

Key Contracting Issues

Owner & Design Professional Agreements

ConsensusDocs v. AIA

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Course Description

Speakers will review and analyze key provisions in owner and design professional agreements.

The speakers will use standard AIA and ConsensusDocs contracts to review, analyze and discuss key contracting issues, including standard of care, BIM, dispute resolution, indemnification, and more.

Learning Objectives

At the end of this program, participants will be able to:

- 1) Identify key contract provisions that should be in every Owner and Design Professional Contract, with specific reference to AIA and ConsensusDocs provisions
- 2) Analyze and discuss legal and practical implications of different ownership of documents provisions, including owner and design professional perspectives on this issue
- 3) Analyze and discuss standard form indemnification provisions, as well as issues that can trigger an indemnification provision and the impacts on owners and design professionals
- 4) Evaluate dispute mitigation and resolution options and discuss legal and practical considerations to ensure you select the best process and forum for your project

ConsensusDocs

American Institute of Architects



ConsensusDocs®
BUILDING A BETTER WAY

AIA Contract Documents®
THE INDUSTRY STANDARD.

Endorsed by 40+ industry associations

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THE AMERICAN INSTITUTE OF ARCHITECTS

Comparison of AIA B101 and ConsensusDocs 240

- Today's Discussion – Comparing the Two Most Commonly Used Owner/Architect Form Agreements
- The Focus – Selected Significant Issues & Major Differences
- Tailoring Your Contract – Customization is Possible & Often Necessary

**Ownership, Copyright,
Use and Transmission of
Paper and Electronic
Documents**

Designer's Documents

Brief History of the Technology:

- Drawings by hand
- Advent of CADD
- Adding information “in the lines”
- Interactive databases
- Cloud computing

Competing Interests

- Owner's need to protect proprietary information
- Designer's authorship
- Intellectual property rights
- Other protectable interests

Ownership of Documents

ConsensusDocs 240

- Owner Shall Receive Ownership (*Except Copyrights*) of All Documents, Drawings, Data Prepared by Architect or Consultants for the Project, Upon Final Payment or Payment of All Sums Due in the Event of a Termination
(*Art. 10.1*)

AIA B101

- Architect and its Consultants are Owners of Their Respective Instruments of Service, Retaining All Rights, Including Copyrights, in the Documents
(*Art. 7.2*)

Copyright Ownership

ConsensusDocs 240

- Owner Has the Option of Being Granted Copyright Interest in Documents, Contingent on Making All Payments Required, Including a Stated Copyright Fee
(Art. 10.1.1)

AIA B101

- Architect Grants Owner a Non-Exclusive License in Instruments of Service, Solely for Use in Constructing, Using, Maintaining Altering and Adding to the Project, Provided Owner Substantially Performs, Including Making Prompt Payments of All Sums Due
(Art. 7.3)

Termination of Copyright Interest

ConsensusDocs 240

- Owner Can Use Documents to Complete the Project After Owner Termination for Convenience or Termination for Cause by Either Party, If the Owner Pays All Sums Due (*Art. 10.1.2*)

AIA B101

- Owner Non-Exclusive License Terminates if –
 - *Owner Does Not Pay All Sums Due*
 - *Architect Terminates the Contract for Cause (Art. 7.3)*
 - *Owner Does Not Pay an Extra Fee After a Termination for Convenience (Art. 11.9)*

Transmission of Documents

ConsensusDocs 240

- CD 200.2 – Electronic Communications Protocol Addendum
 - Establishes Procedures & Administrative Framework for Electronic Document Transfer
 - More Detailed Document Than the AIA Counterpart
 - Provides Limited License to Use Documents
 - Mutual Indemnity for Damages from Failure to Conform to Protocol

AIA B101

- E201 (2007) – Digital Data Protocol Exhibit
 - Establishes Procedures for Transmission and Exchange of Digital Data
 - Warranty of Ownership, No Warranty of Correctness
 - No Direct License to Use
 - Indemnity by Receiving Party for Unlicensed Use or Modification
- C106 (2007) – Digital Data Licensing Agreement

Indemnification

Indemnification

ConsensusDocs 240

- Mutual Indemnification Based on Comparative Negligence (*Art. 7.1*)
- No Duty to Defend
- Architect Indemnifies Owner, Constructor and Others at the Site
- For Personal Injury, Sickness, Death and Property Damage
- Attorneys' Fees / Costs

AIA B101

- No Indemnity By Architect in B101
- B103 Contains Architect Indemnity for 3rd Party Claims Caused by Architect Only to the Extent of Insurance Proceeds (*Art. 8.1.3*)

Indemnification

ConsensusDocs 240

- Owner Indemnifies Architect for Post-Construction Prohibited Use of Documents (*Art. 10.1.3*)
- Architect Indemnification of Owner for negligence-caused delays (*Art. 5.2*)
- Mutual patent/copyright Indemnities (*Art. 3.9, 4.3*)

AIA B101

- Owner Indemnity Against 3rd Party Claims Arising From Owner's Unauthorized Use of Documents, Unless Proper Termination for Cause (*Art. 7.3.1*)
- Owner & Architect "Warrant" Ownership of License for Furnished Instruments of Service (*Art. 7.1*)

Standard of Care

Standard of Care

ConsensusDocs 240

- 2011 Addition of a Legal Standard of Care:

“In accordance with the standard of professional skill and care required for a Project of similar size, scope and complexity, during the time in which the Services are provided.” *(Art. 2.1)*

AIA B101

- Stated Standard:

“Consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances.”
(Art. 2.2)

Relationship of Trust & Confidence

ConsensusDocs 240

- “Design Professional accepts a relationship of trust and confidence with the Owner”
- “And will furnish the skill and judgment required above in furthering the interests of the Owner.”
(Art. 2.2)

AIA B101

- No Attempt to Establish a Fiduciary Relationship Between the Design Professional and the Owner

Standard of Completeness

ConsensusDocs 240

- Provide Architectural & Engineering Services Necessary to Design the Project (Art. 2.1)
- Construction Documents shall describe all Work necessary to bid and construct the Project.
(Art. 3.2.5)

AIA B101

- Provide the Professional Services as Set Forth in this Agreement (Art. 2.1)
- Prepare Construction Documents Setting Forth in Detail the Quality Levels of Materials and Systems and Other Requirements for the Construction
(Art. 3.4.1)

Building Information Modeling (BIM)

BIM

Brief History of the Technology:

- Drawings by hand
- Advent of CADD
- Adding information “in the lines”
- Interactive databases
- Cloud computing

BIM

Development of Collaboration:

- Shop drawings
- Specifications
- “Value Engineering”
- Design/build
- “Partnering”
- Collaborative approach

BIM Defined:

Building Information Modeling is the development and use of a computer software model to simulate the construction and operation of a facility.

The resulting model, a **Building Information Model**, is a data-rich, object-oriented, intelligent and parametric digital representation of the facility, from which views and data appropriate to various users' needs can be extracted and analyzed to generate information that can be used to make decisions and improve the process of delivering the facility.

[AGC of America, *Contractor's Guide to BIM*, 1st ed., p. 3 (2006)]

AIA Approach – Integrated Project Delivery (IPD):

Integrated Project Delivery (IPD) is a project delivery approach that integrates people, systems, business structures and practices into a process that collaboratively harnesses the talents and insights of all participants to optimize project results, increase value to the owner, reduce waste, and maximize efficiency through all phases of design, fabrication and construction.

[AIA, *Integrated Project Delivery: A Guide* (2007)]

BIM

ConsensusDocs 240

- Required to use BIM if Owner requires
- Reference to separate BIM addendum (ConsensusDocs 301)

AIA B101

- AIA E202-2008, Building Information Modeling Protocol Exhibit

BIM

ConsensusDocs 301

AIA E202-2008

- General Principles

- Does not restructure any other agreements (1.1)
- Parties may append or incorporate (1.3)
- Does not change Designer's obligations or role (1.4)
- Does not change Owner's warranties as to design (1.5)

- General Provisions

- Incorporated by reference into other agreements (1.1.1)
- BIM defined (here AIA defines the model) (1.2.1)
- Level of development (LOD) (1.2.2)

BIM

ConsensusDocs 301

AIA E202-2008

- Types of Models
 - Definition of “Model” (2.14)
 - Design Model (2.6)
 - Construction Model (includes the equivalent of shop drawings) (2.2)
 - Federated Model (individual models do not change) (2.8)
 - Full Design Model (Arch., Struct., MEP) (2.9)
 - Project Model (2.15)
- Level of Development (LOD)
 - LOD 100 (overall massing/3D) (3.2)
 - LOD 200 (generalized assemblies; approx. dimensions) (3.3)
 - LOD 300 (accurate dimensions; traditional CDs) (3.4)
 - LOD 400 (complete fabrication & detailing) (3.5)
 - LOD 500 (altering and adding to the model) (3.6)

BIM

ConsensusDocs 301

- Information Management
 - Role and responsibility of Information Manager (3.2)
 - User accounts
 - Access rights and controls
 - Encryption measures
 - Track data entry
 - Backup and maintain data

AIA E202-2008

- Protocols
 - Model Ownership (2.2)
 - Model Requirements (2.3)
 - Model Management (2.4)

BIM

ConsensusDocs 301

AIA E202-2008

- BIM Execution Plan
 - Contact info on participants (4.3.1)
 - Identify, define and update content of models (4.3.2 - 4.3.5)
 - Schedule for delivery and update of models (4.3.6 - 4.3.7)
 - Procedures and protocols (4.3.9 - 4.3.29)

- Model Elements
 - Reliance on model elements (4.1)
 - Model element table (4.3)
 - Divides the model into separate elements
 - Utilizes CSI UniFormat™ designations

Termination

Owner Termination for Convenience

ConsensusDocs 240

- Owner Right to Terminate for Convenience
- Requires 7 Days Written Notice
- Architect May Recover –
 - Payment for Services Properly Performed
 - Any Proven Loss, Cost or Expense re Services
 - Termination Premium Set Out in Agreement

(Art. 8.2)

AIA B101

- Owner Right to Terminate for Convenience (*Art. 9.5*)
- Requires 7 Days Notice
- Architect May Recover –
 - Payment for Services Performed
 - Reimbursable Expenses Then Due
 - Termination Expenses in Art. 9.7, including –
 - Expenses Directly Attributable to Termination
 - Anticipated Profit
 - Licensing Fee (*Art. 11.9*)

Mutual Termination for Default

ConsensusDocs 240

- Mutual Right to Terminate for Material Breach
- Requires 7 Days Written Notice & Opportunity to Take “Appropriate Corrective Action”
- Then Written Declaration of Termination Required

(Art. 8.1)

AIA B101

- Mutual Right to Terminate for Failure Substantially to Perform
- Requires 7 Days Written Notice But No Mention of Opportunity to Cure
- No Requirement of a Second Declaration of Termination

(Art. 9.4)

Architect Termination

ConsensusDocs 240

AIA B101

- Work Continuation Clause --
 - Architect Will Continue to Perform its Services During any Dispute Proceeding
 - Owner Will Continue to Pay Undisputed Sums
(Art. 9.1)
- *But, Architect Still Has Termination Rights for Material Breach – such as a Failure to Pay?*

- Owner Failure to Make Payment is Substantial Nonperformance and Grounds for –
 - Termination, or
 - Suspension of Services
- To Stop Work, 7 Days Written Notice Required
- Architect Entitled to All Sums Due, Plus Expenses of Suspension & Resumption & Fee Adjustment (Art 9.1)

Dispute Resolution

Dispute Resolution Overview

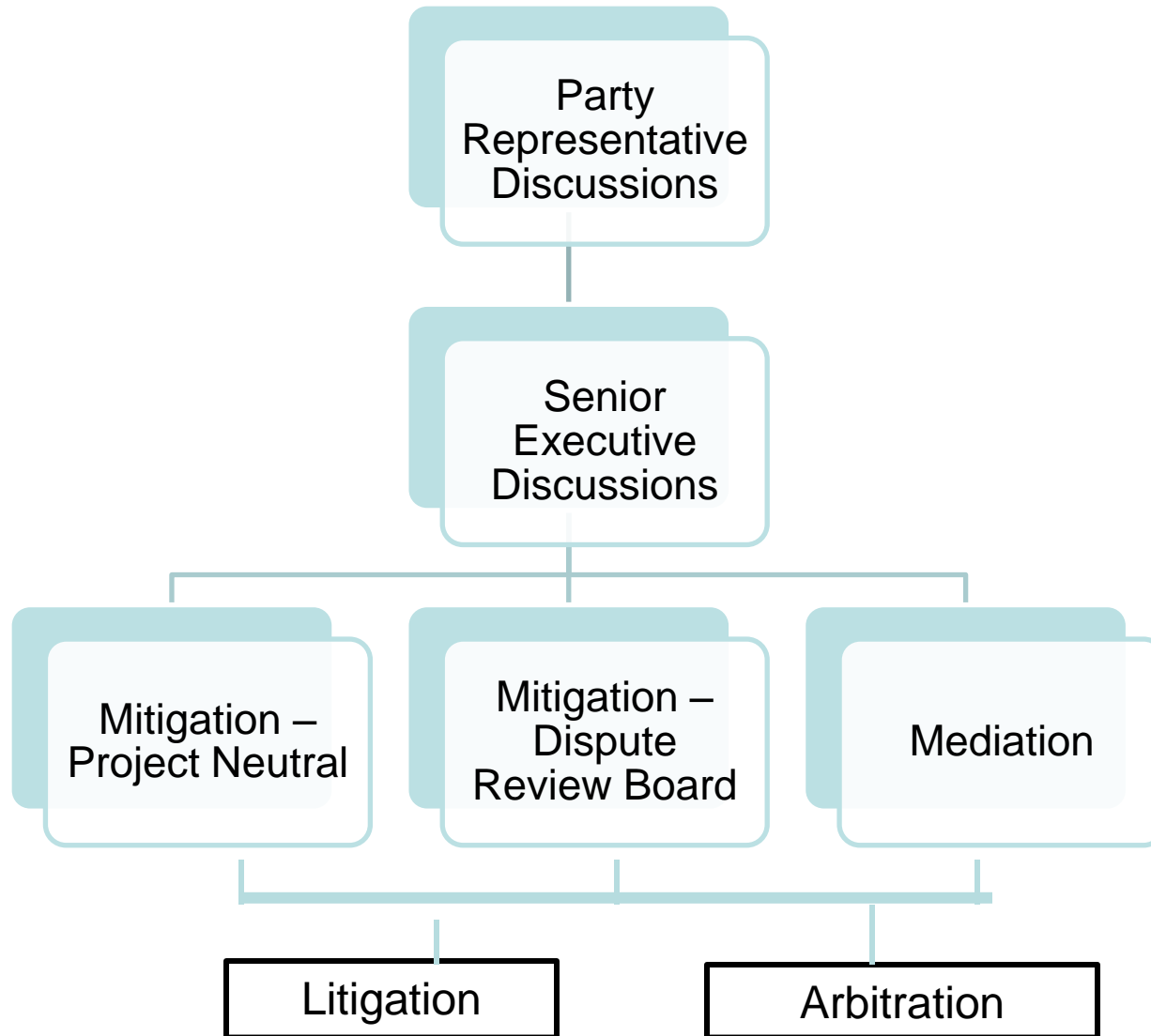
ConsensusDocs 240

- Customizable Multi-Step Dispute Resolution Procedure (*Art. 9*)
- Choices Among ADR Devises –
 - Stepped Negotiations
 - Standing Neutral
 - Dispute Review Board
 - Mediation
 - Arbitration
 - Litigation

AIA B101

- A More Traditional Disputes Process (*Art. 8*)
- Mediation and Then Arbitration or Litigation
- No Default Selection of Arbitration – A Change to a 100 Year-Old Default Disputes Procedure Choice

ConsensusDocs Disputes



ConsensusDocs Disputes

- Emphasis on Speed and Multiple Opportunities for Informal Settlement Procedures
- Is It Too Quick?
- Non-Binding Mitigation Decision Can Be used As Evidence in Final Arbitration or Litigation

- Party Representatives – 5 Business Days to Resolve
- Senior Executives -- 15 Days from “First Discussion”
- Mitigation Non-Binding Decision -- 5 Business Days of Referral Unless Good Cause Shown
- Mediation (if No Mitigation Convened) Within 30 Days of First Discussion & Resolved Within 45 Days

AIA Disputes

- Option to Choose the Architect as the IDM for Owner/Contractor Disputes
- Check-the-Box – Arbitration or Litigation or Something Else
- Litigation is the Default if the Arbitration Box is Not Selected

- Mediation First – A Condition Precedent to Litigation or Arbitration
- AAA Rules & Administration for Mediation & Arbitration Unless Agreed Otherwise
- Minimum Stay of 60 Days for Mediation
- Arbitration or Litigation as a Final Step (*Art. 8*)

Disputes Procedures

ConsensusDocs 240

- Fees & Costs (*Art. 9.5.1*)
 - Prevailing Party Recovers
- Exclusive Rights & Remedies (*Art. 10.10*)
 - The Parties' Rights, Liabilities, Responsibilities & Remedies shall be exclusively those set out in the Agreement.
- AAA Administration? (*Art. 9.5*)
 - AAA Rules But Administration as Mutually Agreed

AIA B101

- Statute of Limitations
 - Prior Editions Established Accrual Dates for Claims Under the Contract
 - '07 Edition: S/L Starts as Established by Applicable Law, but No Claims Later than 10 Years After Substantial Completion
- Waiver of Consequential Damages (*Art. 8.1.3*)
 - Except Architect Termination Costs

Consolidation & Joinder

ConsensusDocs 240

- Stated Goal of Including All Involved Parties (Art. 9.6) –
- Parties “agree that all Parties necessary to resolve a claim shall be Parties to the same dispute resolution procedure”
- Appropriate provisions shall be in all other contracts relating to the Project for consolidation & joinder

AIA B101

- Joinder of Parties –
 - Substantial Involvement in Common Question of Law or Fact
 - Whose Presence is Required for Complete Relief
 - Provided the Party Consents to be Joined(Art. 8.3.4.2)

Consolidation & Joinder

ConsensusDocs 240

- Stated Goal of Including All Involved Parties –
- Parties “agree that all Parties necessary to resolve a claim shall be Parties to the same dispute resolution procedure”
- Appropriate provisions shall be in all other contracts relating to the Project for consolidation & joinder

AIA B101

- Consolidation of Matters
 - Other Arbitration Agreement Permits Consolidation
 - Other Arbitration Substantially Involves Common Questions of Law or Fact
 - Arbitrations Employ Materially Similar Procedural Rules & Methods for Selecting Arbitrators

(Art. 8.3.4.1)

Questions?

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