

American Bar Association
Forum on the Construction Industry

GETTING DIRECTLY TO THE POINT OF THE CONTESTED MATTER:
DISPUTE MITIGATION & RESOLUTION IN CONSENSUSDOCS CONSTRUCTION
FORMS

MARK H. MCCALLUM¹
National Association of Surety Bond Producers
Washington, DC

September 11 & 12, 2008
The Fairmont – Chicago, IL

©American Bar Association

Introduction

Experienced construction project participants know that some incidence of conflicts or disputes should be an expected part of each job, and they plan accordingly. Indeed, the complexities and challenges inherent in today's construction projects virtually assure that some disputes among project participants are inevitable. Each construction project is distinctive, requiring the marshalling of considerable resources and bringing together unique site, design, and time requirements, unknown or unknowable risks, and sometimes unfamiliar parties with divergent goals, interests, communication styles, and technology savvy. Thus, the high risk environments of today's construction projects require project parties to anticipate and to plan for ways in which they will manage and resolve project disputes, building such systems into their written project agreements.

Project parties often adopt as the expression of their bargains pre-printed, standardized construction agreements, which are developed by various industry trade and professional associations and which include sections that direct the parties on the means by which they are to resolve any disputes that may arise. Unless the forms are modified, the parties are committing to the dispute resolution methodologies found within those forms.

The newest library of standardized forms to arrive on the construction scene are forms published by ConsensusDOCS, an initiative of more than 20 leading construction organizations that have committed to discuss and to develop "consensus" contract language for the construction industry.² Among their principal interests is how to avoid construction project disputes, and, once such disputes arise, how to manage and to resolve them practically and expeditiously. To that end, the ConsensusDOCS drafters

crafted a multi-method, graduated approach to defuse project disputes. Such an approach also precluded a role for the project design professional as initial arbiter, a point of departure from other industry standard form families that will be more closely examined in this paper.

History of ConsensusDOCS Forms

To gain a richer understanding of the reasoning and structure of the dispute mitigation and resolution provisions in ConsensusDOCS forms, understanding the history and the context in which they were developed is necessary and important.

During its early formation, the ConsensusDOCS initiative originally adopted the name of “Construction Industry Contracts Council” to denote its objective of being a standing forum for a fragmented industry to discuss and to agree on standardized contract language that exemplifies and memorializes “best practices” as agreed upon by a consensus of construction industry constituencies. The Associated General Contractors of America (AGC) first envisioned such an enterprise as a natural outgrowth of its work started in the 1990s with an in-house private owners group, called the Private Industry Advisory Council (PIAC), the members of which were large institutional owners and were instrumental in encouraging AGC to develop a comprehensive library of standard form documents. The creation of the PIAC also paralleled a growing feeling within AGC of dissatisfaction with and alienation from the documents revision process of the American Institutes of Architects (AIA), a relationship which had grown especially contentious during the revision process that culminated in the publication of the 1997 editions of the AIA A201 documents family.

Prior to PIAC involvement, AGC operated a documents program without a consistent effort to gain and incorporate stakeholder feedback. Further, AGC had considerable gaps in its standardized document lineup—for example, AGC neither had developed agreement forms and general conditions for traditional owner and contractor relationships nor a coordinated agreement form for the owner and design professional relationship. With the help of energetic members, the PIAC, and new professional staff, AGC felt the confidence to jump into the standardized documents business “feet first.”

From 1997 to 2006, the standardized documents offered by AGC increased dramatically, from approximately 20 documents to more than 80 different agreements and related forms. (Although AGC had published standardized agreements for construction management and for design-build projects years earlier, AGC’s first set of coordinated standard form documents for traditional projects was not published until the year 2000.) This unprecedented growth in offerings, however, did not engender a commensurate level of growth in market acceptance. Despite concerted outreach to private owners, the subcontractor community, and other industry stakeholders, AGC still felt that it labored under a general industry perception, fairly or unfairly, of developing heavily biased form documents, a perception that, unfortunately, largely was true prior to efforts by AGC to reach out to and incorporate broader stakeholder feedback starting in the late 1990s. (In fact, after embarking on its outreach effort from the late 1990s on, AGC sought and successfully obtained endorsements by stakeholder groups, such as the Engineers Joint Contract Documents Committee (EJCDC) on its construction management agency documents, the Associated Specialty Contractors, Inc. (ASC) on

certain subcontracts, and the Building Owners and Managers Association, International (BOMA) on its documents for traditional projects.)

At the same time, the PIAC and an outside construction owner association, the Construction Users Roundtable (CURT), which, for a time, shared the same core volunteer leadership, continued to encourage and to challenge AGC to open the doors of its documents program to all organizations that would participate, including the design professional community. (AGC had participated in the document development process of EJCDC as an observer organization and eventually sought and was granted a sponsoring organization role in EJCDC. AGC also invited and received EJCDC comments on some of its document drafts, particularly its construction management agreements. Likewise, less than a decade after its founding in 1918, AGC participated in the AIA documents development and revision process, endorsing generations of its owner and contractor agreements and general conditions documents. When AGC expanded its documents program, AGC sought AIA involvement in its own drafting efforts, but AIA responded that its policy was not to provide feedback and comments on draft documents being developed by other organizations and deemed in competition with its own documents.)

To achieve this aim, AGC realized that it needed a new paradigm for contract development and buy-in, embarking in 2004 on a process of organizational introspection, industry political activity, and communication and discussion with stakeholder groups at all levels of the industry that would lead to the creation of the ConsensusDOCS initiative. One of the selling points of the communications with prospective ConsensusDOCS organizations was the ability of these groups to participate as “equal partners,” not just as “invitees” or “observers,” at the drafting table, and thus, have a voice in the risk

allocation choices and the dispute resolution processes that were to be incorporated in the published forms. Each participating group realized that its own notions of itself, as a distinct industry constituency, would be tested and likely would have to change over time, at least to some degree, in the face of those of other participating organizations in order to realize a “consensus” position, no mean feat in the often intolerant politics of construction industry organizations. Some organizations, such as the American Institute of Architects, opted not to make the attempt, while others, such as the Design Build Institute of America, participated in but eventually left the ConsensusDOCS dialogue, lacking the political support to continue involvement. Perhaps the ones that remained and that had bought into the idea and the process even surprised themselves at the realization of such a swift, initial success when a first set of forms was published and issued under the ConsensusDOCS moniker on September 28, 2007, a date just ahead of the next generation of the AIA construction documents family, which AGC had decided not to endorse. ConsensusDOCS continues to seek the involvement and participation of new organizations, which are welcome to participate in document development and revision efforts at any level of engagement.

Approach of ConsensusDOCS Forms

All first-generation ConsensusDOCS forms can trace an AGC lineage.³ For practical reasons, existing AGC documents were agreed to as the starting point for ConsensusDOCS drafting efforts. Of participating organizations, AGC had invested the most resources in its documents program, publishing a library of coordinated forms that addressed many of the different contracting approaches and tiered relationships found in

today's construction environment. By selecting AGC forms as starting points, the ConsensusDOCS participants avoided beginning their efforts from scratch, saving valuable resources and time to market and capitalizing on political goodwill that oftentimes becomes more fleeting and tenuous as efforts lengthen. Some AGC forms, such as its construction management agreements and subcontracts, also already reflected considerable input from different stakeholder groups, including some of the same groups that had elected to participate in the ConsensusDOCS document development process. On the other hand, AGC forms meant that certain structures and philosophical directions would be adopted and preserved unless intentionally changed by the drafting group.

Among those structures or directions that "made the cut" with the ConsensusDOCS drafting group and that have direct or indirect applicability or importance to the handling of project claims and disputes were the following:

- Integrating agreement forms with general conditions in one document so that disputes provisions are resident in the document being signed,
- Placing provisions characterizing the relationship of the parties in one section at the beginning of the document,
- Forging a more direct nexus between the project owner and the contractor, particularly with respect to project communications and to decision-making,
- Removing the design professional as the initial decision-maker/arbitrator of disputes between the project owner and the contractor,
- Preserving, where possible, as much autonomy for project parties to fashion their own, early solutions to disputes, such as through use of step negotiations and mediation,

- Having no pre-selected default choice of arbitration as the binding resolution procedure,
- Ensuring multiparty proceedings to preserve efficiency of process and consistency of results, and
- Including a “prevailing party” provision to incentivize parties to reach settlement before resorting to any binding dispute resolution procedure.

Key Assumptions within ConsensusDOCS Forms

ConsensusDOCS form agreements carry forward and reflect basic drafting assumptions first made by AGC in the development of its own forms. With respect to shaping the dispute avoidance, mitigation, and resolution procedures in ConsensusDOCS forms, AGC drafting assumptions adopted by ConsensusDOCS include the following:

- AGC developed standardized forms for the commercial construction market, not for the residential construction market, in keeping with the interests of its members. Form users were presumed to be entities operating in the commercial construction market having a basic level of business sophistication and understanding, or at least the ability to retain knowledgeable advisers, concerning construction practices. Inclusion of contract language that exemplified risk allocation choices to serve the “best interests of the project”⁴ and the preservation of business relationships was and continues to be of primary interest to the drafters.
- AGC favored an active, not passive, construction owner that desired a front-line position with respect to project decision-making. AGC took this approach

on the belief that an informed, engaged owner would be more in touch with the progress of the project and, therefore, would be in position to make better, more expedient decisions and to head off potential problems. An “active” owner approach also reflected direct feedback from PIAC owners who communicated to AGC that they wished to choose the level of administrative engagement of the project design professional during construction, rather than to have such engagement predetermined and ingrained throughout the boilerplate of the standardized form, such as in the existing AIA forms. To that end, the design professional was placed in the role of a consultant and an adviser to the construction owner and was relieved of being the owner’s representative during construction contract administration, unless the owner specifically so designated.

- AGC believed that direct communications between the project owner and the contractor were desirable and beneficial to the project and, therefore, communications between the owner and the contractor should not be “filtered” solely through the project design professional. AGC reasoned that imbuing its agreements with an expectancy of direct communications between the owner and the contractor would help foster regular and heightened communications between those parties, raising the information levels and the understanding of the parties, thereby helping to avoid potential misunderstandings and disputes.
- In keeping with the “active” owner philosophy, the project design professional was removed from its traditional role in the American construction

environment as the initial arbiter of disputes between the owner and the contractor. As large institutional owners, most PIAC owners did not place the design professional in such a role in their own contracts, and AGC members were distrustful of the design professional's quasi-arbiter role, believing that the project design professional had an inherent conflict of interest when serving in such capacity, since the design professional was being paid for its services, including those as quasi-arbiter, by the construction owner and disputes between owners and contractors often include claims relating to defective design. Some owner representatives expressed discomfort at the notion that the design professional should ever be placed in a position of rendering decisions concerning the owner's performance. Moreover, neither PIAC owners nor AGC members were persuaded by traditional arguments that the design professional, as a party familiar with the requirements of the project, always stood in the best position to effect quick resolution of owner-contractor disputes through rendering an initial dispute decision. Rather, they sought to forge a structure for handling disputes that would be free of any appearance of unfairness (such as by having initial decisions on contested matters made by the paid agent of one of the contracting parties) and that sought early resolution by adopting a series of dispute techniques, such as step negotiations and mediation, which keep control of the dispute in the hands of the contracting parties, giving those parties every opportunity to explore creative solutions and to preserve business relationships, before resorting to

any third-party imposed methods, with their adversarial posturing, uncertainties, and attendant high costs.

Making the choice to “adopt” these assumptions, the ConsensusDOCS drafters still felt that existent AGC language had not gone far enough in terms of dispute avoidance and management, particularly in view of the growing complexity of construction projects and the need for early-in-time dispute resolution. They seized upon the standing neutral concept, either in the form of a single “Project Neutral” or a multi-person “Dispute Review Board” (DRB), as offering a further tested method to manage and to effect early resolution of project disputes, placing it as an optional methodology that, if selected, would occur after step negotiations. The standing neutral concept, memorialized in ConsensusDOCS agreements under the title of “Dispute Mitigation,” will be discussed more fully later in this paper.

Dispute Avoidance in ConsensusDOCS Forms

ConsensusDOCS drafters believed that standardized form agreements emphasizing party collaboration and engagement, increased communications, risk allocation choices with the stated goal of the “best interests of the project” (that is, risks placed with the party best able to assume, manage and insure against such risks), and opportunities for creative problem solving and self-deterministic solutions were beneficial to avoiding and to mitigating construction disputes and are representative of industry “best practices.”

Shaping Party Expectations for Collaboration & Fair Dealing

Not surprisingly, the expectation of a collaborative relationship between the contracting parties was established upfront in the general provisions of ConsensusDOCS agreement forms. ConsensusDOCS 200, *Standard Agreement and General Conditions Between Owner and Contractor (Where the Contract Price is a Lump Sum)*, Paragraph 2.1, Relationship of the Parties, states that “[t]he Owner and the Contractor agree to proceed with the Project on the basis of mutual trust, good faith and fair dealing.”

Although recognizing that these obligations would be implied by law in most, if not all, jurisdictions, the drafters nonetheless felt inclusion of this language important for setting the proper tone for the underpinnings of the owner-contractor relationship. Likewise, the drafters included language to place on the contracting parties the expectation that they will be actively engaged in promoting to other project participants a collaborative environment on the project. Subparagraph 2.1.1, in part, reads “[t]he Owner and Contractor shall endeavor to promote harmony and cooperation among all Project participants.”

Moreover, wishing to underscore the importance of preserving trust between contracting parties, the drafters chose to make fair dealing a contractual obligation by including a “conflict of interest” provision in ConsensusDOCS agreements.

ConsensusDOCS 200, Subparagraph 2.1.4, states:

“2.1.4 The Owner and the Contractor shall perform their obligations with integrity, ensuring at a minimum that

2.1.4.1 Conflicts of interest shall be avoided or disclosed promptly to the other Party, and

2.1.4.2 The Contractor and the Owner warrant that they have not and shall not pay nor receive any contingent fees or gratuities to or from the other Party, including its agents, officers and employees, subcontractors or others for whom they may be liable, to secure preferential treatment.”

Direct Communications

Unlike the communications pathway delineated in AIA construction documents, under ConsensusDOCS 200, the owner and the contractor engage in direct communications—that is, the design professional does not serve as the communications “switchboard” between the owner and the contractor. In other words, contractor communications are not routed through the design professional, unless a specific provision establishes that contemporaneous notice be given to the design professional (such as in the case of encountering an alleged hazardous material (Subparagraph 3.13.2) or a differing site condition (Subparagraph 3.16.2)), or the Owner specifically directs the contractor to do so (see, e.g., Paragraph 3.14, Submittals), which, of course, the Owner may elect to do. Contractor communications, such as reports, notices, and change order requests, flow to the Owner for the Owner’s information, review and, if needed, action (the Owner then may consult with its design professional to receive the design professional’s advice and interpretations).

In such a situation, clarity on who is the authorized representative for each party is critical. To that end, ConsensusDOCS 200 includes provisions—e.g., Subparagraph 3.4.4 (Contractor’s Representative) and Paragraph 4.7 (Owner’s Representative)—in

which the parties specifically name in the agreement the persons who will serve as their respective authorized representatives on the project. ConsensusDOCS 200 requires that notice be given in writing to the other party in the event of a change in that party's authorized representative.

Contractor Claims Notices

ConsensusDOCS 200 requires the contractor to submit all notices of claims for additional time or additional cost (i.e., Paragraph 8.4) directly to the owner. Thereafter, the contractor must submit written documentation of the claim to the owner within 21 days of providing notice. The Owner then is given 14 days after receipt of the Contractor's claim documentation to accept or reject the Contractor's claim. Matters still contested between the parties move to the dispute mitigation and resolution procedures of Article 12.

Dispute Mitigation

Of particular importance to the ConsensusDOCS drafters was the inclusion of a disputes mitigation and resolution structure that involved tested techniques that offered the parties the ability (1) to maintain control over their dispute and (2) to resolve the dispute close in time to its origin. Party control and opportunities for close-in-time resolution were deemed necessary ingredients to counter the cost escalation, hostility, strained business relations, and other detritus of project disputes, particularly those where resolution was deferred or was imposed by third parties. Moreover, the drafters wished to place a new term into the lexicon of construction contract boilerplate that would convey

their express intent of incorporating techniques *to lessen the severity of disputes*.

“Mitigation” was selected as the word with the right meaning to convey that message, and the standing neutral concept was added as a technique emblematic of the message and an important refinement to the structure carried over from the AGC predecessor document.

Step Negotiations

In its own documents, particularly in light of removing the design professional from its initial arbiter role, AGC had chosen party-to-party negotiations, termed “direct discussions,” as the first technique attempted by the parties to resolve their disagreements, which was subsequently adopted by the ConsensusDOCS drafters (see ConsensusDOCS 200, Paragraph 12.2). “Direct discussions” between project representatives force the parties to confront the contested matter (particularly important when project communications, or the lack there of, may be the source or a contributing source of the disagreement), offering them the opportunity for resolving that matter at the lowest project level, before having to involve more senior company officers in the matter or to seek input from “project outsiders,” such as attorneys and consultants. Under ConsensusDOCS forms, “good faith direct discussions” occur at two levels: at the project level through the authorized project representatives for the parties and, failing any resolution at that level, at the senior executive level. This two step negotiation process includes relatively short time frames for each step, with the intention of making the process brisk, not lengthy, so the parties who fail to come to resolution may move on to

techniques involving assistance through third-party neutral recommendations and findings (project neutral/DRB) or facilitation (mediation).

At the first step, the project representatives are given a timeframe of “five (5) business Days” from the “date of first discussion” to resolve the matter in dispute. Their five-day timeframe recognizes that, in some instances, the project representatives already may be set and unflinching in their positions, so reference of the matter to a higher management level needs to occur promptly after it is apparent that the project representatives are in deadlock. The senior executives are given five business days to meet after receipt of notice from the project representatives that they failed to resolve the matter in dispute and have “fifteen (15) Days” (note that these are calendar days, not business days) from the date of first discussion to reach resolution.

Mitigation

Recognizing the seriousness of any disagreement which reaches senior company officers of each party and which subsequently fails to be resolved, the ConsensusDOCS drafters sought to incorporate a “mitigation” process that would keep hostility levels in check and maintain the parties’ autonomy to fashion solutions to their disagreement while offering them a means to test their positions and to garner “findings” from an impartial, knowledgeable, and credible source. The standing neutral concept via a project neutral or a DRB was selected for its increasingly high regard in the construction industry and its success record⁵ and given a title denoting its purpose of “mitigating” disputes. The drafters made “mitigation” an optional methodology out of concern that not every owner or commercial construction project would shoulder the costs of a standing project neutral

or a DRB, but the drafters felt strongly that the mitigation methodologies, together with their accompanying procedures, should be somewhat fleshed out and placed within the body of Article 12 of ConsensusDOCS 200 to infer that the contracting parties would be wise, at a minimum, to discuss during contract negotiations the use and advantages of a standing project neutral or DRB for their project.

Under Paragraph 12.3, the contracting parties are given the choice of selecting a single neutral or a three-person panel to accommodate the needs of projects of varying sizes and complexities. The project neutral or DRB will render “nonbinding findings,” but those findings “may be introduced as evidence at a subsequent binding adjudication of the matter” to incentivize the parties to adopt the recommendation. The drafters believed that the parties’ knowledge of the availability of the findings to subsequent adjudicatory processes (where it might be accorded significant weight by the trier of fact) would constitute a powerful incentive for settlement. As a result, the drafters chose to make the introduction of the findings the default position. It is worth noting, however, that the findings of the project neutral or the DRB may not be admissible in a subsequent adjudicatory proceeding in every jurisdiction, and users are cautioned to work with legal counsel to review the laws in the applicable jurisdiction to determine admissibility.

Subparagraph 12.3.1 establishes some of the basic parameters for and responsibilities of the project neutral or DRB, specifically the following:

- mutual selection by the parties,
- execution of retainer agreement describing the full scope of responsibilities,
- equal sharing of costs and expenses,

- the availability of the project neutral or DRB “throughout the course of the Project,”
- a specific obligation on the part of the project neutral or DRB to “make regular visits to the Project so as to maintain an up-to-date understanding of the Project progress and issues,” and
- the issuance of nonbinding findings within five (5) business days of referral, unless good cause is shown.

Users of the form should seek assistance to augment the boilerplate language to address in more specific fashion such matters as the procedures for selecting the project neutral or DRB, including the relevant qualifications and neutrality, the time of appointment, the retainer agreement, and other matters mentioned in Paragraph 12.3 but left for the parties to negotiate and to detail.⁶

Matters remaining unresolved after the issuance of the nonbinding recommendations or if the project neutral/DRB fails to issue its findings within 5 days of referral, the parties next proceed to the binding adjudicatory process selected in the contract, either arbitration or litigation.

Mediation

Under ConsensusDOCS 200, contracting parties that do not select mitigation procedures in the standardized form commit to mediating disputes not resolved through the use of the two-tiered step negotiations process (direct discussions followed by mediation is a carry-over concept from the AGC predecessor document). Mediation offers the parties the benefit of a third-party neutral to clarify issues, to review and to

“reality test” positions, and to recommend paths for settlement. However, unlike the project neutral/DRB panelist in the “mitigation” procedures, the mediator will be selected after the dispute has arisen and, at the time of his or her selection, will have very little, if any, specific knowledge about the project and its requirements. Nonetheless, mediation has proven to be a worthy method for resolving construction disputes that, when successful in facilitating settlement, can generate significant time and costs savings for disputants.⁷ Even when mediation does not result in settlement, the mediation may benefit the parties by creating agreement on specific facts or issues and can pave the way for later resolution of the disputed matter.⁸

Paragraph 12.4 defines the key parameters of the mediation procedure. The mediation will be convened within thirty (30) business days of the matter being first discussed (remember, the project representatives are to record the date on which they first hold direct discussions of the contested matter) and are to conclude the mediation within an additional fifteen business day period (45 business days from the matter being first discussed). Again, the timeframes are intentionally tight to place the parties in front of a third-party neutral in the hopes of realizing an early resolution of the matter. Other mediation procedures set out in Paragraph 12.4 are the following:

- specifies current Construction Industry Mediation Rules of the American Arbitration Association (AAA) or a set of rules mutually agreed by the parties,
- equal sharing of the costs of the mediation, and
- stipulates that termination may occur after the first mediation session; however, the decision to terminate must be “*delivered in person*” by

the terminating party to the other party and to the mediator (the idea to condition the notice of termination upon delivery in person is to force one last opportunity for the parties to talk in-person and possibly settle their dispute before resort to a binding adjudicatory process).

Binding Dispute Resolution

The ConsensusDOCS drafters, like the AGC drafters before them, believed that the contracting parties should be free to select the final method by which to adjudicate disputes. As a result, mandatory arbitration is not the default choice for the binding dispute resolution method. In Paragraph 12.5 of ConsensusDOCS 200, the contracting parties may select either arbitration, using the current Construction Industry Arbitration Rules of AAA or a set of rules mutually agreed by the parties, or litigation in either a state or federal court in the location of the project.

The drafters, who represented owner, contractor, subcontractor, and surety community constituencies, had decidedly mixed views concerning whether arbitration, as it has evolved presently, lived up to its original promise of being less complex, expensive, and time-consuming than litigation. Some drafters expressed the opinion that the lack of cost and time savings combined with the limited ability of parties' to appeal an arbitral decision vitiated a default preference for arbitration over litigation. Others believed strongly in the benefits of arbitration and argued for its inclusion as the default adjudicatory procedure. After much discussion, a consensus of the drafters reasoned that a "check the blank" approach—that is, one requiring the parties to make an affirmative selection—at least in theory would force the contracting parties to discuss with their own

legal counsels and with each other the relative merits of arbitration or litigation for their particular project and situation and to understand, that in the absence of a selection, the default would be, in fact, litigation. Paragraph 12.5 also establishes that the venue of any adjudicatory proceeding will be the location of the project, unless the parties mutually agree otherwise (see Subparagraph 12.5.2).

Likely to be a provision that garners discussion and debate, Subparagraph 12.5.1 is a form of a “prevailing party” provision, that reads: “[t]he costs of any binding dispute resolution procedures shall be borne by the non-prevailing Party, as determined by the adjudicator of the dispute.” Again, the “prevailing party” provision is another carry over concept from the AGC predecessor document (although worded differently), and its inclusion is for the purpose of dissuading frivolous claims and in motivating the parties to work earnestly to settle their dispute before resort to a third-party imposed resolution. This provision should be carefully reviewed by legal counsel as it leaves “much to the imagination” of the adjudicator of the dispute, such as whether attorneys’ fees are to be considered “costs” and how to determine which party is the “non-prevailing” party, particularly in light of the presence of counterclaims.

Multiparty Proceeding

Paragraph 12.6 requires that “[a]ll parties necessary to resolve a matter shall be parties to the same dispute resolution procedure.” Another carry over concept from the AGC predecessor document, the requirement for multiparty proceedings—that is, joinder of “all parties necessary” —is intended as a means (1) to make resolution of disputes more efficient by having all parties directly involved in the dispute in the same forum and

(2) to avoid inconsistent rulings that may arise when related matters are adjudicated in different forums. The use of the phrase “all parties necessary” is intended to be broad and encompassing so as to be inclusive of any project participant bearing upon the dispute. Furthermore, the provision includes a requirement that the Owner and the Contractor include “appropriate provisions” in their other contracts to ensure joinder of other parties involved with the project. The drafters believed that the opportunity afforded to resolve disputes early by having all the key parties in the same forum outweighed competing concerns that such a joinder requirement might overly complicate the dispute resolution procedure.

Work Continuance and Payment

ConsensusDOCS 200 includes a requirement (at Paragraph 12.1) that, during any dispute mitigation or resolution proceedings, the contractor must continue to perform and to maintain the work schedule so long as the owner continues to make payments “in accordance with this Agreement.”

Placing ConsensusDOCS Procedures in Context with AIA Procedures

New editions of the AIA A201 family of documents were released in 2007. Among their notable revisions were those relating to provisions addressing the handling of project disputes. Some of these, such as removing arbitration as the “default” for binding adjudication of disputes and allowing the contracting parties to “check off” their choice of a binding adjudicatory proceeding, follow decisions made years earlier by EJCDC and by AGC in their respective standard form documents. In those respects, the

current editions of AIA and ConsensusDOCS forms are in closer alignment on the use of dispute methods than their predecessor documents. Nonetheless, critical distinctions remain, perhaps the most significant being the role given—or not given—the architect in facilitating project communications and in addressing disagreements between the owner and the contractor, which are explored briefly below.

Architect As IDM

The 2007 editions of AIA Document A101, *Standard Form of Agreement Between Owner and Contractor where the basis of payment is a Stipulated Sum*, and AIA Document A201, *General Conditions of the Contract for Construction*, continue to place the architect as the communications⁹ and decision-making hub of the project. For example, the 2007 editions introduce into AIA A201 family boilerplate the concept of a project neutral, termed the “Initial Decision Maker” (IDM).¹⁰ The IDM concept, however, still holds a primary role for the architect in deciding disputes between the owner and the contractor as the architect serves as the IDM, except when the parties appoint another individual to so serve (see, e.g., Paragraph 6.1 of AIA Document A101, which reads, “[t]he Architect will serve as Initial Decision Maker...unless the parties appoint below another individual, not a party to this Agreement, to serve as Initial Decision Maker.”). Thus, on many projects in which AIA forms are used, the architect, not an independent third-party, likely will serve as the IDM. In contrast, the ConsensusDOCS forms “mitigation” approach presumes that the project neutral or the panelists comprising the DRB will be independent third-parties, not parties with vested interests in the project, avoiding the appearance of unfairness and enhancing the

credibility of the neutral, which, in turn, may generate a higher likelihood that the contracting parties will accept the neutral's or DRB's findings and recommendations.

The AIA IDM concept also constitutes the first process through which disputes flow between the owner and the contractor, thereby setting up a dispute resolution structure in which the parties look outside of themselves to settle disagreements. This is a significant philosophical difference with the ConsensusDOCS approach, which employs step negotiations between the contracting parties to keep control of the dispute within the hands of those parties for mutual problem solving.

A further difference (again perhaps reflective of different views on the importance of preserving party autonomy for problem-solving) between the forms is the finality of the neutral's decision. Clause 15.2.6.1 of AIA Document A201-2007 establishes that either contracting party may, within 30 days of the date of the IDM's decision, demand that the other party file for mediation (within 60 days of the IDM's decision) or the IDM's decision will become final and binding, precluding recourse to mediation or to any adjudicatory proceeding. By contrast, the ConsensusDOCS "mitigation" procedures result in the issuance of a nonbinding finding (that can be introduced as evidence in a subsequent adjudicatory proceeding).

Rules Regarding Joinder

Traditionally, AIA forms expressly prohibited joinder of the architect in arbitration proceedings without the architect's consent. Under the 2007 editions of the AIA A201 family of standard forms, such prohibition has been relaxed, but not removed entirely. The AIA documents now permit, under limited circumstances, consolidation of

arbitration proceedings and joinder of other parties where common questions of law or fact are involved.¹¹ However, joinder of the architect still requires the consent of the architect.¹² Under ConsensusDOCS forms, “all parties necessary” (including the architect) to resolve the dispute are joined in the same proceeding.

Conclusion

With a focus on preserving the business relationship by affording the contracting parties opportunities to communicate directly, to manage their disputes and to apply creative problem-solving, and to seek the recommendations of independent, third-party neutrals, the dispute mitigation and resolution structure in ConsensusDOCS form contracts blazes a different disputes path from those found in other, existing industry standard form families. The ConsensusDOCS forms direct disagreements down a multi-method, graduated path in the hopes that party disagreements will find early resolution before resort to adversarial proceedings. Not all parties may choose to adopt the ConsensusDOCS path due to cost or other project considerations, but the industry shall be richer for and benefit from having another standardized representation of tested strategies to defuse construction disputes.

¹ The opinions contained in this paper are solely those of the Author based on the Author’s own observations and experiences and should not be construed to be the opinions or actions of the National Association of Surety Bond Producers or any other organization.

² More information about ConsensusDOCS is available at www.consensdocs.org. Participating organizations in ConsensusDOCS include: the Construction Users Roundtable; the National Association of State Facilities Administrators; the Construction Owners Association of America; the Construction Industry Roundtable; the Associated General Contractors of America; the Associated Specialty Contractors, Inc.; Lean Construction Institute; American Subcontractors Association; Associated Builders and Contractors, Inc.; Association of the Wall and Ceiling Industry; National Association of Surety Bond Producers; Surety and Fidelity Association of America; Sheet Metal and Air Conditioning Contractors’ National Association; National Subcontractors Alliance; Plumbing Heating Cooling Contractors Association; Painting and

Decorating contractors of America; National Roofing Contractors Association; National Insulation Association; National Electrical Contractors Association; Mechanical contractors Association of America; and the Finishing Contractors Association. See also Mary B. Powers, "Accentuate the Positive, Eliminate the Negative," *Constructor* (September/October 2007).

³ *Ibid* at 53.

⁴ *Ibid*.

⁵ See, e.g., Robert J. Smith and Robert A. Rubin, "A New Look at Dispute Resolution Boards (DRBs)," AAA Online Library, in which the authors state that "DRBs have been credited with a 99% success rate."

⁶ Additional resources on DRBs and DRB procedures are available from the Dispute Resolution Board Foundation, Inc. at www.drb.org.

⁷ See, e.g., Maria R. Lamari, "The Role of Alternative Dispute Resolution in Government Construction Contract Disputes," 23 *Hofstra L. Rev.* 205 (Fall 1994) at 218-219.

⁸ See Richard Fullerton, "Searching for Balance in Conflict Management: The Contractor's Perspective," *Dispute Resolution Journal* (February/April 2005) at 5.

⁹ See AIA Document A201 – 2007, Subparagraph 4.2.4, which states in part that "the Owner and Contractor shall endeavor to communicate with each other through the Architect."

¹⁰ See Suzanne Harness, Kenneth Cobleigh, Michael Bomba and Howard Goldberg, "2007 Revisions to AIA Contract Documents," *The Construction Lawyer* (Spring 2008) at 5.

¹¹ See generally AIA Document A201 – 2007, Subparagraph 15.4.4.

¹² See AIA Document A201 – 2007, Clause 15.4.4.2.