



One Liberty Plaza, 32nd Floor  
New York, New York 10006

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# A&E Briefings

Structuring risk management solutions



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## What's new in the new contract documents?

It seems that change is taking place everywhere we look these days – and even the standard contract forms for design professionals and contractors have changed significantly. The process that building industry associations go through to develop and produce their standard contract documents is a long and tedious one – involving tremendous volunteer efforts from many individuals from numerous different organizations. Within certain segments of the construction business, the issuance of new forms is greeted with a mixture of anticipation and heartburn, while others give it a yawn. Whichever camp you (and your legal counsel) fall in to, it is important to know about new documents because they set a standard that can affect the course of dealings within the industry.

It has been about a year and a half since a slew of new contract documents were issued in 2007 by various industry associations:

- The Engineers Joint Contract Documents Committee (EJCDC) major effort was to update its C-Series of construction related documents.
- The Associated General Contractors (AGC) led a consortium of industry groups in issuing a revamped series of over seventy documents under the ConsensusDOCS (CDocs) label.

- The American Institute of Architects (AIA) issued or updated thirty-seven contracts, forms and guides.

*This article will mostly discuss the designer-focused documents. Future issues of A&E Briefings will provide additional risk management insights concerning the key clauses of these new documents.*

### EJCDC

The EJCDC documents are intended for use on work designed by engineers, such as horizontal infrastructure and industrial projects. In 2007, EJCDC developed document E-560, *Standard Form of Agreement between Engineer & Land Surveyor for Professional Services*. This document is intended for use when surveying services are provided to the engineer by specialists who are not necessarily engineers.

### CDocs

How and why did the CDocs program come about? Our story takes us back a few years to the mid-1990s when the 1997 versions of AIA documents were being developed. Some of the contractors and project owners were apparently not entirely satisfied with the process or final contract forms. As a result, between 1998 and 2002, AGC and several owners' groups (COAA – Construction Owners Association of America, and AOD – Associated

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# New contract documents

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Owners and Developers) published their own documents. In anticipation of the 2007 cycle, a group of associations came together under the umbrella name of the Construction Industry Contracts Council (CICC). Using the AGC documents as a starting point (approximately seventy-five percent of the content of any given CDocs document is verbatim from the corresponding AGC document), they developed the ConsensusDOCS series. However, for all the talk of "a collaborative effort of entities representing a wide cross-section of the construction industry" (DOCS is an acronym for Designers, Owners, Contractors, Sureties), the following organizations did not endorse CDocs: the aforementioned AIA and EJCDC, as well as DBIA - Design/Build Institute of America, and CMAA - Construction Management Association of America.

The treatment of the architect in the CDocs is markedly different from the AIA. In CDocs, the primary parties are the owner and the contractor. Nowhere is this more obvious than in the CDocs 200, *Standard Agreement and General Conditions between Owner and Contractor*:

"3.14.1 The Contractor shall submit to the Owner, and, if directed, to its Architect/Engineer, for review and approval all shop drawings, samples, product data and similar submittals required by the Contract Documents."

Functions such as preparing change orders, reviewing submittals and shop drawings, rejecting nonconforming work, and determining substantial and final completion are owner responsibilities. If the owner so directs, then the architect

receives contractor submittals. Better hope the "sophisticated" owner knows when to involve the architect.

Some other key provisions of the CDocs 240, *Standard Form of Agreement Between Owner and Architect/Engineer (A/E)* worth knowing about include:

- **Communication.** In keeping with the diminution of the A/E's role, paragraph 3.1.4 states:  
"Except as provided in this Agreement or unless otherwise directed by the Owner, the Architect/Engineer shall communicate with the Contractor and Subcontractors only through the Owner."
- **Standard of care.** The CDocs 240 removed the standard of care contained in AGC Document No. 240, "The standard of care for architectural and engineering Services performed under this Agreement shall be the care and skill ordinarily used by members of the architectural and engineering professions practicing under similar conditions at the same time and locality," and replaced it with the heightened (and riskier) wording: "The Architect/Engineer represents that it possesses the requisite skill, expertise, and licensing to perform the required services."
- **Construction documents.** Paragraph 3.2.5 now includes a new sentence which could adversely affect the A/E's scope of services and ability to be compensated for additional services (see the risk tip "Absolutes" in the Summer/Fall 2008 A&E Briefings):  
"The Construction Documents shall completely describe all work necessary to bid and construct the Project."

- **Processing applications for payment.** The AGC 240 stated that "...the Architect/Engineer shall make recommendations to the Owner as to amounts due." The CDocs 240 now states that "...the Architect/Engineer shall certify to the Owner the amounts due to the Contractor..." This clause is now followed by a provision (very similar in wording to the AIA Document B141™-1997 (Part 2), *Standard Form of Architect's Services: Design and Contract Administration*) conditioning the certification for payment:  
"3.2.8.6 The Architect/Engineer's certification for payment shall not be a representation that the Architect/Engineer has:
  - a. made exhaustive or continuous on-site inspections to check the quality or quantity of the Work;
  - b. reviewed construction means, methods, techniques, sequence or procedures for the Contractor's Work;
  - c. reviewed copies of requisitions received from Subcontractors and Material Suppliers and other data requested by the Owner to substantiate the Contractor's right to payment; or
  - d. ascertained how or for what purpose the Contractor has used money previously paid. The Architect/Engineer shall be entitled to rely on the Contractor's certification as to the application of moneys previously paid."
- **Indemnity.** The CDocs 240 contains more favorable mutual indemnification between the owner and the A/E than its predecessor document. Also, the word "defend" has been removed - now the clauses merely list "...indemnify and hold harmless..." which may reduce the potential cost liability.

- **Dispute resolution.** An expanded menu of alternative dispute resolution methods has been incorporated including: direct discussions, project neutral, dispute review boards, mediation, arbitration and litigation. This menu is touted as helping to resolve disputes without having to resort to litigation - who wants to see the inside of a courtroom? But others are of the opinion that these choices, starting with mandatory on-site discussions among the parties at ever-higher levels of authority, only prolong the agony.

ConsensusDOCS also offers the CDocs 245, *Standard Short Form Agreement Between Owner and Architect/Engineer*. The CDocs website ([www.consensusdocs.com](http://www.consensusdocs.com)) provides several free resources including partial sample contracts and regularly updated Guidebooks for various documents. A complete set of sample documents is available in a ConsensusDOCS Reference Kit available for purchase - just be careful that you receive a newer pressing of the CD-ROM, as older ones contained only a partial sample of the CDocs 240.

## AIA

Small, medium, large or extra-large? Which one describes your project? The AIA has contracts which may be appropriate:

- **B105™-2007, Standard Form of Agreement Between Owner and Architect for a Residential or Small Commercial Project**
- **B104™-2007, Standard Form of Agreement Between Owner and Architect for a Project of Limited Scope**

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The AIA has contracts which maybe appropriate for your project – no matter what the size.

"The Construction Documents shall completely describe all work necessary to bid and construct the Project."

# New contract documents

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The flagship document of the AIA B-Series is the B101™-2007, which replaces the B151™-1997.

- B101™-2007, *Standard Form of Agreement Between Owner and Architect*
- B103™-2007, *Standard Form of Agreement Between Owner and Architect for a Large and Complex Project*

The B105 lives up to its name. At only three pages, it is smaller (by one page, even though there is no reduction of content) than its predecessor, the B155™-1993, *Standard Form of Agreement Between Owner and Architect for a Small Project*. So what is missing? Insurance, indemnity and dispute resolution provisions, among the more important issues. Considering that residential work is one of the most claim-inducing types of projects, leaving these issues to the mercies of the laws of the state where the project is located is risky – and isn't that what we're trying to prevent here? This is where the liberal use of "Article 7: Other Provisions" or an Addendum is needed to "fill in the blanks" and address those risks. While a contract for residential construction should be clear and simple, it should not be too short.

Next up, the B104 for projects of limited scope straddles between the B105 and the B101. While the B104 is a simplified and abbreviated version of the standard B101, it takes some of its cues from the smaller B105. Like the B101, the B104 presents a professional

standard of care, but like the B105 it is silent regarding insurance.

The flagship document of the AIA B-Series is the B101™-2007 which replaces the B151™-1997, *Abbreviated Standard Form of Agreement Between Owner and Architect*, which replaced the B141™-1987. The AIA maintains that the B101 is a one-part document. It is and it isn't. It is not as blatantly two-part as the B141™-1997 edition was, but it still relies on an Appendix. So what else is new in the B101™-2007?

- **Standard of care.** For the first time, the owner-architect agreement contains a definition of the standard of care to which the architect is expected to perform work:  
"2.2 The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances."
- **Insurance:** Also for the first time, the B101 includes insurance provisions:  
"2.5 The Architect shall maintain the following insurance for the duration of this Agreement. If any of the requirements set forth below exceed the types and limits the Architect normally maintains, the Owner shall reimburse the Architect for any additional costs:
  - .1 General Liability
  - .2 Automobile Liability
  - .3 Workers' Compensation
  - .4 Professional Liability
- **Environmental design.** In the schematic design phase, environmentally responsible design approaches and alternatives are to be discussed and considered.

- **Dispute resolution.** Traditionally, in the AIA Owner-Architect Agreement, it has been the architect's responsibility to "...render initial decisions on claims, disputes or other matters in question..." and arbitration has been mandatory. Both traditions have changed. B101 allows the owner and contractor to designate a third-party Initial Decision Maker other than the architect, and arbitration is now optional.

For larger and more complex projects, a new first edition document was developed in 2007. The B103™-2007 resulted from efforts of the AIA Large-Firm Roundtable which was ready to develop its own contract. The B103 shares many of the characteristics of the B101 while accommodating the need for consultants to both the owner and the architect. The B103 has been well-received by the legal community.

If none of the above suit your purposes, the AIA also offers a successor to the two-part format of the B141™-1997, the B102™-2007, *Standard Form of Agreement Between Owner and Architect without a Predefined Scope of Architect's Services*, which works with a series of scope documents referred to as *Standard Form of Architect's Services*:

- B201: Design and Construction Contract Administration
- B203: Site Evaluation and Planning
- B204: Value Analysis, where the Owner employs a Value Analysis Consultant
- B205: Historic Preservation
- B206: Security Evaluation and Planning
- B209: Construction Contract Administration, where the Owner has retained another Architect for Design Services
- B210: Facility Support
- B211: Commissioning

- B214: LEED® Certification
- B252: Architectural Interior Design
- B253: Furniture, Furnishings and Equipment Design

In keeping with the updated provisions of B101-2007, the following agreements were modified and renumbered:

- B152™-2007, *Standard Form of Agreement Between Owner and Architect for Architectural Interior Design Services*, which replaces the B171™ID-2003.
- B153™-2007, *Standard Form of Agreement Between Owner and Architect for Furniture, Furnishings and Equipment Design Services*, which replaces the B175™ID-2003.

The main document of the C-Series is now the C401™-2007, *Standard Form of Agreement between Architect and Consultant*. The document itself has been reduced from the seventeen pages of the predecessor C141™-1997 to the current eight pages. How? By relying heavily on incorporation by reference of the prime agreement between the owner and the architect through a flow-down clause in Section 1.3. This nip-and-tuck makes it extremely important to review the prime agreement per the provision of Section 1.1:

"A copy of the Architect's agreement with the Owner, known as the Prime Agreement (from which compensation amounts may be deleted), is attached as Exhibit A and is made a part of this Agreement."

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The AIA also offers an Agreement that works by using a series of scope documents.

# New contract documents

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Just make sure this section is not deleted – what you don't know CAN hurt you. Otherwise, the C401™-2007 mirrors some of the changes in the B101™-2007 in regards to professional standard of care, insurance and indemnification.

The G-Series of three documents which amend the professional services agreement (see the risk tip “Are you a cobbler?” in the Winter 2007 A&E Briefings) have been renumbered. The G605, 606 and 607 are now G801, 802 and 803. Not enough design professionals know about these forms or use them.

The AIA website ([www.aia.org](http://www.aia.org)) provides free PDF copies of its document commentaries and comparisons, and guides for amendments and supplementary conditions. *The Architect's Handbook of Professional Practice, 14th Edition* includes a CD which contains samples of the AIA contract documents. But, the CD has printing intentionally disabled. Who thought that was a good idea? – it's not the adjuncts who teach from the documents that the AIA needs to be concerned about regarding the copyright. You can view the documents (with

the word “SAMPLE” watermarked across the page), but if you want hardcopy documents to review, then you will need to purchase them from the AIA directly.

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## Get a good tailor

Contracts are really about allocating risk among the parties, whether that allocation is equitable or not. With a change of wording, any contract document can be tailored to read like any other contract document. The real purpose of the association-produced standard documents is for users to have a “know what you're getting” basis from which to work, rather than having to reinvent the contract wheel every time.

With a history dating back to 1888, longevity is the advantage that AIA documents have over their competitors. Law moves slowly – legal history and precedent affect court interpretation of contracts. This brings to question the revision cycles of the various associations. Only since 1987 has the ten-year cycle been in effect. Prior to that, the main documents were revised as needed, whether it took two years or twenty-two years. Now, the CDocs program is establishing a minimum five-year drafting cycle.

Some may welcome these changes as keeping the documents contemporary – one faction of users would even like to see the documents updated every year. Another faction would rather the documents have time to work their way through the legal system to establish a body of knowledge (as documented in the *AIA Legal Cimator*, published by Matthew Bender) that attorneys can rely on when negotiating or litigating contract terms. As with fashion, change for change's sake is not always flattering and becoming. This article has

described what is new and available off-the-rack. Like clothes, some standard documents fit, and some are uncomfortable and need tailoring for your particular project, location and circumstances.

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