The AIA Contract Documents…

Not the Only Game in Town

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One version or another of the American Institute of Architects (AIA) *Standard Form of Agreement Between Architect and Consultant* continues to be the contract form most commonly presented to structural engineers. In 2007, the AIA issued the updated document C401-2007. This version coincided with the release of an entirely new set of standard form contracts called ConsensusDOCS, which were developed by a coalition of construction industry organizations representing owners, general contractors, subcontractors, and surety providers.

Though ConsensusDOCS are presented as representing all interests in the construction industry, organizations representing the interests of design professionals were not significantly involved. In fact, after *Engineering News-Record* published an article about ConsensusDOCS, executives of the National Society of Professional Engineers, the AIA, the American Society of Civil Engineers, and the American Council of Engineering Companies jointly authored a letter to the editor clarifying that none of those organizations had endorsed the use of ConsensusDOCS. Regardless, given the number, stature, and market power of the organizations involved in drafting ConsensusDOCS, it is probable that structural engineers will soon be presented with one or more of these forms.

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A real question is *which* document will be presented to structural engineers, as ConsensusDOCS does not have a contract form applicable to the most common arrangement of an engineer retained by an architect. Instead, it provides ConsensusDOCS 240 (CD240), titled *Standard Form of Agreement Between Owner and Architect/Engineer*, presuming that the engineer will contract directly with the owner, as opposed to serving as a consultant to the architect. The absence of significant design professional input is evident in this presumption.

Nevertheless, CD240 will likely be presented by an architect to a structural engineer, and it is important to note the similarities and differences between it and the AIA form. For example, CD240 does not attempt to impose a standard of care higher than that which would otherwise apply to the design professional's work. While the AIA form specifies that "the Consultant shall perform its services consistent with the professional skill and care ordinarily provided by professionals practicing in the same or similar locality under the same or similar circumstances," CD240 does not reference a standard of care applicable to the design professional's services. Because it is silent on this issue, the applicable standard must be determined by reference to the professional's standards and the law in effect in the jurisdiction in which the services are performed. Clarifying language should be inserted.

Some engineering organizations have complained that CD240 limits the design professional's role during the construction phase more than the AIA form. For example, CD240 provides that the design professional may communicate with the general contractor and the subcontractors only through the owner, unless "otherwise directed" by the owner. Thus, a design professional subject to CD240 should not communicate directly with the general contractor or any subcontractors absent direction or consent from the owner to do so. The contract form does not require any particular form of owner consent, so indirect or implied consent should be as effective as express written consent (though, perhaps, harder to prove).

Concerning time of performance, CD240 contains the general statement that "services to be provided by the Architect/Engineer shall be rendered promptly..." The term "promptly" is vague and gives little guidance to the design professional. Any claim that the design professional has delayed the project will have to be determined on a case-by-case, issue-specific basis.

Like the current AIA form (and unlike its predecessor document, C141-1997), CD240 does not specify the date on which the statute of limitations begins to run on claims against the design professional. An added provision to the effect that the statute of limitations begins to run "no later than the date when services are substantially complete" protects the design professional from a lawsuit filed years after the work was finished. Consequently, an engineer presented with CD240 should take steps at the contract negotiation stage to specify the date on which the statute of limitations begins to run on claims against the engineer.

CD240 imposes a detailed, multi-step dispute resolution process, much like the AIA form, first requiring direct discussions by the parties' project representatives, followed by direct discussions by "senior executives" of the parties, mitigation (before a mutually-selected "project neutral" party or a mutually-selected "dispute review board"), mediation (pursuant to the Construction Industry Mediation Rules of the American Arbitration Association or as otherwise agreed upon by the parties), and,

finally, binding arbitration or litigation (as selected in the contract). One significant difference is that CD240 provides that "[t]he costs of any binding dispute resolution process [i.e., arbitration or litigation] shall be borne by the non-prevailing party…" One question left open by this provision is whether the term "costs" includes attorneys' fees. If it does, and the dispute has gone to trial or arbitration, the "non-prevailing" party could be faced with a substantial bill for the other party's attorneys.

Finally, CD240 and the AIA form differ with respect to ownership of the work product of the design professional. Under the AIA contract, the consultant grants the architect a license to use the consultant's design documents, but the consultant retains ownership of the documents. In contrast, CD240 provides that the owner "shall receive ownership of the property rights, except for copyrights, of all documents, drawings, [etc.]" prepared by the design professional or consultants retained by the design professional. This shift in ownership rights should be reflected in the pricing.

The above are just a few of the most critical provisions that a structural engineer should consider if presented with CD240. Engineers should also be aware that ConsensusDOCS are not the only alternative to the AIA contract forms. For example, the Engineers Joint Contract Documents Committee (EJCDC) publishes an entire suite of contract documents for construction projects. Like ConsensusDOCS, the EJCDC documents do not address the typical situation in which the architect retains the structural engineer. Instead, EJCDC E-568, titled *Standard Form of Agreement Between Engineer and Architect for Professional Services*, presumes that the engineer retains the architect.

Ultimately, no matter what contract form is presented, it is imperative to consider it only as a starting point from which to negotiate a contract that is fair to all parties. Careful review of the above issues is recommended to ensure as equitable a contract as possible, given the relative bargaining positions.▪

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