

LEGALLY SPEAKING

by Bob Dunlevey

New AIA vs. ConsensusDOCS THE BATTLE OF CONTRACT FORMS

While the American Institute of Architects' ("AIA") model construction contract documents have served as a cornerstone of construction contract documents for many years, a new system of documents entitled ConsensusDOCS are receiving great notoriety. This Fall, a consortium of interested professionals published ConsensusDOCS. The group was comprised of owners, contractors, subcontractors, designers, and sureties. Some of the Associations involved included AGC, SMACNA, PHCC, NECA, MCAA, ABC, ASA, and ASC. Over 20 leading construction associations combined to create these contract provisions more fairly balancing the interests of owners, general contractors, subcontractors and designers. The time had come because the AIA provisions were not meeting all of the needs of the industry and far too many modifications to those documents were occurring.

In the past, there have been a variety of construction associations producing purported standard form contracts. However, standard contracts published by just one association have been perceived as ultimately favoring that association's membership.

Those involved with ConsensusDOCS claim that the contracts employ better practices and fairer risk allocation for all the parties. They claim that the contracts focus on yielding better project results and fewer disputes. Whether or not ConsensusDOCS become the standard of the industry, it is obvious that this is the most significant industry development in at least two or three decades.

Interestingly, the AIA did not participate in the ConsensusDOCS process although invited to do so almost three years ago. Instead, the AIA in late Fall released its own 2007 version of its construction documents – approximately 40 of them. For the first time in approximately 50 years, the AGC decided not to endorse these AIA forms as they relate to the general terms and conditions. Not only did the AIA not participate in the ConsensusDOCS process but also the American Council of Engineering Companies, American Society of Civil Engineers, and the National Society of Professional Engineers did not participate as well. In any event, because over 20 leading construction associations, including the AGC, are in favor of ConsensusDOCS, there is a strong likelihood that these documents will become prominent.

The ConsensusDOCS include more than 70 contracts and forms and address all project delivery methods. They address cutting edge issues such as electronic communications, lean construction, and building information modeling (BIM). The entire catalog of provisions is powered by the DocuBuilder software for editing purposes.

The ConsensusDOCS include a new model subcontract form – 750 and it contains provisions friendlier to subcontractors, including: subcontractors not being required to indemnify the contractor, owner or architect for all types of claims but limits the indemnity to the extent caused by the negligent acts or omissions of the subcontractor and its subs, entitlement to pay within seven days after the contractor is paid or should have been paid but for the fault of the contractor, right to stop work if not paid, retainage not to exceed the amount the owner retains from the general contractor, review of plans/specs not implying constructability, and liquidated damages being limited to the subcontractor's actual responsibility and not to exceed the amount assessed by the owner against the contractor.

One of the new features of ConsensusDOCS is the Tri-Party Agreement for Collaborative Contract Delivery – ConsensusDOCS 300. The Tri-Party Agreement is a hybrid of a construction management/design-build contract incorporating a cost plus compensation system. It is an agreement between the owner, designer, and contractor calling for a collaborative effort to establish a Project Target Cost Estimate which serves as the functional equivalent of a GMP but without the protection to the owner of a guarantee. Both the designer and contractor are paid on the basis of cost plus a fee. All three parties share any savings to the extent project costs are less than the PTCE. A mechanism also exists for sharing costs in excess of the PTCE. This collaborative effort is designed to minimize the risk of delay, conflict and increased costs typically experienced by project participants in a design-build concept. The theory behind this approach is that each of the three parties (owner, contractor and designer) all have a substantial interest in the success of the project and will suffer the consequences if the project is unsuccessful.

Another feature of ConsensusDOCS is the 3-D building information modeling (BIM). This BIM is a method by which all of the parties more efficiently manage the project in a joint electronic exchange of information. ConsensusDOCS includes a standard form addendum which addresses all aspects of electronic communications for the project. Each party designates an IT administrator and then a model facilitator is responsible for collecting, inputting and updating the logical product model or other data assembled for virtual design modeling. The facilitator is designated to lead the analysis of work coordination and collision avoidance.

As to dispute resolution, ConsensusDOCS offers a unique procedure called mitigation. The parties may select an intermediary step between direct negotiations and required mediation. A project neutral or dispute review board may be selected to hear the dispute promptly. The

neutral is available to either party upon request and must make regular visits to the project in order to maintain familiarity. If a dispute arises, the neutral must issue non-binding findings within five days. Failure to resolve the matter, the dispute goes to mediation and thereafter arbitration. Interestingly, the cost of arbitration is borne by the non-prevailing party.

While there are many changes to the AIA forms, one is the abandonment of binding arbitration as the preferred dispute resolution mechanism. Unless the parties affirmatively select arbitration, litigation in court is the new default. For those who are intimately involved in construction claims matters, it is hard to grasp how litigation could ever be preferred over arbitration. The AIA forms do require that prime contractors pay a subcontractor within seven days of receiving payment from the owner. There are new procedures allowing the owner to issue joint checks to subcontractors and directly communicate with them to assure they have been paid. Important changes occurred as to insurance as well. Completed operations coverage is now required. Also, the prime contractor's commercial liability coverage must name the owner and the architect as additional insureds for certain claims and name the owner as additional insured for certain claims arising during the prime contractor's completed operations. Other new revisions concern submittals, disputes, sharing digital information, concealed conditions, requests for information, claims and the commencement of statutes of limitation. Claims for consequential damages are waived between the contractor and the owner. An initial decision maker (IDM) can replace the architect and serve as a third party neutral in disputes between the owner and the contractor and if either party fails to accept the decision, mediation not arbitration occurs.

Only time will tell whether the industry accepts the ConsensusDOCS as the primary contract tool of the construction industry and whether contractors will condition their bids upon

acceptance of ConsensusDOCS. In any event, by virtue of the forms being modified by the AIA and the inception of the ConsensusDOCS, it is obvious that the current forms and the indiscriminate modification of those forms cannot and should not continue. Those involved in the construction industry have no choice but to become familiar with the new AIA and ConsensusDOCS forms and to adopt an approach for their individual companies.

On January 31, 2008, Dunlevey, Mahan & Furry, in conjunction with nine construction associations, will present a two hour seminar on the “New AIA vs. ConsensusDOCS – A Comparison of Key Contract Provisions.” Register at www.dmfdayton.com after January 4, 2008.