

Equip Your Company for the New 2017 AIA A201 & ConsensusDocs Contracts: What Contractors Need to Know

Speakers

Ron Ciotti
Hinkley Allen



Robert Majerus
Hensel Phelps



Brian Perlberg
AGC



Statement of Purpose

- Understand the updates to the AIA A201 General Conditions document, including important insurance changes and BIM protocols
- Understand the 2016 and 2017 ConsensusDocs standard contracts.
- Learn industry trends, changes, and legal disputes that drove changes in the industry standard documents
- Learn how to leverage terms in standard contracts to formulate better contract negotiating strategies.

AGC's Overview of 2017



- 2017 **Not** a Major Rewrite
 - Except **optional insurance Exhibit A**
- Major Issues Persist:
 - AGC not invited to provide input
 - AGC formed working group on 2017 AIA A201
 - AGC published AGC [Commentary](#) in July by AGC Contract Docs Forum.

ConsensusDocs Overview and Philosophy



- Active Owner
- Plain English
- Fair Contracts w/ Best Practices
- Reduce Transactional Costs & Inefficiencies

- **AIA A201 §1.6 – Claims Notice**
 - One Notice standard for claims;
 - Another standard for things other than claims.

CONCERN:

- Very broad definition of “Notice.”
- For claims, notice is formal.
- Hand-delivery no longer sufficient



ConsensusDocs, Notice



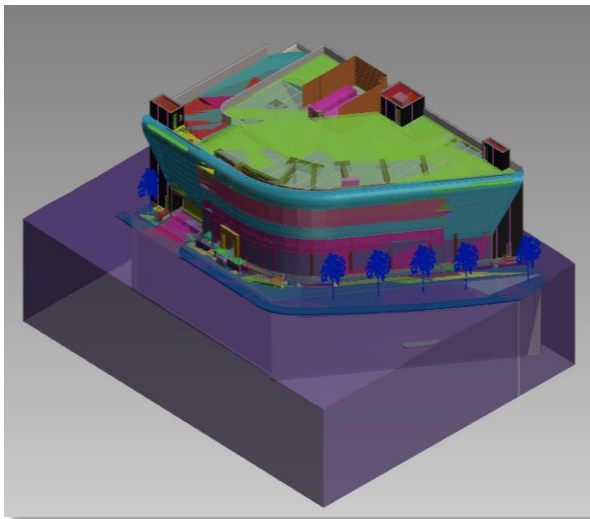
2016 Update to allow notice by any effective means, except for termination (formal delivery).

AIA Branded Documents Required

§1.7 and §1.8



CONCERN: First time AIA Logo impacts your contractual rights



Recommendation: Reject exclusivity of AIA by adding or equivalent.

Article 2 – Owner’s Financial Information (§2.2.1):

- A Contractor can stop work if evidence of financing is not provided within 14 days of request, HOWEVER:
 - Contractor can only stop work in the area affected by the material change giving rise to the need for Contractor’s request.
 - The difficulty in making this determination may prevent Contractor from actually stopping work.



Article 2 – Owner’s Financial Information (§2.2.4):

- Now Contractor ***cannot*** disclose financial information received from the Owner to Contractor’s lenders.
 - Creates the potential for litigation resulting from the Contractor’s disclosure of confidential information by sharing relevant information to its own lender.



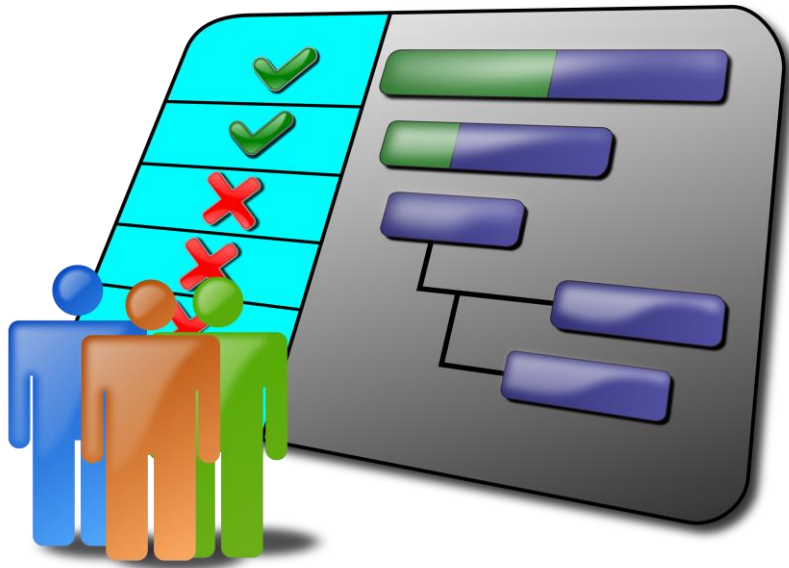
ConsensusDocs Project Financing



- You ask for it, you get
 - Has teeth, no info, work can stop
- Like AIA A201 1997



§3.10.2 – Submittal Schedules



- Recognizes that Contractor may not be the entity preparing the schedule.
- The Contractor must provide submittals per the schedule.

§3.10.2 – Submittal Schedules (cont'd.)

CONCERN:

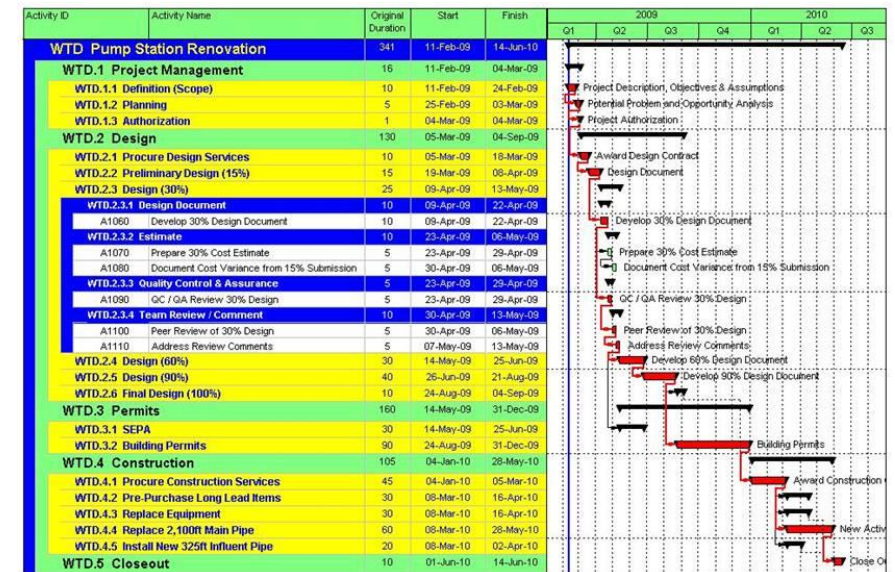
Gives Architect a free pass on submittal response if the Contractor misses a submittal by even one day.

RECOMMENDATION:

In your subcontracts, Contractor should incorporate submittal obligations to the Subcontractor (and share or shift the risks if submittals are late from the Subcontractor).

ConsensusDocs Schedule

- Scheduled review by Owner and IF direct Design Professional
- Basic requirements of CPM schedule now required contractually §8.3.4.



Communication



- ✓ Positive Change
 - AIA no longer requires all communications to go through the architect §4.2.4.

Article 6.1.1 – Construction by Owner or by Separate Contractors

- Eliminates express language allowing a Contractor to make a claim pursuant to Article 15 for delays and additional costs resulting from the Owner's action in performing work with its own forces or with separate contractors.

CONCERN:

- Could cause substantial impacts to Contractor concerning both cost and schedule (especially given potential of same scope of work).

RECOMMENDATION:

- Should be rejected or otherwise modified!

§6.2.2 – Mutual Responsibility

- Contractor's requirement to “promptly notify” Architect, instead of “report” to Owner, separate contractor's apparent discrepancies or defects, now calls in new notice requirements.
- **CONCERN:**
 - May create an obligation to observe the operations of the separate contractors.
 - Had such observation been performed, would there be an expectation that latent problems of the separate contractor's work would have been detected?

§6.2.2 – Mutual Responsibility (cont'd.)

RECOMMENDATION:

- Revise so that failure to notify Owner is not an acknowledgement of proper work.
- Alternatively, use language as leverage to make Architect's failure to report Contractor's Work in a timely manner an affirmative acknowledgement that the Contractor's Work is in conformance with the contract documents.
- Also, although AIA changed Contractor's requirement for notifying the Architect from "reasonably discoverable" defects to "apparent" defects, the term "patent" defect would more clearly define the Contractor's responsibility.

Article 9 – Payment

- §9.10.2(1) - requires Contractor to make all payments to downstream subcontractors/suppliers prior to receipt of final payment.

CONCERN:

- Unreasonable and not realistic.

RECOMMENDATION:

- Modify to read, "...or otherwise satisfied or will be promptly made upon receipt of final payment from Owner."



Article 9 – Payment (cont'd.)

- §9.10.2 gives Owner unfettered right to pay any amount to discharge a lien and then receive refund from Contractor.
- **RECOMMENDATION:**
 - Modify to state "...the Contractor shall refund to the Owner all ~~money~~ reasonable payments that the Owner ~~may be compelled to pay~~ has made in discharging the lien...."

ConsensusDocs Payment

- Constructor is now paid in **15 Days** instead of **20 Days** (§9.2.1)
- Design Professional **no longer** certifies pay application (§9.2.1)
- Retention for Final Completion is now **150%** instead of **200%**.

Article 11 – Insurance and Bonds



NEW AIA A201 Exhibit A – Builder’s Risk

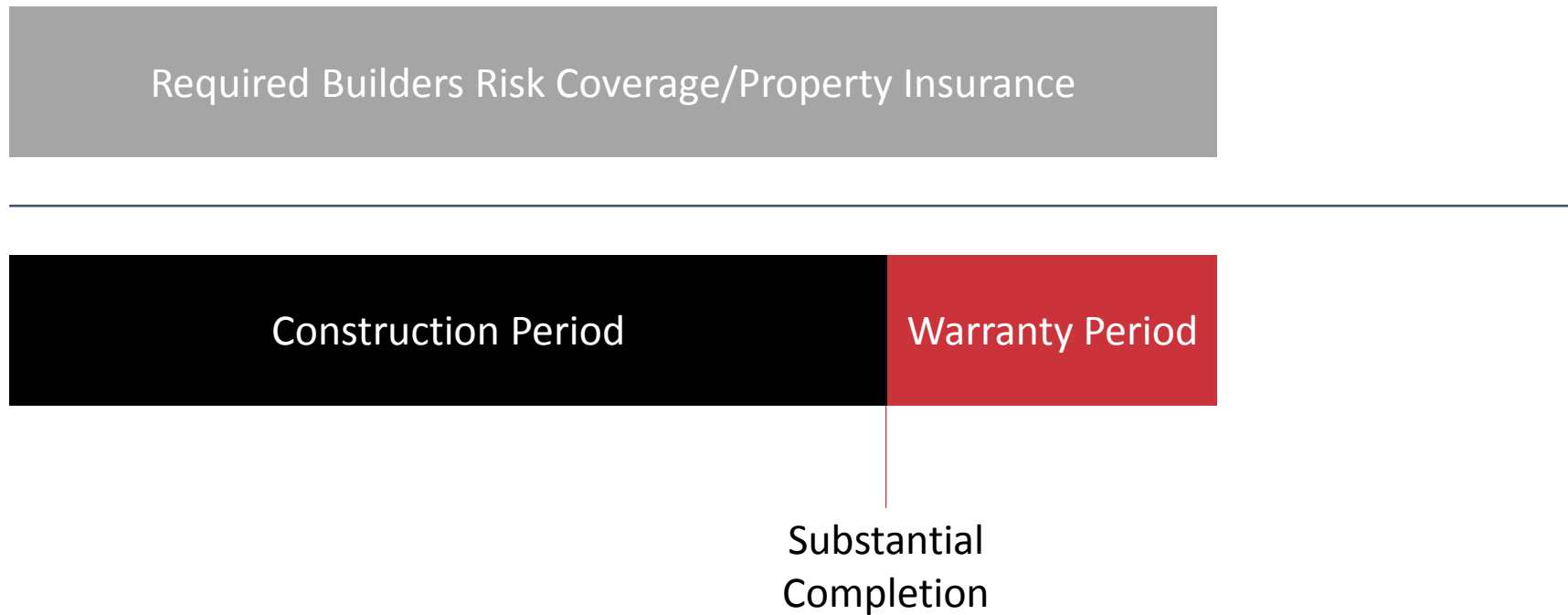
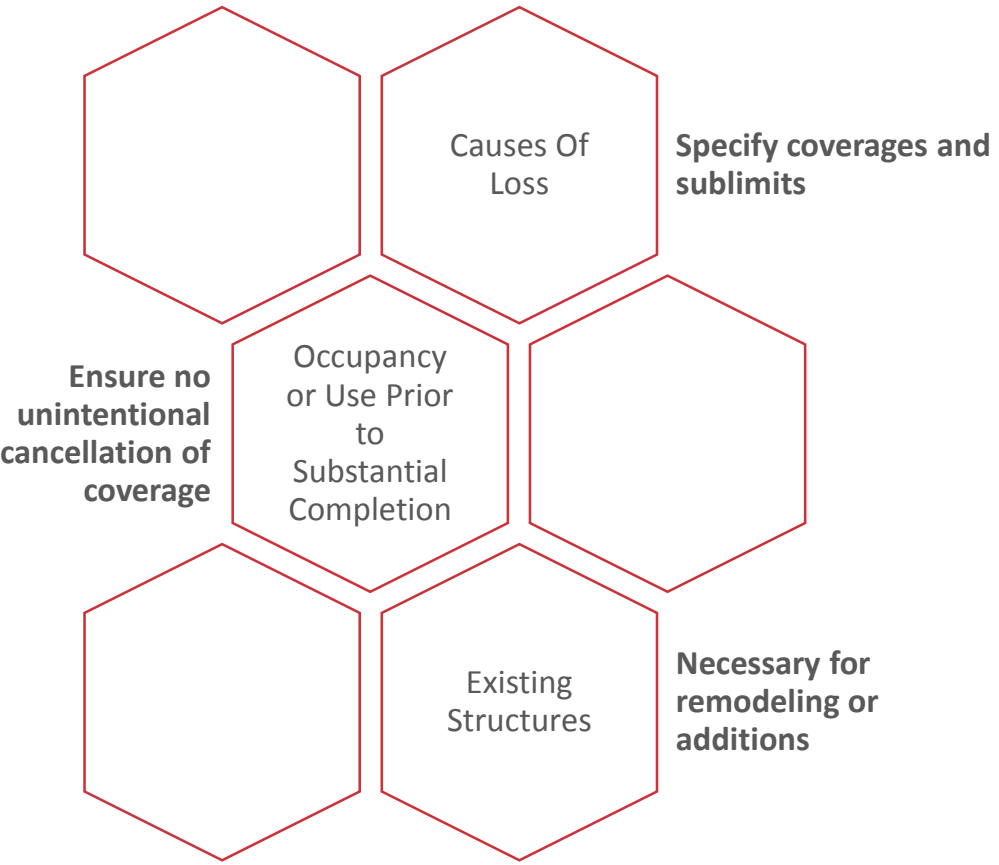


Exhibit A – Builder’s Risk (cont’d)



be more specific please

Exhibit A – Owner’s Other Insurance



Exhibit A – Contractor’s General Liability

Prohibited Exclusions

Only where the Work involves these hazards

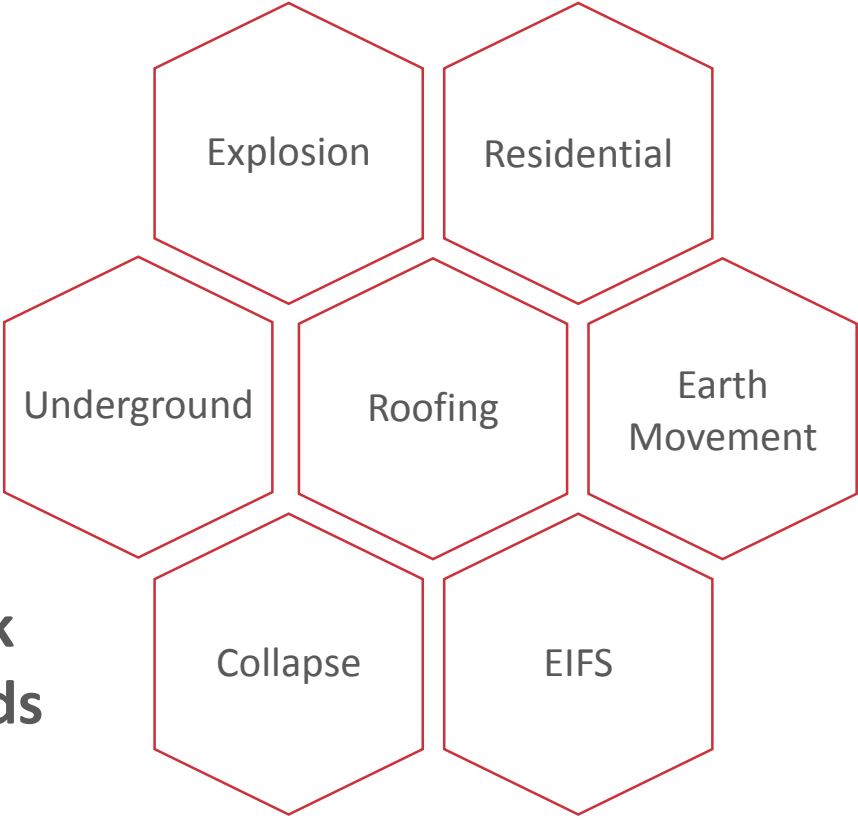
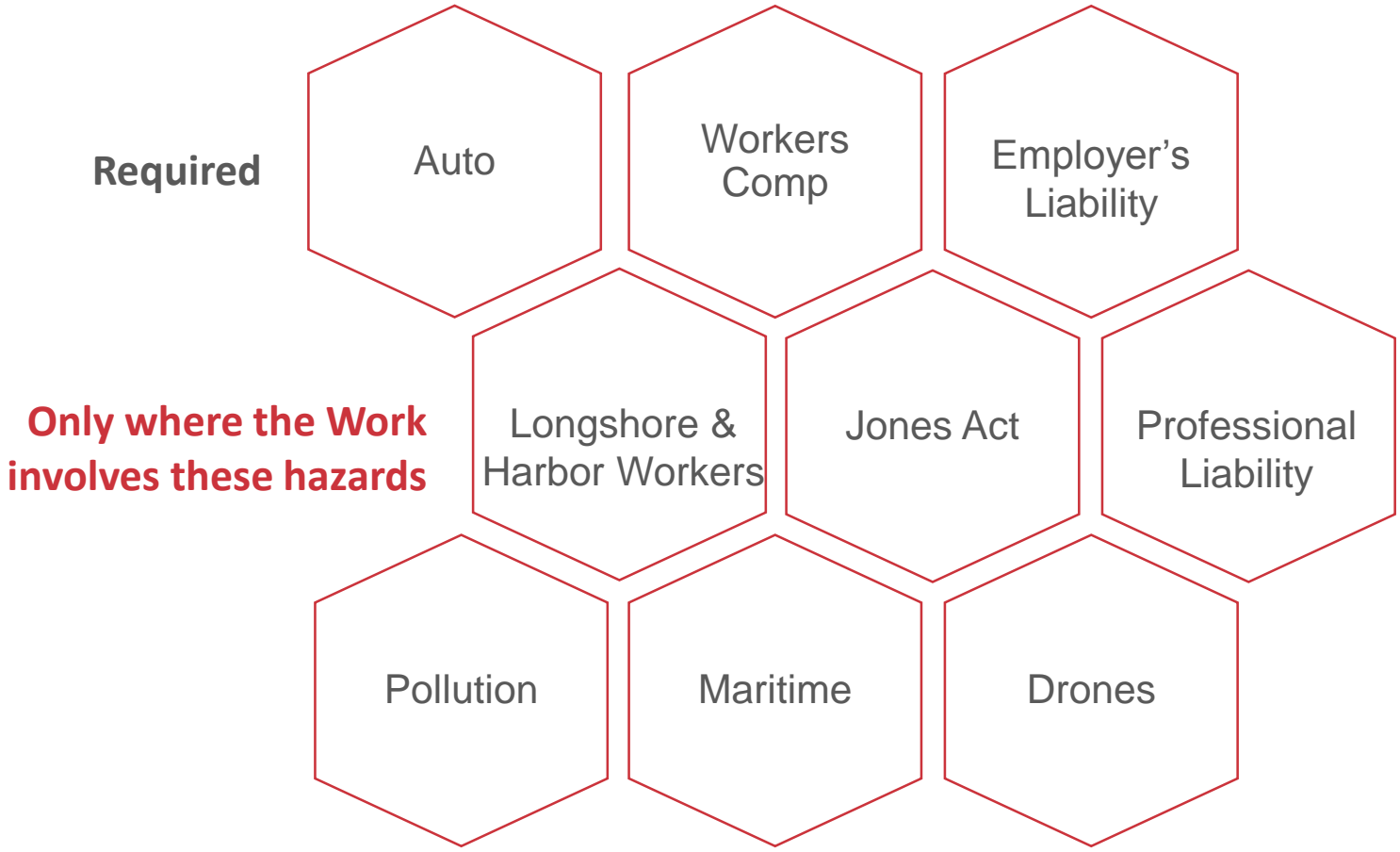


Exhibit A – Contractor’s General Liability

- Limitations on Deductibles and SIRs
 - More specific AI requirements
 - Require excess coverage to be just as broad
- be more
specific
please**

Exhibit A – Contractor’s Insurance



ConsensusDocs Property Insurance, Builder's Risk

- Builder now buys Builder's Risk policy instead of Owner §10.3
 - 50% cheaper
 - Constructor must factor this into its pricing
 - Procuring party is responsible for deductible and co-insurance
 - Owner can purchase and give notice
- Language carefully crafted to cover renovations and existing structures
- Risk of Loss is now upon the Constructor in 750 & 751 Subcontracts.

Termination for Convenience

Art. 14

- **CONCERN:**
 - Inconsistent provisions in the Prime and Subcontracts.
 - “Termination fee, if any.”
 - A401 Subcontract has lost profits and overhead on unperformed Work.



Article 15 – Claims and Disputes

§15.1.1 defines “Claim” as “a demand or assertion by one of the parties seeking, as a matter of right, payment of money, a change in the Contract Time, other relief with respect to the terms of the Contract . . . and other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract.”

- **CONCERN:**
 - Without notice, the Contractor can be surprised by a claim.
- **RECOMMENDATION:**
 - The Contractor should insist on notice of claims for Liquidated Damages.

Section 15.2 – Initial Decision

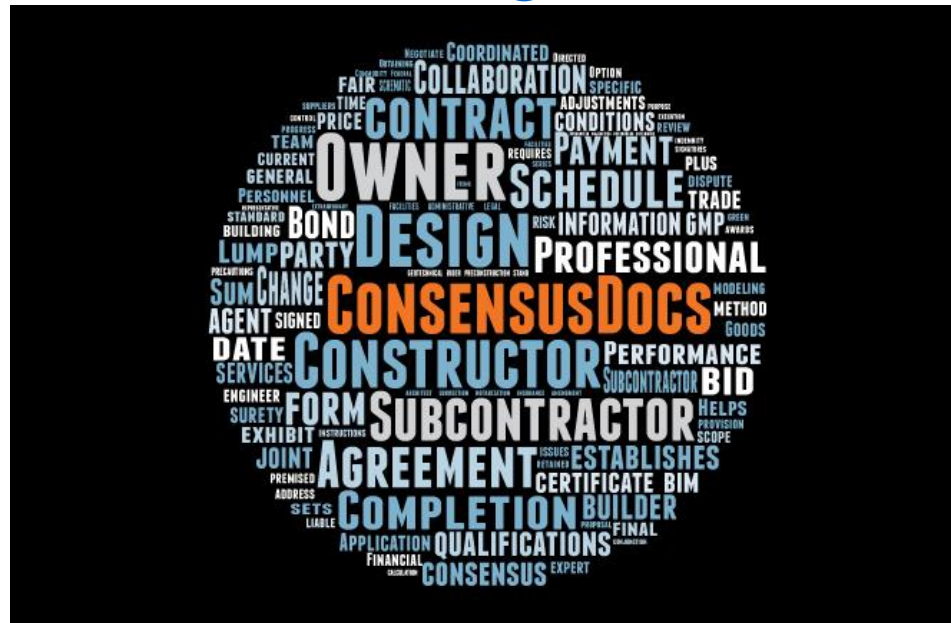
- Key Revisions/Observations:
 - §15.3.3 - New timing mechanism that may act to bar a party's ability to file a Claim in arbitration or litigation.
 - After the IDM's initial decision and mediation, either party may demand that the other party file its claim in either arbitration or litigation.
 - If the other party does not file for binding dispute resolution within 60 days after receipt of the demand, then both parties waive their rights to binding dispute resolution (i.e., arbitration or litigation) with respect to the initial decision.

Dispute Mitigation and Resolution

- Oriented to Mitigate, NOT Escalate claims
- Mitigate through mandatory direct Party communications
 - Project Level w/in 5 Days
 - Management Level w/ 5 Days
- Optional Project Neutral or Dispute Review Board (DRB)
- Mediation is required
- Parties decide - Arbitrate or Litigate
 - **Non-Prevailing party pays, including legal fees.**

Clarifications and Consistency

- Hundreds of editorial changes
- Get a sample by registering at www.ConsensusDocs.org
- **Free Redlines** available here
<https://www.consensusdocs.org/2016-2017UpdatedContracts>



Questions?



Brian Perlberg, AGC

703.837.5318

perlbergb@agc.org



Robert Majerus, Hensel Phillips

970.352.6565

RMajerus@henselphelps.com



Ron Ciotti, Hinkley Allen

603.225.4334

rciotti@hinckleyallen.com