

# AIA v. ConsensusDocs

## Overview Comparison Between AIA v. ConsensusDOCS Contract New Provisions in the AIA 2007 Edition versus the New ConsensusDOCS

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Round	Issue	ConsensusDOCS	AIA
1	<b>General Philosophy</b>	<ul style="list-style-type: none"><li>• Drafted by consensus of Owners, Contractors &amp; others</li><li>• AIA declined to participate</li><li>• Allocates risks to who may control them</li><li>• Infuses A/E into risk matrix</li></ul>	<ul style="list-style-type: none"><li>• Selling point is its unevenness</li><li>• Supposedly favors Owners</li><li>• Avoids A/E liability &amp; protects A/E interests</li><li>• Further diminishes historical role of A/E</li></ul>

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<p><b>2</b></p>	<p><b>Instruments of Service &amp; Digital Data Transfer</b></p>	<p>¶ 10.1 Instruments of Service</p> <ul style="list-style-type: none"> <li>• Owner has rights of use and ownership w/o copyright</li> <li>• Payment or termination triggers ownership for use to complete Work</li> <li>• Owner may purchase copyright</li> <li>• Owner’s rights include use to maintain, renovate, remodel or expand Project               <ul style="list-style-type: none"> <li>—use is at O’s sole risk</li> <li>—O indemnity required</li> </ul> </li> <li>• A/E’s reuse is restricted</li> </ul> <p>¶ 10.2 Digital Transfer of Data</p> <ul style="list-style-type: none"> <li>• CD 200.2 (2007)</li> <li>• Digital data may be relied upon</li> <li>• Pass through to every tier</li> <li>• IT Management Coordinator</li> <li>• Encourages consensus but leaves ultimate control with Owner</li> <li>• Provides for 3<sup>rd</sup> party administrator</li> </ul>	<p>¶ 1.1.7 Instruments of Service</p> <ul style="list-style-type: none"> <li>• Eliminates Project Manual</li> <li>• A/E owns the IoS ¶1.5</li> <li>• Restricts use by Owner</li> </ul> <p>¶ 1.6 Digital Transfer of Data</p> <ul style="list-style-type: none"> <li>• Leaves it to the parties to figure things out</li> <li>• No guidance in the document re protocols</li> <li>• AIA C 806 (2007)               <ul style="list-style-type: none"> <li>—Licensing Agreement between 2 parties only</li> <li>—Non-exclusive license for use for Project only</li> <li>—Transferor warrants only ownership</li> <li>—Transferee must indemnify transferor</li> </ul> </li> <li>• AIA E 201 (2007)               <ul style="list-style-type: none"> <li>—Digital Protocol Exhibit</li> <li>—Identical to C 806</li> <li>—Except for a blank page for the protocol</li> <li>—No guidelines provided for implementation</li> </ul> </li> </ul>
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		<ul style="list-style-type: none"> <li>• Addresses cost sharing among construction entities</li> <li>• Establishes system parameters that correspond to the participating parties' software capabilities</li> <li>• Details the scope of the digital data encompassed in the protocol</li> </ul>	
<b>3</b>	<b>Contractor's "Study &amp; Compare" Obligations</b>	<p>¶¶ 3.3.2 – 3.3.4</p> <ul style="list-style-type: none"> <li>• Contractor must report in writing "discovered" errors, omissions or inconsistencies in the Contract Documents</li> <li>• Review is for facilitating construction, not an affirmative obligation to detect A/E's mistakes</li> <li>• Reporting obligates Owner to direct subsequent action by Contractor</li> <li>• Contractor not liable for costs related to A/E errors unless Contractor "knowingly" fails to report a "recognized" problem</li> </ul>	<p>¶¶ 3.2 -3.2.4</p> <ul style="list-style-type: none"> <li>• Study &amp; Compare obligation extends to more than Contract Documents &amp; includes any information provided by the Owner that may intimate errors by the A/E's IoS</li> <li>• Reporting obligation is not contingent upon "discovery," but also what is "made known" by a reasonable inspection process</li> <li>• Creates opportunity for "should have known" contribution disputes between Contractor and others</li> <li>• "Coordination" now an express purpose of the Study &amp; Compare obligation</li> <li>• Failure to report bars Contractor's REA arising out of A/E's errors and omissions that</li> </ul>

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		<ul style="list-style-type: none"> <li>• Contractor entitled to price adjustment if warranted by facts and circumstances</li> <li>• Equal footing is CD's benchmark, the actors being responsible for their own behaviors</li> </ul>	<p>Contractor "should have" discovered</p> <ul style="list-style-type: none"> <li>• Changes to ¶3.7.3 confirm that the intent of the language is to hold Contractor responsible for A/E's mistakes</li> </ul>
<b>4</b>	<b>Owner Financial Information</b>	<p>¶ 4.2</p> <ul style="list-style-type: none"> <li>• Prior to commencement of Work and thereafter at written request of Contractor</li> <li>• Evidence is condition precedent to Contractor commencing or continuing Work</li> <li>• Contractor notified prior to any material change in Project financing</li> <li>• Essentially identical to old General Conditions provision</li> </ul>	<p>¶ 2.2</p> <ul style="list-style-type: none"> <li>• Waters down Contractor's "right to know"</li> <li>• Limited disclosure obligation after Work commences             <ul style="list-style-type: none"> <li>—3 Conditions trigger Contractor's right to know                 <ol style="list-style-type: none"> <li>1 failure to pay</li> <li>2 "material" change</li> <li>3 "reasonable concern"</li> </ol> </li> <li>—All 3 are unique in the AIA family of docs</li> <li>—Dispute resolution will define their meaning</li> </ul> </li> <li>• Discourages flexibility in Contractor performance</li> <li>• Encourages hyper-technical construction of Changes</li> <li>• Promotes early disputes regarding</li> </ul>

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			<p>information and claims for time extensions</p> <ul style="list-style-type: none"> <li>• Fosters disagreements about “Changes” or “Concerns” during the Project</li> <li>• Advances litigation over finding solutions</li> </ul>
<b>5</b>	<b>IDM</b>	No similar blunder appears in CD	<p>¶ 1.1.8</p> <ul style="list-style-type: none"> <li>• Replaces A/E for some, but not all decisions</li> <li>• May or may not review A/E errors</li> <li>• No contract for hiring an IDM</li> <li>• Cottage industry in the works</li> </ul>

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<b>6</b>	<b>Consequential Damages and Liquidated Damages</b>	<p>¶ 6.6 Limited Mutual Waiver of Consequential Damages</p> <ul style="list-style-type: none"> <li>• Overall general waiver of types of consequential damages described</li> <li>• Waiver does not include agreed-upon liquidated damages (¶6.5)</li> <li>• Owner and Contractor can agree upon certain items of damages that are excluded from mutual waiver</li> </ul> <p>¶ 6.5 Liquidated Damages</p> <ul style="list-style-type: none"> <li>• Optional</li> <li>• Substantial Completion</li> <li>• Final Completion</li> <li>• May also be based on other project milestones, performance requirements</li> </ul>	<p>¶ 15.1.6 Mutual Waiver of Consequential Damages</p> <ul style="list-style-type: none"> <li>• “Direct v. indirect damages”</li> <li>• Liquidated damages; not “direct”</li> <li>• Consequential Damages may include calculated consequential damages —Reflects a current practice</li> </ul>
<b>7</b>	<b>Dispute Resolution</b>	<p>¶ 6.4 Notice of Delay Claims</p> <ul style="list-style-type: none"> <li>• Written notice per ¶8.4</li> </ul> <p>¶ 8.4 Claims for Additional Cost or Time</p> <ul style="list-style-type: none"> <li>• Written notice within 14 days after occurrence or 14 days after Contractor first recognizes condition giving rise to claim,</li> </ul>	<p>¶ 1.1.8 Initial Decision Maker (See above)</p> <p>¶ 15 Claims and Disputes</p> <p>¶ 15.1 Definition of Claim is broad</p> <ul style="list-style-type: none"> <li>• Broad enough to encompass claims v. A/E?</li> <li>• Adjustments to Contract price <i>and time</i>?</li> <li>• Concealed conditions?</li> </ul>

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		<p>whichever is later</p> <ul style="list-style-type: none"> <li>• Written documentation of claim within 21 days after giving notice, unless longer period is agreed upon</li> <li>• Owner to deny or approve claim in writing no later than 14 days after receipt of Contractor's claim</li> </ul> <p>Article 12</p> <p>¶12.1 Work Continuance and Payment</p> <p>¶12.2 Direct discussions</p> <ul style="list-style-type: none"> <li>• Parties' representatives</li> <li>• Then senior representatives</li> <li>• Then dispute mitigation or dispute resolution</li> </ul> <p>¶12.3 Mitigation—optional</p> <ul style="list-style-type: none"> <li>• Project Neutral</li> <li>• Dispute Review Board</li> </ul> <p>¶12.4 Mediation</p> <p>¶12.5 Binding Dispute Resolution</p> <ul style="list-style-type: none"> <li>• Arbitration</li> </ul>	<p>¶ 15.1.2 Notice within 21 days</p> <ul style="list-style-type: none"> <li>• Of what?</li> <li>• To whom?</li> </ul> <p>¶ 15.1.3 Continue Work Through Dispute</p> <ul style="list-style-type: none"> <li>• IDM's decision may circumvent A/E's CCD's and force payment when A/E and Owner dispute claim</li> </ul> <p>¶ 15.2 Initial Decision</p> <ul style="list-style-type: none"> <li>• By IDM</li> <li>• A/E is IDM unless otherwise indicated</li> <li>• Except claims relating to:             <ul style="list-style-type: none"> <li>○ Hazardous substances (§ 10.3)</li> <li>○ Emergencies (§ 10.4)</li> <li>○ Property Insurance Claims (§§ 11.3.9 &amp; 11.3.10)</li> </ul> </li> <li>• Can it render decision v. A/E?             <ul style="list-style-type: none"> <li>○ Claim definition = yes</li> <li>○ This language = no</li> </ul> </li> </ul> <p>¶15.2.6.1 Appeal of IDM Decision</p> <ul style="list-style-type: none"> <li>• Either party may demand that "the Other" file for Mediation of IDM's Decision</li> <li>• 30 Days runs from date of decision, not receipt</li> </ul>
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		<ul style="list-style-type: none"> <li>• Litigation</li> <li>• Venue is location of Project</li> <li>• Has a far greater demand for the predictable</li> </ul>	<ul style="list-style-type: none"> <li>• What if unhappy party demands that the other file for Mediation but the other party does not?</li> <li>• Do §§ 15.2.5 or 15.2.6.1 allow the unhappy party to file for Mediation?</li> <li>• Mediation shall occur within 60 days of IDM’s decision?</li> <li>• Appeals after unsuccessful mediation are not necessarily arbitrated</li> </ul> <p>¶ 15.4 Arbitration—This is no longer the primary process of Dispute Resolution</p> <ul style="list-style-type: none"> <li>• Default is to litigation</li> <li>• Contractor must “check the box” for it</li> </ul> <p>¶15.4.4 Now allows consolidation of Arbitrations and Joinder of other parties</p> <ul style="list-style-type: none"> <li>• All participants have Arbitration rights</li> <li>• Common issues of law or fact</li> <li>• Similar procedural rules</li> </ul>
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<b>8</b>	<b>Insurance</b>	<p>¶10.2 Contractor’s Insurance</p> <ul style="list-style-type: none"> <li>• Operations and completed operations</li> </ul> <p>¶10.2.4</p> <ul style="list-style-type: none"> <li>• Completed operations coverage maintained until one year after acceptance of Work, Substantial Completion of the Project, or time required by Contract Documents, whichever is longer</li> <li>• Certificates of Insurance, furnished prior to commencement of Work</li> </ul> <p>¶10.3 Property Insurance</p> <ul style="list-style-type: none"> <li>• Builder’s Risk Policy or equivalent form; insure at least against listed perils</li> <li>• Terrorism loss</li> </ul> <p>¶10.5 Additional Liability Coverage</p> <ul style="list-style-type: none"> <li>• Provision is optional</li> <li>• If option selected, then coverage options:</li> </ul>	<p>¶ 11.1 Contractor’s Liability Insurance</p> <ul style="list-style-type: none"> <li>• Operations and completed operations</li> </ul> <p>¶ 11.1.2 Completed operations coverage maintained until expiration of correction period or longer period for maintenance of completed operations coverage if required by Contract Documents</p> <p>¶ 11.1.3 Certificates of Insurance</p> <ul style="list-style-type: none"> <li>• 1997—Recognized changes in market must allow flexibility in certifying coverage</li> <li>• 2007—Knowingly encourages false certifications</li> </ul> <p>¶ 11.1.4 Contractor must procure Additional Insured protection of Owner and Others</p> <ul style="list-style-type: none"> <li>• But the scope of coverage is limited</li> <li>• Expressly limited to damages “caused by” Contractor’s negligence</li> <li>• The provision is a “contribution” model—vicarious liability</li> </ul> <p>¶ 11.3 Property Insurance</p> <ul style="list-style-type: none"> <li>• Perils v. Policies</li> </ul>
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		<p>—Additional Insured</p> <ul style="list-style-type: none"> <li>▪ Contractor’s CGL policy</li> <li>▪ For operations and completed operations</li>   <li>▪ But only with respect to liability for BI, PD to the extent caused by the negligent acts, omissions of Contractor, Subcontractors</li> </ul> <p>—Owner’s and Contractor’s Protective Liability Insurance (OCP)</p> <ul style="list-style-type: none"> <li>• Additional cost for surcharge paid by Owner Certificate of coverage provided prior to commencement of Work</li> </ul>	<p>AIA opts for perils and all are insurable</p>
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<b>9</b>	<b>Owner Directed Means &amp; Methods</b>	<p>¶3.1.2 Owner Directed Means and Methods</p> <ul style="list-style-type: none"> <li>• Contractor responsible for means and methods unless Contract Documents give other specific instructions</li> <li>• Contractor not responsible for damages resulting from compliance with instructions unless Contractor recognized and failed to timely report to Owner error, unsafe practice, etc.</li> </ul>	<p>¶ 3.3.1 Owner Directed Means and Methods</p> <ul style="list-style-type: none"> <li>• OLD Rule = Owner responsible</li> <li>• NEW Rule = Contactor responsible for “shared liability” —Owner liable only if 100% at fault</li> </ul>
<b>10</b>	<b>Hazardous Materials</b>	<p>3.13 Hazardous Materials</p> <ul style="list-style-type: none"> <li>• Broad definition of Hazardous Material</li> <li>• Contractor not required to commence or continue work until Hazardous Material discovered is removed, rendered or determined to be harmless by Owner</li> <li>• Certified by an independent testing laboratory</li> <li>• Contractor entitled to adjustment in Contract Price, Contract Time for</li> </ul>	<p>10 Hazardous Materials</p> <ul style="list-style-type: none"> <li>• General Loosening of the Scope of the Old Provisions</li> <li>• Radical Change of Haz-Mat Provisions —OLD Rule: Whoever was responsible for its presence was singularly liable for its consequence —NEW Rule: Owner may order Contractor to determine how to safely use and hold it jointly liable for consequences</li> <li>• Contract Documents may introduce Haz-Mat into the site and Contractor may be held</li> </ul>

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		<p>additional costs incurred and delays experienced as a result of encountering Hazardous Materials</p> <ul style="list-style-type: none"> <li>• Owner obligated to indemnify and hold harmless Contractor for all claims, losses arising out of or relating to performance of Work in area affected by Hazardous Material, to the extent not caused by the negligent acts or omissions of Contractor</li> </ul> <p>¶3.1.3.7.2 Contractor responsible for proper handling of all materials brought to Worksite by Contractor</p> <p>¶3.13.7.3 Contractor indemnifies Owner for all claims arising from delivery, handing, application, storage, removal and disposal of substances brought to Worksite per Contract Documents</p>	<p>accountable for not figuring out how to handle them safely ¶ 10.3.1</p> <ul style="list-style-type: none"> <li>• What was a non-delegable duty is now shared risk</li> <li>• What was a “sole negligence” liability trigger is now ? —50-50...75-25...90-10%</li> <li>• Owner indemnity incorporates new liability calculus</li> <li>• Contractor indemnity clause is new —Contractor liability triggered by             <ul style="list-style-type: none"> <li>○ bringing haz-mat to the site</li> <li>○ breach of the ¶ 10.3.1 duty</li> </ul> </li> </ul> <p>—Not patterned on the Owner indemnity ¶</p> <ul style="list-style-type: none"> <li>○ Liability of Contractor is singular, not shared</li> </ul>
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