This should not be a problem if the Owner uses the A201 without any modifications, but can become a real problem if the Owner modifies the A201. The ConsensusDOCS take the approach of incorporating all of the basic General Conditions into the body of the contract itself.

10. While the A201 is intended to be a “one-size-fits-all” document, it really is written more from the perspective of a lump sum contract; and, as a result, some of the provisions are ambiguous when applied to a cost-reimbursable contract. For this reason, the ConsensusDOCS approach of incorporating the “General Conditions” into the body of contract probably makes more sense because it allows the General Conditions to reflect the nature of the contract. Admittedly, at this point, the “General Conditions” are virtually identical from one ConsensusDOCS construction contract form to another; but I anticipate that may change over time, as the documents are revised and improved.
11. Obviously, the AIA Documents have a long history and proven track record, and dominate the current market. However, over time, the fact that the AIA Documents are written by Architects (with limited input from other segments of the industry, who had no seat at the table), whereas the ConsensusDOCS are the product of a collaborative effort by all segments of the industry, positions the ConsensusDOCS well to be more universally received and to be perceived as more fair and balanced, in the long run.
12. It is anticipated that the ConsensusDOCS will be revised on a much more frequent basis than the every-ten-year cycle followed by AIA, which will allow the ConsensusDOCS to continue to evolve and to better reflect current technology and best practices.
13. Although the AIA Documents have now, in the 2007 edition, created a new entity called the “Initial Decision Maker” who the parties can designate to be the initial decider of claims and disputes in lieu of the Architect, the default if no “IDM” is designated, is still to the Architect. With all due respect to architects, there is nothing in their training or background which particularly qualifies them to be a judge, jury, or arbitrator of construction claims and disputes. Moreover, Architects are often presumed to side with the Owner, since it is the Owner who pays them, creating an inherent conflict of interest.
14. While the AIA Document dispute resolution procedure has changed radically in the 2007 edition of the AIA Documents, so that the parties can now choose between arbitration and litigation when they sign the contract, the AIA Documents still create an adversarial system; whereas the ConsensusDOCS encourage the parties to resolve disputes on their own, through direct negotiation, before involving any third parties (again supporting the goal of effective communication).
15. The 2007 changes to the AIA Documents were designed, in part, to give the Owner greater control of the subcontractor payment process; for example, it authorizes the issuance of joint checks in certain circumstances. While subcontractors certainly deserve to be paid for their work, it may be inappropriate for the Owner to interfere with the relationship between the General Contractor and its subcontractors (especially where the project is bonded and the Owner has no exposure), and many Owners do not want that “right” because Subcontractors will look to them to exercise it. It is true that it may be in the Owner’s best interest to see that subcontractors are properly paid; but, it is also in the Contractor’s best interest to make sure the Owner discharges all of its other contractual and legal obligations (such as to its obligations to its lender and its Architect), yet the General Contractor does not interfere with that relationship and the contract does not give the Contractor the right to do so.

16. The new 2007 AIA Document A201 requires the Contractor to submit, for the Architect's approval, a submittal schedule (Section 3.10.2). This is a good idea. However, the penalty for failing to do so is too severe. Under Section 3.10.2, if the Contractor fails to submit a submittal schedule, the Contractor is not entitled to any additional compensation or a time extension based upon the Owner's or the Architects slow processing of submittals, *regardless* of how long they take – in other words, if the Contractor fails to timely submit a submittal schedule, the Architect has a blank check to take as long as it wants to process submittals and the Contractor has no right to complain.