

*The Battle Royal:
AGC Consensus Contracts
VS.
AIA Documents*

**Presented by: Richard Capshaw, Esq.
Capshaw & Associates
3031 Allen Street, Suite 100, Dallas, TX 75204
Phone: 214-761-6619
E-mail: richard@capslaw.com
April 2009**

**Created by: David A. Ericksen, Esq.
Severson & Werson, A Professional Corporation
One Embarcadero Center, 26th Floor
San Francisco, CA 94111
Direct Line: 415-677-5637
Facsimile: 415-956-0439**

Overview

- The Build Up
- The Paradigm Shift of Relationship
- The Good, The Bad, & The Dangerous
- A Strategic Plan to Implement the AGC Model

The Build Up

September 2007 – AGC Releases “Consensus” Documents

November 2007 – AIA Releases Dramatically Revised & Renumbered Documents

AGC Unanimously Refuses to Endorse AIA Documents for First Time in 50 years

AGC Motivations

- AIA Bias for Design Professionals
- AGC “excluded” from AIA Drafting Process
- Frustration with Dispute Resolution Process
- Expand AGC Market Share of Standard Agreements
- Excessive Contractor Risk w/out Authority
- \$\$\$\$\$\$\$\$\$\$\$\$\$

The Key Agreements

- Owner/Architect/Engineer
 - AIA B101
 - AGC 240
- Owner/Contractor
 - AIA B101 & B201
 - AGC 200

Key AIA Changes for 2007 for Owner/Architect Agreement

- Added Standard of Care – 2.2
- Added Insurance Requirements for Architect – 2.5
- Disclaimer of Responsibility for Independent Owner Directives – 3.1.4
- Requires consideration of “environmentally responsible design” – 3.2.5.1
- Architect, the default “Initial Decision Maker” – 3.6.2.5
- Owner rights in documents do not automatically end at termination – 7.3.1
- Maximum 10-year Statute of Limitation – 8.1.1
- Arbitration no longer the default – 8.2.4
- Architect entitled to rely on Owner consultants – 3.1.2
- Expanded rights of unilateral consolidation or joinder in arbitration – 8.3.4

The AGC Hole

Despite having over 70 separate forms, the AGC provides NO form for Prime Consultants to retain Subconsultants.

This can and will create gaps.

This is the best rationale for refusing to use AGC Documents.

The Paradigm Shift

- AIA – Owner to communicate with Contractor through Architect – 5.10
- AGC – Architect to communicate with Contractor through Owner – 3.2.8
- AGC removes Architect from Construction Phase Role & Responsibilities in the AGC 200 – All to Owner

Paradigm Shift Impacts

Will limit AGC Documents to Projects with more sophisticated owners who can manage or hire manager.

Will require design discipline to observe protocols and limitations.

AGC – *The Good*

Great Disclaimer of Responsibility for Others:

“The A/E shall not be responsible for the acts or omissions of the Owner, the Contractor and Subcontractors, and their respective agents or employees, or any other persons or entities performing work on the Project who are not under the direct control or authority of the A/E.” - 3.1.6

AGC – *The Good*

Express entitlement to rely on Owner

Consultants: “the A/E shall be entitled to rely upon the adequacy, accuracy and completeness of such design services.” - 3.2

- But, responsible to “coordinate services of all design consultants for the Project, including those retained by Owner.” - 3.2.6

AGC – *The Good*

Superior Third-Party Liability Clause:

“This Agreement and each and every provision is for the exclusive benefit of Owner and A/E and not for the benefit of any third party except to the extent expressly provided in this Agreement.”

- Compare to AIA 10.5

AGC – *The Good*

- “Evidence of Owner’s financial ability to pay for Services shall be a condition precedent to A/E commencing or continuing services.” – 3.8
- Right to information continuous throughout Project.

AGC – *The Good*

Superior Waiver of Consequential Damages:

“ . . .whether arising in contract, warranty, tort (including negligence), strict liability or otherwise . . . ”

AGC – *The Good*

Superior Waiver of Consequential Damages:

“ . . . including but not limited to losses of use, profits, business, reputation or financing . . . any rental expenses incurred, loss of income, profit or financing related to the Project as well as the loss of business, loss of financing, principal office overhead and expenses, loss of profits not related to this Project.” – 5.4.1

AGC – *The Good*

- No duty for means, methods, techniques, sequences, or procedures – 3.2.8.1, 3.2.8.3
- No duty for safety 3.2.8.4.
 - Absent actual knowledge which then imposes duty of reporting to owner.

AGC – *The Good*

Adds two additional steps to ADR –

- “Direct Discussions” – Staged five-day “discussion” periods starting with “representatives” and then elevating to “senior executives” - 9.2
- “Mitigation” – Elective Process. Project Neutral or Dispute Review Board. Non-binding. Costs shared equally. Five days to decision. Supplants Mediation - 9.3

AGC – *The Bad*

Mutual Indemnity – 7.1

- A/E duty to indemnify and hold harmless
- “To the fullest extent permitted by law”
- Limited “to the extent caused by the negligent acts or omissions”

AGC – *The Bad*

Defense obligations:

A/E and Owner each entitled to
“reimbursement of any defense costs
paid above [their] percentage of liability
for the underlying claim.” – 7.1

AGC – *The Bad*

Lesser Rights in Design Documents:

- Ownership (except copyright) to Owner
- Lacking controls over reuse
- Great clause for reuse of design components by A/E: “Where A/E has transferred copyright . . . A/E may reuse Documents prepared pursuant to this Agreement in its practice, but only in the separate constituent parts and not as a whole.” – 10.1.4

AGC – *The Bad*

- Very extensive insurance obligations for A/E – 7.2
- Owner right to backcharge or withhold payment – 6.3.4
- Only Owner can terminate for convenience – 8.2

AGC – *The Bad*

- No compensation for revisions to address contractor “constructability problems” – 3.1.2.2
- No express right to rely on owner-provided information – 4.1.1

AGC – *The Bad*

- Worksite observations on a more specific timetable than AIA.
- Worksite observations require written reporting.
- Limitations of impacts of observations (as set forth in AIA) lacking. Only says not responsible for “ensuring that the Work is in accordance with the CDs.”
- Overbroad and ambiguous AIA language lacking.

AGC – *The Bad*

- No standard of care language similar to AIA – 2.2

AGC – *The Dangerous*

- Expanded A/E Exposure

“The A/E accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate and exercise the A/E’s skill and judgment in furthering the interests of the Owner.” - 2.2

- “mutual trust, good faith, and fair dealing”
- “endeavor to promote harmony and cooperation”

AGC – *The Dangerous*

- Expanded A/E Exposure
 - “The A/E shall furnish or provide the architectural and engineering services necessary to design the project.” - 2.1
 - “The Construction Documents shall completely describe all work necessary to bid and construct the Project.” - 3.2.4

The Design Professional's Strategic Response

1. Insert standard of care and address corresponding issues:
 - a. No warranty;
 - b. No perfection;
 - c. Costs for revisions;
 - d. Expectations as to contractor interpretation and planning.

The Design Professional's Strategic Response

2. Develop clear, specific, and written understandings as to construction phase responsibilities and limitations.
 - Make sure to follow them.

The Design Professional's Strategic Response

3. Review Indemnity Provisions.
4. Coordinate Other Agreements & Obligations:
 - a. Consistency with Contractor terms.
 - b. All design team bound to terms including ADR;
5. Review checklist of “bad” provisions for modification.
6. Strike or modify the dangerous.

Questions & Answers

Thank you!