



Comparing The ConsensusDocs 200 And AIA 101 & 201 Documents

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Introduction

The Defense Research Institute's (DRI's) Construction Law Committee is comprised of construction lawyers from across the country who represent contractors in the myriad of risk management and construction issues that they face every day. Several of its members authored this reference guide for comparing and evaluating ConsensusDocs and AIA stipulated sum contracts.

Contract Structure

AIA	CONSENSUSDOCS
<p>The current AIA contract for a stipulated sum consists of AIA Document A101-2017 and AIA Document A201-2017 forms, but can also include additional documents to reflect changes during the project, bonding requirements, or electronic document sharing.</p>	<p>The ConsensusDocs consist of the integrated Consensus 200 form.</p>
COMMENTARY	
<p>The AIA did not make widespread changes to its document set, as it did in 2007 but, instead, made mostly narrow alterations and clarifications to the contract documents. In the 2017 document set, AIA continued its historical approach of separating the Owner/Contractor Agreement from the General Conditions that apply to the remainder of its contract documents.</p> <p>In contrast, the ConsensusDocs include the general conditions in its Owner/Constructor Agreement.</p> <p>This distinguishing feature can prove important because if a modification is made to the AIA's Owner/Contractor Agreement or its General Conditions, great care must be taken to ensure the change is reflected throughout both documents and does not inadvertently alter another provision of either document. By including the general conditions in the Owner/Constructor agreement, the ConsensusDocs minimize the risk a change will unintentionally alter any additional provisions.</p>	

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Construction of Contract Terms

AIA	CONSENSUSDOCS
<p>§ 1.2 Correlation and Intent of the Contract Documents</p> <p>§ 1.2.1 “The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and . . . performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.”</p>	<p>§14.2. Interpretation of Contract Documents</p> <p>§14.2.1 “The drawings and specifications are complementary. If Work is shown only on one but not on the other, the Contractor shall perform the Work as though fully described on both...”</p> <p>§14.2.2 “In case of conflicts between the drawings and specifications, the specifications shall govern. In any case of omissions or errors in figures, drawings or specifications, the Contractor shall immediately submit the matter to the Owner for clarification. The Owner’s clarifications are final and binding on all Parties...”</p> <p>§14.3 “In case of any inconsistency, conflict or ambiguity among the Contract Documents, the documents shall govern in the following order: (a) Change Orders and written amendments to this Agreement; (b) this Agreement; (c) subject to Subparagraph 14.2.2 the drawings (large scale governing over small scale), specifications and addenda issued prior to the execution of this Agreement; (d) information furnished by the Owner pursuant to § 3.13.4 or designated as Contract Documents in §14.1; (e) other Contract Documents listed in the agreement. Among categories of documents having the same order of precedence, the term or provision that includes the latest date shall control.”</p>
<p>COMMENTARY</p> <p>Section 1.2.1 of AIA Document A201-2017 provides a means for tying the applicable contract documents together and for the resolution of any ambiguity. Conflicts between the contract documents frequently arise in construction documents. Information may be included on one of the contract document but excluded from another. Necessary details may be omitted entirely. To address the practical realities of construction, the AIA documents require the contractor to make all reasonable inferences from the contract documents necessary to complete the project as intended. For example, when the documents show wall partitions covered by drywall, it may be inferred that some reasonable method will be used to attach the drywall to the underlying framework. ConsensusDocs § 14.2.1 also requires the Constructor to make reasonable inferences in order to facilitate uniform results. The ConsensusDocs provide a clear procedure and hierarchy to follow if there are any errors, omissions, inconsistency, ambiguity, or conflicting drawings and specifications. It provides a process for the Constructor to inform the Owner of any errors or omissions and to seek clarification. AIA Documents do not provide explicit instructions, but require the Contractor to submit a request for information to the Architect. The ConsensusDocs eliminate this additional step, promoting the importance of the relationship between the Owner and Constructor.</p>	

Document Ownership

AIA	CONSENSUSDOCS
<p>§ 1.5 Ownership and Use of Drawings, Specifications and Other Instruments of Service</p> <p>§ 1.5.1 The Architect and the Architect’s consultants shall be deemed the authors and owners of their respective Instruments of Service . . . and retain all common law, statutory, and other reserved rights...including copyrights.</p> <p>§ 1.5.2 The Contractor, Subcontractors, Sub-subcontractors, and suppliers may not use the Instruments of Service on other projects or for additions to the Project outside the scope of the Work without the specific written consent of the Owner, Architect, and the Architect’s consultants.</p>	<p>§2.3 Architect/Engineer</p> <p>§2.3.1 Owner shall obtain from the Design Professional either a license for Contractor. . . to use the design documents . . . or ownership of the copyrights for such design documents. Owner shall indemnify and hold harmless the Contractor against any suits or claims of infringement of any copyrights or licenses arising out of the use of the design documents for the Project.</p>
<p>COMMENTARY</p> <p>Architectural works receive protection under United States copyright laws. The Architects designs, specifications, and other instruments of service are necessary to construct the Project. An Architect is deemed to be the author of the instruments of service and generally retains ownership over the plans and specifications. Under the AIA’s Owner/Architect agreement, the Architect grants the Owner a nonexclusive, limited license to utilize the Architect’s Instruments of Service for purposes of constructing and maintaining the Project. Because the ConsensusDocs focus on the Owner/Constructor relationship, not the parties’ relationship with the Architect or other design professional, the ConsensusDocs make clear that the duty to obtain a license to use the plans and specifications lies solely with the Owner.</p>	

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Electronic Document Transmission

AIA	CONSENSUSDOCS
<p data-bbox="203 258 683 289">§ 1.7 Digital Data Use and Transmission</p> <p data-bbox="203 325 800 556">The parties shall agree upon protocols governing the transmission and use of instruments of Service or any other information or documentation in digital form. The parties will use AIA Document E203 2013... to establish the protocols for the development, use, transmission, and exchange of digital data.</p>	<p data-bbox="826 258 1154 289">§4.6.1 Digitized Documents</p> <p data-bbox="826 325 1421 590">If the Owner requires the exchange of documents and data in electronic or digital form, Owner, Design Professional, and Contractor must agree on and follow a written protocol governing all exchanges in ConsensusDocs 200.2 or a separate agreement. In the absence of a written protocol, use of documents and data in electronic or digital form shall be at the sole risk of the recipient.</p>
<p data-bbox="203 674 448 705">COMMENTARY</p> <p data-bbox="203 743 1421 1108">The construction industry is quickly converting to the utilization and modification of electronic construction documents in lieu of traditional paper documents. Creating and transmitting construction documents and other project information electronically is now common practice. Many owners, contractors, and architects conduct a majority of their communication through e-mail or utilize software in order to facilitate completion of the project. Thus, it is important that the project participants establish protocols to govern the create, transmission, and use of project documents. Both the AIA Document A201-2007 and ConsensusDocs require the parties to agree on protocols for the exchange of documents and data in electronic or digital form. AIA Document E201TM-2007, Digital Data Protocol Exhibit, provides the parties with a form document to define the necessary protocols for the transmission of electronic information. Similarly, Section 4 of ConsensusDocs 200 enumerates specific provisions that must be in the protocol prior to any exchange of electronic information.</p>	

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Financial Information

AIA	CONSENSUSDOCS
<p>§2.2 Evidence of Owner’s Financial Arrangements</p> <p>§2.2.1 Prior to commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner’s obligations under the Contract. The Contractor shall have no obligation to commence the Work until the Owner provides such evidence.</p> <p>§ 2.2.2 After the Work has been commenced, Contractors may request financial information from Owner after the Work has commenced “only . . . if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) the Contractor identifies in writing a reasonable concern regarding the Owner’s ability to make payment when due; or (3) a change in the Work materially changes the Contract Sum.</p>	<p>§4.2 Financial Information</p> <p>Before commencing the Work and thereafter, at the written request of the Contractor, Owner shall provide Contractor with evidence of Project financing. Evidence of such financing shall be a condition precedent to the Contractor’s commencing or continuing the Work. Contractor shall be notified prior to any material change in Project financing.</p>
<p>COMMENTARY</p> <p>The most important aspects of a contract for a contractor relates to payment: when, where, and how will the contractor be paid. Not surprisingly, the contractor is not always aware of the owner’s financial arrangements prior to entering into the contract for construction. Both the AIA Documents and ConsensusDocs provide the Contractor an opportunity to obtain reasonable assurances that the Owner has or will have the necessary financial backing to pay the contractor for its services under the construction contract.</p> <p>Under both document sets, the contractor may request the owner provide reasonable evidence of proper project financing. However, the owner’s obligation to provide this information only arises after the contractor makes a written demand for this information. A disagreement about what constitutes reasonable evidence could result in delayed commencement or a suspension of the work. To avoid these issues, the parties can determine what constitutes reasonable evidence of appropriate financing that satisfies the contractor. Under AIA Document A201-2017, the Contractor may stop work if the Owner fails to provide evidence that it can make payments when due. This is a valuable right for the Contractor and provides protection in the event of financial instability of the Owner. The ConsensusDocs only require the Owner to provide evidence of project financing, as opposed to general financial information. However, the Owner is obligated to do so both prior to commencement of the work and at any time thereafter upon written request of the Constructor. Although the ConsensusDocs do not allow the Constructor to suspend performance for the Owner’s failure to provide financial information, the Constructor may terminate the contract under Section 11.5 if the Owner fails to provide this information. Nevertheless, contractors are advised to thoroughly consider whether to terminate the contract if the termination is based solely on the failure to provide information.</p>	

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Contractor/Constructor Reporting

AIA	CONSENSUSDOCS
<p>§ 3.2 Review of Contract Documents and Field Conditions by Contractor</p> <p>§ 3.2.2 “. . . Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents . . . shall take field measurements of any existing conditions related to that portion of the Work, and shall observe any conditions at the site affecting it.</p> <p>§ 3.2.3 The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Contractor shall promptly report to the Architect any nonconformity discovered by or made known to the Contractor as a request for information in such form as the Architect may require.</p> <p>§ 3.2.4 “If the Contractor fails to perform the obligations of Sections 3.2.2 or 3.2.3, the Contractor shall pay such costs and damages to the Owner, subject to Section 15.1.7, as would have been avoided if the Contractor had performed such obligations. . . .”</p>	<p>3.3.1 Before commencing the Work, Constructor shall examine and compare the drawings and specifications with information furnished in the Contract Documents, relevant field measurements made by Constructor, and any visible conditions at the Worksite affecting the Work.</p> <p>3.3.2 Should Constructor discover any errors, omissions, or inconsistencies in the Contract Documents, Constructor shall promptly report them to owner. It is recognized, however, that Constructor is not acting in the capacity of a licensed design professional, and that Constructor’s examination is to facilitate construction and does not create an affirmative responsibility to detect errors, omissions, or inconsistencies or to ascertain compliance with the law, building code, or regulation.</p> <p>3.3.3 . . . Constructor may be entitled to adjustment of the Contract Price or Contract Time because of clarifications or instructions arising out of the Constructor’s reports described in this §3.3.</p> <p>3.3.4 Nothing in §3.3 shall relieve Constructor all of responsibility for its own errors, inconsistencies, or omissions.</p>
<p>COMMENTARY</p> <p>Section 3.2 of A201-2017 maintains the Contractor’s obligation to report known nonconformities between the conditions in the field and the Contract Documents. In fact, there is an affirmative obligation to take field measurements to determine conformity with the Contract Documents. The failure to do so may obligate Contractor to reimburse Owner for damages for any resulting losses, subject to Section 15.1.7</p> <p>ConsensusDocs continues to impose an obligation on the Constructor to report errors in the Contract Documents that it discovers in the field. However, it is a less burdensome obligation, noting that Constructor is NOT a licensed design professional and is not held to the same standard. Moreover, ConsensusDocs provides for Constructor to receive an adjustment in the Contract Price or Contract Time when it discovers errors that require clarification or revised instructions.</p>	

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Owner's Responsibilities

AIA	CONSENSUSDOCS
<p>§ 3.8 Allowances</p> <p>§ 3.8.3 Materials and equipment under an allowance shall be selected by the Owner with reasonable promptness.”</p> <p>§ 4.2.4 Communications</p> <p>The Owner and Contractor shall include the Architect in all communications that relate to or affect the Architect’s services or professional responsibilities. The Owner shall promptly notify the Architect of the substance of any direct communications between the Owner and the Contractor otherwise relating to the Project. Communications by and with the Architect’s consultants shall be through the Architect. Communications by and with Subcontractors and suppliers shall be through the Contractor. Communications by and with Separate Contractors shall be through the Owner. The Contract Documents may specify other communication protocols.</p>	<p>4.1 INFORMATION AND SERVICES Owner’s responsibilities under this article shall be fulfilled with reasonable detail and in a timely manner.</p> <p>4.4 BUILDING PERMIT, FEES, AND APPROVALS Except for those permits and fees related to the work which are the responsibility of Constructor, Owner shall secure and pay for all other permits, approvals, easements, assessments, and fees required for the development, construction, use, or occupancy of permanent structures or for permanent changes in existing facilities, including the building permit.</p> <p>4.10 COST OF CORRECTING DAMAGED OR DESTROYED WORK With regard to damage or loss attributable to the acts or omissions of Owner or Others and not to Constructor, Owner shall either (a) promptly remedy the damage or loss (and assume affected and warranty responsibilities), (b) accept the damage or loss, or (C) issue an Interim Directive or Change Order to remedy the damage or loss. If Constructor incurs costs or is delayed due to such loss or damage, Constructor may seek an equitable adjustment in the Contract Price or Contract Time under this agreement.</p>
<p>COMMENTARY</p> <p>AIA A201-2017 states an obligation on the Owner to readily communicate to his Design Professional(s) the substance of his communications with the Contractor. Communications between Design Professional consultants and Subcontractors and suppliers still move through the Architect and Contractor respectively.</p> <p>ConsensusDocs continues to place an obligation on Owner to potentially compensate the Constructor for delays to the Work, whether caused by Owners or Others (not including Constructor). It is also the clear responsibility of the Owner to both secure and pay for any and all permits, approvals, etc. that are not the express responsibility of the Constructor.</p>	

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Superintendents/Constructor’s Representative

AIA	CONSENSUSDOCS
<p>§ 3.9 Superintendent</p> <p>§ 3.9.2 “The Contractor, as soon as practicable after award of the Contract, shall notify the Owner and Architect of the name and qualifications of a proposed superintendent. Within 14 days of receipt of the information, the Architect may notify the Contractor, stating whether the Owner or the Architect (1) has reasonable objection to the proposed superintendent or (2) requires additional time for review. Failure of the Architect to provide notice within the 14-day period shall constitute notice of no reasonable objection.”</p> <p>§ 3.9.3 “The Contractor shall not employ a proposed superintendent to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not change the superintendent without the Owner’s consent, which shall not unreasonably be withheld or delayed.”</p>	<p>3.4.1 Constructor shall provide competent supervision for the performance of the Work. Before commencing the Work, Constructor shall notify Owner in writing of the name and qualifications of it is proposed superintendent(s) and project manager so Owner may review their qualifications.</p> <p>3.4.4 CONSTRUCTOR’S REPRESENTATIVE Constructor’s authorized representative is [_____]. Constructor’s Representative shall possess full authority to receive instructions from Owner and to act on those instructions. If Constructor changes its representative or the representative’s authority, Constructor shall immediately notify Owner in writing.</p>

COMMENTARY

Under the AIA A201-2017 the scope of the superintendent remains unclear. However, the Contractor is obligated to select someone who is “competent.” Moreover, the superintendent is considered a “representative” of the Contractor and any communications given to the superintendent are binding as if they are given to the Contractor. Sections 3.9.2-.3 were new to A201-2007 and remain changed. These sections provide a mechanism for the Owner or Architect to reject the superintendent, but such rejection must still be based upon “reasonable” grounds.

ConsensusDocs also provides for the timely designation by the Constructor to the Owner of his proposed superintendent(s), but additionally gives the Constructor the ability to designate his own representative who will have full authority to receive instructions from the Owner. ConsensusDocs give Constructor more latitude on communications and designation of representatives than does AIA A201-2017.

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Schedule

AIA	CONSENSUSDOCS
<p>§ 3.10 Contractor’s Construction and Submittal Schedules</p> <p>§ 3.10.1 The Contractor, promptly after being awarded the Contract, shall submit for the Owner’s and Architect’s information a Contractor’s construction schedule for the Work. The schedule shall contain detail appropriate for the Project, including (1) the date of commencement of the Work, interim schedule milestone dates, and the date of Substantial Completion; (2) an apportionment of the Work by construction activity; and (3) the time required for completion of each portion of the Work. The schedule shall provide for the orderly progression of the Work to completion and shall not exceed time limits current under the Contract Documents. The schedule shall be revised at appropriate intervals as required by the conditions of the Work and Project.</p> <p>§ 3.10.2 The Contractor, promptly after being awarded the Contract and thereafter as necessary to maintain a current submittal schedule, shall submit a submittal schedule for the Architect’s approval. The Architect’s approval shall not be unreasonably delayed or withheld. The submittal schedule shall (1) be coordinated with the Contractor’s construction schedule, and (2) allow the Architect reasonable time to review submittals. If the Contractor fails to submit a submittal schedule, or fails to provide submittals in accordance with the approved submittal schedule, the Contractor shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of submittals.</p>	<p>6.2.1 Before submitting its first application for payment, Constructor shall submit to Owner, and if directed, to Design Professional, a schedule of the work showing the dates on which Constructor plans to begin and complete various parts of the Work, including dates on which information and approvals are required from Owner. Except as otherwise directed by Owner, Constructor shall comply with the approved schedule of the Work. Unless otherwise agreed, the schedule of the Work shall be formatted in a detailed precedence-style critical path method that (a) provides a graphic representation of all activities and events, including float values that will affect the critical path of the Work, and (b) identifies dates that are critical to ensure timely and orderly completion of the Work. Constructor shall update the Schedule of the Work on a monthly basis or as mutually agreed by the Parties.</p> <p>6.2.2 Owner may determine the sequence in which the Work shall be performed, provided it does not unreasonably interfere with the Schedule of the Work. Owner may require Constructor to make reasonable changes in the sequence at any time during the performance of the Work in order to facilitate the performance of Work by Owner or Others. If Constructor consequently incurs costs or is delayed, or both, Constructor may seek an equitable adjustment in the Contract Price or Contract Time under ARTICLE 8.</p>
COMMENTARY	
<p>AIA A201-2017 includes additional information that is to be included in schedule submittals, including the date of commencement of the Work, apportionment of the Work by construction activity and the time required for the completion of each portion of the Work. The contract also mandates that the schedule shall be revised at appropriate intervals based upon the conditions in the Work and Project.</p> <p>ConsensusDocs 2017 update is notable on the issue of scheduling because it mandates basic elements of the critical path method scheduling into contract. CPM is typically considered the best practice for scheduling in the industry, but this is the first standard contract to tie it into the construction contract. It continues to impose an obligation on the Constructor to regularly (monthly or as agreed by the Parties) update the Schedule of the Work.</p>	

Indemnification

AIA	CONSENSUSDOCS
<p>§ 3.18 Indemnification</p> <p>§ 3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect’s consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys’ fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss, or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.</p>	<p>10.1 INDEMNITY</p> <p>10.1.1 “To the fullest extent of the law, Constructor shall indemnify and hold harmless Owner, Owner’s officers, directors, members, consultants agents, and employees, Design Professional, and Others (the Indemnitees) from all claims for bodily injury and property damage, other than to the Work itself and other property insured, including reasonable attorneys’ fees, costs and expenses, that may arise in the performance of the Work, but only to the extent caused by the negligent or <u>intentional wrongful acts</u> or omissions of Constructor, Subcontractors . . .</p> <p>10.1.2 “To the fullest extent permitted by law, Owner shall indemnify and hold harmless Constructor, its officers, directors, members, consultant, agents, and employees, Subcontractors, Suppliers, or anyone directly or indirectly by any of them or anyone for whose asked any of them may be liable from all claims for bodily injury and property damage, other than property insured, including reasonable fees costs and expenses, that may arise from the performance of the work by Owner, Design Professional . . .</p>
<p>COMMENTARY</p> <p>AIA continues to impose a one-sided indemnity obligation upon the Contractor. The provision is intended to be as broad as possible and protects the indemnitees from claims arising out of the negligent acts or omissions of the Contractor, Subcontractors or their employees. It also requires indemnification, even in the event that one of the indemnitees i.e. Owner or Design Professional, is alleged to be concurrently negligent.</p> <p>Conversely, ConsensusDocs provides a two-way mutual indemnity obligation between the Constructor and Owner. A change in the most recent revision is that Owners and Design Professionals are now indemnified not only for claims related to the negligent acts or omissions of the Constructor or its Subcontractors, but also the intentional wrongful acts or omissions of the Constructor or its Subcontractors.</p>	

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Project Administration

AIA	CONSENSUSDOCS
<p>§4.2 Administration of the Contract</p> <p>§4.2.1 The Architect will provide administration of the Contract as described in the Contract Documents and will be an Owner’s representative during construction ... The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents.</p> <p>§§15.2.1 to 15.2.5, describe procedures for evaluating, presenting, and resolving claims by the “Initial Decision Maker.” Section 1.1.8 defines the Initial Decision Maker as “the person identified in the Agreement to render initial decisions on Claims.”</p>	<p>§2.1 Parties’ Relationship</p> <p>Each Party agrees to act on the basis of mutual trust, good faith, and fair dealing, and perform in an economical and timely manner. The Parties shall each endeavor to promote harmony and cooperation among all Project participants.</p> <p>§2.1.1 Neither Constructor nor any of its agents or employees shall act on behalf of or in the name of Owner.</p> <p>Article 3 - Constructor shall use diligent efforts to perform the Work in an expeditious manner consistent with the Contract Documents. Such Work includes furnishing construction administration and management services.</p>

COMMENTARY

Under the AIA Documents, the Architect’s Services include administration of the construction contract. However, the Architect’s administration of the construction contract does not require or allow the Architect to supervise or direct the contractor’s means and methods of construction. The ConsensusDocs also do not impose a duty upon the design professional, instead, requiring the constructor to provide construction administration and any management services. This duty is continued from the ConsensusDocs prior version despite the language being moved from Section 2.1.1 to Article 3 in the 2017 document set.

Section 2.1 of the ConsensusDocs, explicitly states the importance of the maintaining a positive relationship between all of the parties furnishing labor or services in furtherance of the Owner’s project, requiring the Owner and Constructor to “promote harmony and cooperation among all Project participants.” Accordingly, the ConsensusDocs seek to have the Owner and Constructor engage in direct communications, which assists in fostering an environment where disputes can be resolved efficiently and amicably.

AIA Document A201 continues to provide for an Initial Decision Maker to evaluate and resolve claims between the Owner and Contractor. Maintaining the direct relationship between the parties, ConsensusDocs 200 removes the architect as the intermediary between the Owner and the Constructor, resulting in the Owner being responsible for many of the Project’s administrative duties. When disputes do arise, ConsensusDocs 200 provides an autonomous approach that permits the parties to engage in in dispute resolution themselves, utilizing good faith attempts to mitigate claims before they escalate to a formal claim. If a claim is not resolved informally, ConsensusDocs employs other dispute mitigation techniques such as a project neutral or a dispute review board (DRB).

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Liquidated Damages

AIA	CONSENSUSDOCS
<p>The standard A201 does not include a liquidated damages provision and parties most often insert the language into the A101 (or other standard contract form) in the substantial completion deadline provision.</p> <p>.”</p>	<p>§§ 6.5 LIQUIDATED DAMAGES</p> <p>6.5.1.1 Owner will suffer damages which are difficult to determine and accurately specify if the Substantial Completion date, which may be amended by Change Order, is not attained. Constructor shall pay Owner [_____] dollars (\$[____]) as liquidated damages and not as a penalty for each Day that Substantial Completion extends beyond the Substantial Completion date.</p> <p>6.5.3 Owner will suffer damages which are difficult to determine and accurately specify if the Final Completion date, as may be amended by subsequent Change Order, is not attained. Constructor shall pay Owner [_____] dollars (\$[____]) as liquidated damages and not as a penalty for each Day that Final Completion extends beyond the Final Completion date. These liquidated damages are in lieu of all liability for any extra costs, losses, expenses, claims penalties, and any other damages of any nature incurred by Owner resulting from not attaining Final Completion date.</p>
COMMENTARY	
<p>Both contracts leave it for the parties to determine whether they will have liquidated damages and, if so, in what amount.</p>	

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Substantial Completion

AIA	CONSENSUSDOCS
<p>§§ 8.1.3 - The date of Substantial Completion is the date certified by the Architect in accordance with Section 9.8</p> <p>§§ 9.8.1 - Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.</p> <p>§§ 9.8.5 - The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in the Certificate. Upon such acceptance, and consent of surety if any, the Owner shall make payment of retainage applying to the Work or designated portion thereof. Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents.</p>	<p>§§ 2.4.24 - “Substantial Completion” of the Work, or of a designated portion, occurs on the date when the Work is sufficiently complete in accordance with the Contract Documents so that Owner may occupy or utilize the Project, or a designated portion, for the use for which it is intended, without unapproved disruption. The issuance of a certificate of occupancy is not a prerequisite for Substantial Completion if the certificate of occupancy cannot be obtained due to factors beyond Constructor’s control. This date shall be confirmed by a Certificate of Substantial Completion signed by the Parties.</p>
COMMENTARY	
<p>The provisions are similar with ConsensusDocs expressly protecting the contractor in the event a certificate of occupancy fails to issue for reasons beyond the contractor’s control.</p>	

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Mechanic's Liens and Waivers of Lien

AIA	CONSENSUSDOCS
<p>§ 9.3.1 At least ten days before the date established for each progress payment, the Contractor shall submit to the Architect an itemized Application for Payment prepared in accordance with the schedule of values, if required under Section 9.2, for completed portions of the Work. The application shall be notarized, if required, and supported by all data substantiating the Contractor's right to payment that the Owner or Architect require, such as copies of requisitions, and releases and waivers of liens from Subcontractors and suppliers, and shall reflect retainage if provided for in the Contract Documents.</p>	<p>§ 9.2.3.1 If required by Owner as a prerequisite for payment, Constructor shall provide a partial lien and claim waiver in the amount of the application for payment and affidavits from its Subcontractors and Suppliers for the completed Work. Such waivers shall be conditional upon payment Constructor shall not be required to sign an unconditional waiver of lien or claim, before receiving payment or in an amount in excess of what it has been paid.</p>
<p>COMMENTARY</p> <p>Both the AIA and ConsensusDocs do not specifically require that the contractor provide lien waivers with its monthly payment applications. Instead, the AIA calls for lien waivers only when “required” by the Owner or Architect. Likewise, ConsensusDocs demands partial lien waivers only “if required by Owner as a prerequisite for payment.” To avoid any ambiguity, additional language should be inserted in both agreements to clarify whether lien waivers must be submitted with all payment applications.</p> <p>Unlike the AIA, ConsensusDocs identifies the lien waivers as “partial” and further prohibits the practice of “unconditional lien waivers” absent full payment. As Owners typically require lien waivers as part of an application of payment, such language would require the use of conditional lien waivers, i.e., waivers that extinguish lien rights only upon receipt of the delineated payment. Conditional lien waivers allow Contractors and their subs to execute lien waivers prior to receipt of payment from the Owner.</p> <p>In addition, the language employed by ConsensusDocs contemplates “lien and <u>claim</u> waivers.” It is unclear whether this language contemplates mutual waivers of claims or, more likely, Contractor waiver of additional payments associated with a particular payment application. Contractors may resist having to sign claim waivers while the project is ongoing, especially if there are open change orders/directives or delay damage disputes.</p>	

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Payment/Third Party Claim and Progress Payment

AIA	CONSENSUSDOCS
<p>Section 9.6.2 provides that, “[t]he Contractor shall pay each Subcontractor no later than 7 days after receipt of payment from the Owner ...”</p> <p>Section 9.6.4 also provides that the Owner has the right to request written evidence from the Contractor that it has properly paid Subcontractors and material suppliers. If the Contractor fails to furnish this evidence within 7 days, the Owner has the right to contact the Subcontractor directly.</p> <p>Section 9.5.4 provides that if the Contractor fails to properly pay the Subcontractors, the Architect can withhold certification for payment and, “[t]he Owner may ... issue joint checks to the Contractor and any Subcontractor or material or equipment suppliers ...”</p>	<p>Pursuant to section 9.3.7, the Owner may adjust or reject a payment application to the extent that the Contractor is responsible under the Agreement for third party claims involving the Contractor or reasonable evidence demonstrating that third party claims are likely to be filed unless and until the Contractor furnishes the Owner adequate security. Adequate security consists of a surety bond, letter of credit, or other collateral or commitment that would be sufficient to discharge such claims once established.</p>
COMMENTARY	
<p>Both AIA and ConsensusDocs allow the Owner to withhold payment if a third party files a claim. They differ in the determination of what is sufficient security to require the eventual release of funds.</p>	

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Retainage

AIA	CONSENSUSDOCS
The standard A201 does not include a retainage provision and parties most often insert the language into the A101 (or other standard contract form).	§§ 9.6.4 - Upon Owner's written acceptance of the Certificate of Substantial Completion, Owner shall pay to Constructor the remaining retainage held by Owner for the Work described in the Certificate of Substantial Completion, less a sum equal to one hundred fifty percent (150%) of the estimated cost of completing or correcting remaining items on that part of the Work, as agreed to by the Parties as necessary to achieve Final Completion. Uncompleted items shall be completed by Constructor in a mutually agreed upon timeframe. Owner shall pay Constructor monthly the amount retained for unfinished items as each item is completed.
COMMENTARY ConsensusDocs fixes the retainage amount.	

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Final Payment/Waiver of Claims

AIA	CONSENSUSDOCS
<p>§ 9.10 Final Completion and Final Payment</p> <p>§ 9.10.1 Upon receipt of the Contractor's written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make such inspection and, when the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's on-site visits and inspections, the Work has been completed in accordance with terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions listed in Section 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled.</p> <p>§ 9.10.4 The making of final payment shall constitute a waiver of Claims by the Owner except those arising from</p> <ol style="list-style-type: none">.1 liens, Claims, security interests or encumbrances arising out of the Contract and unsettled;.2 failure of the Work to comply with the requirements of the Contract Documents; or.3 terms of special warranties required by the Contract Documents.	<p>§ 2.4.13 "Final Completion" occurs on the date when Constructor's obligations under this Agreement are complete and accepted by Owner and final payment becomes due and payable. This date shall be confirmed by a Certificate of Final Completion signed by Parties.</p> <p>§ 9.8.6 OWNER'S CLAIMS RESERVATION Owner's claims not reserved in writing with final payment are waived except for claims relating to liens or similar encumbrances, warranties, Defective Work, and latent defects.</p>
<p>COMMENTARY</p> <p>Final Completion/Payment</p> <p>Unlike Substantial Completion, neither document provides a direct definition of Final Completion. Instead, Final Completion- and the right to final payment- is tied to the completion of contractual requirements as verified by the Owner or design professional. ConsensusDocs requires that the date of Final Completion be memorialized in a certificate of final completion signed by both parties. AIA instead ties in final completion with a series of events, starting with receipt of the Contractor's final payment application and culminating in the Architect's issuance of a Final Certification of payment. The AIA approach can be more burdensome and time consuming for the Contractor and necessitates the continued involvement of the architect. ConsensusDocs is more streamlined but still allows for the Owner to withhold certification if the contractual obligations have not been completed- as determined by the Owner! Thus, both agreements leave the date in the hands of the Owner or its agent.</p>	

Waiver of Claims

AIA's 2017 version of its General Conditions adds an additional exception to the general rule that the Owner waives all claims by making final payment. Subsection 9.10.4.4 now allows the Owner to preserve claims that arise out "audits performed by the Owner, if permitted by the Contract Documents, after final payment." Such audit rights are often found in cost-plus agreements. ConsensusDocs has no such reservation. In addition, whereas AIA allows an Owner to bring a claim after final payment for "failure of the Work to comply with the requirements of the Contract Documents," ConsensusDocs limits claims after final payment to "claims relating to liens or similar encumbrances, warranties, Defective Work, and latent defects"

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Hazardous Materials

AIA	CONSENSUSDOCS
<p>§ 10.3.1 The Contractor is responsible for compliance with any requirements included in the Contract Documents regarding hazardous materials or substances. If the Contractor encounters a hazardous material or substance not addressed in the Contract Documents and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop Work in the affected area and notify the Owner and Architect of the condition.</p> <p>§ 10.3.3 To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor . . . arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Section 10.3.1 and has not been rendered harmless, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), except to the extent that such damage, loss, or expense is due to the fault or negligence of the party seeking indemnity.</p> <p>§ 10.3.5 The Contractor shall reimburse the Owner for the cost and expense the Owner incurs (1) for remediation of hazardous materials or substances the Contractor brings to the site and negligently handles, or (2) where the Contractor fails to perform its obligations under Section 10.3.1, except to the extent that the cost and expense are due to the Owner’s fault or negligence.</p>	<p>§ 3.13.4 Owner shall be responsible for retaining an independent testing laboratory to determine the nature of the material encountered and whether the material requires corrective measures or remedial action. Such measures shall be the sole responsibility of Owner, and shall be performed in a manner minimizing any adverse effect upon the Work.</p> <p>§ 3.13.6 To the extent permitted by §6.6 and to the extent not caused by the negligent or intentionally wrongful acts or omissions of Constructor, its Subcontractors and Subsubcontractors, and the agents, officers, directors, and employees of each of them, Owner shall defend, indemnify, and hold harmless Constructor, its Subcontractors and Subsubcontractors, and the agents, officers, directors, and employees of each of them, from and against all claims, damages, losses, costs, and expenses, including but not limited to reasonable attorneys' fees, costs, and expenses incurred in connection with any dispute resolution procedure, arising out of or relating to the performance of the Work in any area affected by Hazardous Material.</p> <p>§ 3.13.7.3 To the extent caused by the negligent or intentionally wrongful acts omissions of Constructor, its agents, officers, directors, and employees; Constructor shall indemnify and hold harmless Owner, its agents, officers, directors, and employees, from and against any and all claims, damages, losses, costs, and expenses, including but not limited to, attorneys' fees, costs, and expenses incurred in connection with any dispute resolution procedure, arising out of or relating to the delivery, handling, application, storage, removal, and disposal of all materials and substances brought to the Worksite by Constructor.</p>
<p>COMMENTARY</p> <p>The AIA chose to retain the language from its 2007 version with respect to Hazardous Materials. These sections detail each party’s responsibilities and indemnification obligations as to remedial work and injuries caused by hazmat materials, both as to HazMat brought on site as part of the contract and those uncovered during the Work itself. For example, AIA places the burden on the Contractor to immediately stop work and notify the Owner if it encounters hazardous materials that are not part of the Work, but only if “reasonable precautions” would be inadequate to remediate the situation. This leaves open the question as to what “reasonable” precautions are and who pays for them.</p>	

ConsensusDocs takes a more Contractor friendly approach, especially in its limitation of the Contractor's indemnification obligations. Pursuant to section 3.18.7.3, the Contractor must indemnify the Owner only for negligence relating to its "delivery, handling, application, storage, removal and disposal" of hazardous material "brought to the Worksite by Constructor." The AIA requires Contractor indemnification to the Owner regardless of who brought the material to the site. *See 10.3.5*. In addition, ConsensusDocs has amended 3.13.4 to further define the parameters upon which the Work can resume after hazardous materials are discovered. It also deleted the previous edition's provision that required a written mutual agreement to continue.

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Termination By The Contractor

AIA	CONSENSUSDOCS
<p>14.1.1 Contractor may terminate if work stopped for 30 consecutive days through no fault of Contractor, a sub or a Sub-sub due to: (1) an order of court; (2) an act of government; (3) for certain interruptions in payment; or (4) Owner fails to provide evidence of financial arrangements.</p> <p>14.1.2 Allows Contractor to terminate where there have been extended interruptions by only the Owner that either amount to more than 100% of the time for completion, or are 120 days in any 365 day period.</p> <p>14.1.3 Allows Contractor to recover from Owner, in a termination; payment for work executed; reasonable O&P on work not executed; costs incurred by the termination.</p>	<p>11.5.1 is similar, but requires 7 days advance notice for items 14.1.1 (1), (2) and (3) of the AIA; as to item 14.1.1(4) of AIA, 11.5.2 also gives the Owner 3 additional days to cure.</p> <p>No provision similar to AIA 14.1.2 exists</p> <p>11.5.3 is similar, but also opens a window to recover for “any proven loss”; and for demob costs.</p>
<p>COMMENTARY</p> <p>Under the ConsensusDocs, the Contractor may recover a more favorable equitable adjustment with 11.5.3.</p>	

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Termination By The Owner For Cause

AIA	CONSENSUSDOCS
<p>14.2.1 Allows the Owner to terminate for cause if Contract or: (1) repeatedly is unable to supply enough workers or materials; (2) fails to pay Subs or suppliers; (3) disregards laws; or (4) is guilty of a substantial breach.</p> <p>14.2.2 Requires the Architect to certify that cause exists to justify a termination of Contractor after 7 days notice to Contractor and Surety, subject to the rights of the Surety. Owner can then: (1) exclude Contractor from the site and take over materials and equipment; (2) accept assignment of subs; (3) finish the work and provide an accounting to Contractor when done.</p> <p>14.2.3 Provides that Contractor is not entitled to receive further payment until the work is done.</p>	<p>11.2 Is similar, but also requires Contractor to adhere to the approved schedule.</p> <p>11.2.1 Is similar but the Owner must give Contractor a second notice to cure within 3 additional days.</p> <p>11.2.2 Goes beyond AIA 14.2.2 and allows Owner to recover reasonable O&P on the costs to complete, plus attorneys' fees. Payments may be withheld from Contractor.</p> <p>11.3 Is similar to AIA 14.2 because it is a termination for cause or default.</p> <p>11.3.2 Goes beyond AIA 14.2.2 by allowing Owner to also utilize tools/equipment at worksite belonging to both Contractor "or Subcontractors".</p>
<p>COMMENTARY</p> <p>The ConsensusDocs here is more favorable to the Owner.</p>	

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AIA	CONSENSUSDOCS
<p>14.2.4 Requires the Initial Decision Maker to review the Owner’s accounting and to certify the amount to be paid to Contractor; if any, upon completion of the work.</p> <p>14.3 allow for Owner suspension of the work for convenience, in whole or in part, without cause.</p> <p>14.3 Allows an adjustment of the contract sum and time due to an Owner suspension, with profit to the Contractor.</p> <p>14.3.2 Provides that Contractor may not receive an adjustment of Contract sum or time where performance would have been suspended, delayed or interrupted by another cause for which Contractor is responsible.</p>	<p>11.3 Does not have a similar provision that requires the Architect/Engineer or the IDM to certify the Owner’s accounting of the termination costs.</p> <p>11.1.1 is similar in effect.</p> <p>11.1 Is silent on Contractor’s right to time or dollars, or profit, if a suspension is ordered by Owner.</p> <p>No comparable provision to AIA 14.3.2 is found.</p>
<p>COMMENTARY</p> <p>The AIA provisions are more favorable to the Contractor.</p>	

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Termination For Convenience

AIA	CONSENSUSDOCS
<p>14.4.1 Allows the Owner to terminate at any time for its convenience, without cause.</p> <p>14.4.2 Provides direction on what the Contractor shall do upon a TFC notice.</p> <p>14.4.3 Provides that in a TFC, Owner pays Contractor for work property executed; costs of the TFC; any “termination fee” (if any) included in the Agreement.</p>	<p>11.4.1 is similar.</p> <p>11.4.3 and its (4) subparts is similar.</p> <p>11.4.2 is similar but makes clear that Contractor recovers O&P on work performed; all demob and TFC costs; that no O&P is recovered on unperformed work; reasonable attorney’s fees; plus, the document specifically mentions that a “premium” for a TFC should be awarded the Contractor.</p>
<p>COMMENTARY:</p> <p>The ConsensusDocs provide a more favorable framework for the Contractor at the time the terms are negotiated.</p>	

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Claims Process/Interim Change Directives

AIA	CONSENSUSDOCS
<p>The Architect is the “default” Initial Decision Maker under 15.2.1.</p> <p>The 2017 edition clarifies that the Initial Decision Maker may not show partiality to the Owner or Contractor. It also clarifies that the architect will not be liable for the results of interpretations and decisions rendered in good faith.</p> <p>A201 section 15.1.4.1 require work under protest. It also requires the Contractor to preserve its rights in the event of a denial of its claim.</p> <p>A201 section 15.1.3.1 require that claims by parties must be initiated within 21 days after the occurrence of the event giving rise to such claim or within 21 days after the claimant first recognizes a condition giving rise to the claim, whichever is later.</p>	<p>Pursuant to sections 8.1.1, 8.2.2 and 8.3.4, the following occurs during the claims process:</p> <p>Change Orders can be directed by the Owner or requested by the Contractor.</p> <p>If the parties cannot agree upon the Change Order price, an Owner may order an Interim Directive.¹ The 2017 edition requires the Owner to pay the Constructor 50% of its actual (incurred or committed) costs to perform the work. The parties reserve their rights. The Constructor must submit its application for payment within 30 days of the issuance of the Interim Directive.</p> <p>Cost of the Work under sections 8.3.4 and 8.3.4.19 is determined net of savings from the change. Constructor’s overhead and profit is added to any net increase in the cost of the Work.</p>
COMMENTARY	
<p>Most contracts contain a claims process and, in such instances, the claims process must be followed, or claims can be waived in some jurisdictions. The ConsensusDocs claims process puts the contractor in a better position in the event the parties cannot agree on a change order issue.</p>	

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¹ Under §8.2.2, if the parties’ dispute whether something is a Change Order at all, they share the estimated cost until resolved, whether amicably or via dispute resolution.

Claims and Disputes

AIA	CONSENSUSDOCS
<p>Article 15 covers claims and disputes.</p> <p>Article 15.1.2 sets a ten (10) year statute of limitations after substantial completion.</p> <p>Article 15.1.3 generally requires written notice of claims within 21 days.</p> <p>Article 15.1.4 requires continuing performance by both parties during a dispute.</p> <p>Article 15.1.3.1 makes submission of the claim to the Initial Decision Maker (“IDM”) Step 1.</p> <p>Article 15.2 further defines the IDM process, which is a condition precedent to mediation. Decisions by the IDM are not binding.</p>	<p>Article 12 covers claims and disputes.</p> <p>Article 12.1 requires continuing performance by both parties during a dispute.</p> <p>Article 12.2 does not use an IDM but requires good faith direct discussions between the parties with authority to resolve the dispute.</p> <p>Article 12.3 takes unresolved disputes to either a Project Neutral, or to a Dispute Review Board (“DRB”)</p>
COMMENTARY	
<p>Both agreements recognize the value of flexibility in the disputes resolution process.</p>	

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Consequential Damages

AIA	CONSENSUSDOCS
<p>15.1.6 Includes a mutual waiver of consequential damages.</p> <p>Article 15.2.1 provides that the architect is typically the IDM, unless the parties agree otherwise.</p> <p>Article 15.2.5 provides that the decision of the IDM is nonbinding, and subject to mediation.</p>	<p>Article 6.6 includes a mutual waiver of consequential damages.</p> <p>Article 12.3.1 provides that the Project Neutral or the DRB shall be mutually selected soon after the execution of the Agreement. The findings of the DRB during the project on claims are nonbinding.</p> <p>Article 12.3.2 provides that claims not resolved by the DRB may proceed to either Arbitration or litigation, per 12.5.1 or 12.5.2.</p>
COMMENTARY	
<p>The DRB procedure provides additional flexibility in the equitable resolution of disputes.</p>	

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Arbitration

AIA	CONSENSUSDOCS
<p>Under the AIA A201, if litigation is required, it is at the location of the Project.</p> <p>15.4.4 Provides for consolidation or joinder of persons substantially involved in a common question of law or fact whose presence is required for complete relief.</p> <p>The AIA is silent on this topic.</p>	<p>15.5.2 Outlines the litigation procedure which can be in either state or federal court where the Project is located.</p> <p>12.6 also provides for consolidation and joinder</p> <p>12.5.3 Provides that costs and reasonable attorneys' fees in any binding proceeding are to be borne by the non-prevailing party.</p>
<p>COMMENTARY</p> <p>The inclusion of 12.5.3 in the ConsensusDocs does address the right to recover attorneys' fees and may aid in the pre-litigation resolution of disputes, or it may provide an incentive for litigation.</p>	

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