

The ADR Provisions in the New AIA A201 and the New ConsensusDOCS 200

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The prior installment of this article provided an overview of the new AIA A201-2007 form, focusing on several of the new requirements that that form imposes on the GC/CM. This installment analyzes possible problems resulting from the AIA's addition of a new concept to the dispute resolution process – the “Independent Decision Maker” – and then compares the provisions of the new A201 with those contained in the ConsensusDOCS 200 form, a new competitor to the A201 form.

Possible Problems with the A201's “Independent Decision Maker”

In adding an “Independent Decision Maker” (IDM) to the ADR process, the AIA appears to be responding to criticism that having the architect as the decision maker in the first instance tended to favor the Owner, its client. In addition, the IDM concept appears to be part of an overall trend in the new AIA form documents generally to shield the architect from liability.

In the prior A201-1997, the architect was in essence the IDM. In the new A201-2007, the parties must choose an IDM at the time of executing their agreement, although they may choose the architect for that role. Assuming the parties select someone else, the questions that will arise from that selection are many (and none is addressed in the form): To whom does the IDM report – the owner or the CM/GC? Who pays for the IDM's services? Is the IDM required to interpret the drawings? Is the IDM qualified to do so, and doesn't that impinge on the architect's administration of the contract? What immunity will the IDM have from suit? What insurance will the IDM carry, if any insurance can be obtained?

Though by no means exhaustive, the extensiveness of these questions, and the fundamental nature of the issues raised, shows that one should not blindly sign any agreement that incorporates the A201 by reference. The parties and their counsel would be well advised to revise the new A201 form before executing any agreement utilizing it.

The ConsensusDOCS 200

The ConsensusDOCS form documents were produced by a collaboration of nineteen construction association groups, including owners, contractors, subcontractors, and others. (The acronym “DOCS” stands for Designers, Owners, Contractors and Subcontractors, although I am not aware of any association of designers or architects that has participated in this collaboration.) ConsensusDOCS 200 is their analog to the AIA A201.

ConsensusDOCS 200's ADR Provisions

The ConsensusDOCS 200 approach to dispute resolution differs considerably from that of the AIA A201 in that it provides for a more collaborative process, in three distinct

stages. Preliminarily, the ConsensusDOCS 200 requires that during any dispute situation, the Contractor continue working and the Owner continue payments. The first stage of actual dispute resolution is direct discussions – first at the field level, but if that does not succeed within five days, at the senior executive level. If those discussions fail, the next stage is either “mitigation” or “mediation,” depending on the choice agreed upon at the time of executing the agreement. If no choice is made, the default is mediation.

The “mitigation” process set forth in ConsensusDOCS 200 requires designation of an independent Neutral or Dispute Review Board (“DRB”), selected and paid for by the parties equally. That DRB is to hear the dispute and render non-binding findings within five days of hearing. The ConsensusDOCS 200 does not address whether or not the DRB's findings are to be kept confidential, so the parties must address that issue. In addition, distinct from dispute resolution functions, if the parties so request, the DRB may also visit the project periodically throughout the course of the project. Such a function would only make sense on relatively large projects, but would certainly facilitate dispute resolution, likely even preventing disputes from occurring, another indicator that the ConsensusDOCS 200 seeks to have the parties act collaboratively.

Mediation, the default procedure for the second ADR stage, is designated to be performed by the American Arbitration Association, unless the parties choose otherwise. In order to prevent undue delay, there are specific deadlines about completing the mediation – within 45 days of the issue having been raised.

The third stage, if neither mediation nor mitigation has succeeded, is binding litigation or arbitration, depending on the parties' choice at the time of executing the contract (although not specified in the ConsensusDOCS 200, the default would be litigation, because parties may not arbitrate without a written agreement to do so). Additional provisions worth noting: (1) joinder of all necessary parties is required, and (2) the “non-prevailing party” must pay the costs of the adjudication, as determined by the adjudicator. With regard to the latter, the term “costs” is not defined, so whether or not it includes legal fees, and the amount, should be determined by the adjudicator.

As noted, the ConsensusDOCS 200 form appears to foster a more collaborative relationship between owner and GC/CM than does the new AIA A201, although both forms will require a fair amount of modification by counsel, so be sure to contact your attorney. [CM](#)

This article is a continuation of an article that Mr. Lustbader prepared for the March/April 2008 CM Advisor. The author can be reached at blustbader@mclawfirm.com.