

ConsensusDOCS Guidebook



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by

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Introduction to the ConsensusDOCS Guidebook

ConsensusDOCS is the product of leading construction associations, dedicated to identifying and utilizing best practices in the construction industry for standard construction contracts. The 21 participating associations represent Designers, Owners, Contractors, Subcontractors, and Sureties that literally spell the DOCS in ConsensusDOCS. If you are looking for documents that are pro-Owner or pro-Contractor, you should not use these documents. ConsensusDOCS contracts and forms attempt to fairly and appropriately allocate risks to the Party in the position to manage and control the risk. The practices articulated in the documents are forward-thinking, and may not always represent the status quo, but rather a better path forward. The goal of the multidisciplinary drafters was to create documents that best place the Parties to a construction contract in a position to complete a project on time and on budget with the highest possibility of avoiding claims.

By starting with better standard documents that possess unprecedented buy-in, you reduce your transaction time and costs in reaching a final Agreement. Many “fill-in-the-blanks” are intended to lead to productive discussions about how particular risks should be allocated on specific projects before a contract is finalized. Also, the ConsensusDOCS catalog includes complete “families” of documents for each project delivery method that provide a coordinated set of Agreements and complimentary administrative forms. There also are short form Agreements that address the Owner-Contractor (205), the Owner-Design Professional (245), and the Contractor-Subcontractor contractual relationships in a more abbreviated manner than do the standard Agreements (ConsensusDOCS 200, 240, and 750 respectively).

In this portion of the Guidebook you will find comments by individual associations regarding ConsensusDOCS 200. The overview sections highlight issues and innovative features of the documents generally. Association comments are expressions by an association to its association membership. These comments highlight provisions or alert their membership to consider possible project-specific modifications to a consensus standard Agreement or form. ConsensusDOCS contracts covered in the initial release of the complete Guidebook (others will be added later) include the 200; 200.1; 200.2; 240; 300; 410; 750.

Comments and Recommendations regarding ConsensusDOCS 200*

Standard Agreement and General Conditions Between Owner and Contractor (Where the Contract Price is a Lump Sum)

Overview

There are many differences between the way this document addresses issues and the way you may have previously seen the issues handled in other standard contract documents. Some general characteristics of the ConsensusDOCS 200:

- Integrates the general terms and conditions with the contractual Agreement.
- Emphasizes the primacy of the Owner-Contractor relationship and focuses on clear communication pathways and positive relationships. The design professional is removed from the dispute process between Owner and Contractor.
- Clarifies that the Owner is responsible for design and design coordination; while the Contractor is responsible for design elements only if specifically noted. In that situation the Owner should supply all performance and design criteria. The Owner should approve submittals, and the approved submittals become contract documents. (See Sections 2.3, 2.4.4, and 3.14.)
- Defines overhead (Section 2.4.12) in a more detailed and clear manner to assist in finalizing change orders and the associated costs (see Section 8.3.1.3) and would avoid disputes during the course of the project.
- Clarifies that Parties specifically name authorized representatives (Section 3.4.4 for Contractors; Section 4.7 for Owners); the Contractor also names a safety representative (Section 3.11.3).
- Establishes how electronic information exchanges may be relied upon.
- Establishes dates of Substantial Completion and Final Completion (Sections 6.5.1 and 6.5.2, respectively).
- Addresses liquidated damages by giving Parties the option as to whether to use liquidated damages (“LDs”) or not (Section 6.5). The document also gives the option to use LDs

* This publication is designed to provide information in regard to the subject matter covered. It is published with the understanding that the publisher, endorsers of ConsensusDOCS and contributors to this Guidebook are not engaged in rendering legal, accounting, or other professional services. If legal advice or other professional advice is required, the services of a competent professional person should be sought.

—From the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations

both for Substantial Completion as well as Final Completion. The amount of the LDs is expressed as a lump sum amount, but the Parties may choose to use a per diem amount.

- Provides an order of precedence clause (Section 14.2).

Comments from the Associated General Contractors of America (AGC) for ConsensusDOCS 200:

(Additional comments on this document can be found on AGC's website at www.agc.org/contracts)

Design Authority and Responsibilities (Section 2.3): Under the *Spearin Doctrine*, the Party responsible for furnishing the completed design impliedly warrants its sufficiency and adequacy. *United States v. Spearin*, 248 U.S. 132 (1918). Contractors need to carefully consider the effect of specifying any design responsibilities in this fill-in-the-blank section. Also, a Contractor should pay particular attention to the ramifications of performance specifications, equipment selections, preparation of shop drawings, and the like in the context of Section 2.3. Similarly, post-award actions such as Contractor initiated value-engineering changes may alter the Parties' responsibilities for the adequacy of the design of a particular system on the project. These actions may shift risk for design responsibilities to the Contractor. In addition, Contractors should be weary of modifications that add disclaimers to shift the risk of design flaws to a Party that was not responsible for the preparation of the design.

Correction of Defective Work (Section 3.9): The Contractor is to be notified of defective work during the warranty period and given the option to correct Correction of work even after the Correction of Work period expires.

Professional Services (Section 3.15): When taking on design responsibility (See Section 2.3), the Contractor should also consider the provisions of Section 3.15 that obligates it to obtain professional services from licensed design professionals and to require the design professionals to carry E&O insurance as specified in Section 10.8.

Digitized Documents (Section 4.6.1): Electronic documents are increasingly being used by the industry. This provision requires a protocol to be established relating to the use of such documents. Contractors are strongly encouraged to use the protocol in Consensus DOCS 200.2 to ensure that the risks associated with use of electronic documents are clearly understood by all the Parties to a contract. At a minimum, the 200.2 can allow Contractors to rely upon e-mails and faxes, if the document is completed to indicate such a desire.

Liquidated Damages (Section 6.5): Section 6.5 is an optional liquidated damages provision, which allows the Parties to elect whether or not to provide for liquidated damages. In general, AGC members view liquidated damages negatively, and advise Contractors to take extreme caution before electing to provide any liquidated damages in this section. Liquidated damages are intended to compensate the Owner (and serve as a substitute for) the Owner's actual delay damages, such as lost revenues. Thus, a contract which allows the Owner to recover liquidated damages, but otherwise bars both Parties from collecting consequential damages, is not truly mutual; it allows the Owner to have its cake and eat it too. If liquidated damages are elected, the Contractor should recognize that the limited mutual waiver of consequential damages contained in Section 6.6 is not truly mutual. In addition, Contractors should not agree to liquidated damages measured from final completion.

Note that this section contains blanks for the Parties to fill in to establish the appropriate dollar amounts (one tied to substantial completion and one tied to final completion) if the Parties elect

to provide for liquidated damages. The amount of the LDs is expressed as a lump sum amount but the Parties may choose to use a per diem amount.

Limited Mutual Waiver of Consequential Damages (Section 6.6): The Parties agree to waive consequential damages except for items specified in 6.5. A mutual waiver of consequential damages benefits the Contractor if the waiver is truly mutual, meaning that liquidated damages are not specified in Section 6.5.

Setting aside the interplay between liquidated damages and a “mutual” waiver of consequential damages, the Parties should also carefully consider whether liquidated damages are, themselves, desired. Many sophisticated General Contractors today desire, and may even insist upon, the inclusion of a liquidated damages provision in their contracts, because – perhaps among other reasons - it allows them to better quantify their risk. Moreover, some General Contractors and Construction Managers insist that the contract provide for liquidated damages and that the liquidated damages be capped at some amount, such as one-half of the Construction Manager’s fee (under a cost-plus-fee contract). By doing this, the Contractor/Construction Manager truly can attain a real limitation of damages.

Interim Directed Change (Section 8.2.2): An Owner is required to pay 50% of cost estimate if dispute occurs over whether work is within scope. This provision allows an important balance for a Contractor to maintain financial viability, while allowing an Owner to retain legitimate claims in dispute.

Retainage (Section 9.2.4.1): This provision is important for Contractors to ensure payment flows in a fair and equitable manner. Owner is required to release retainage applying to work of early finishing Subcontractors upon acceptance of such work. Once the work is 50% complete, the Owner shall not withhold any additional retainage. If the recommended best practice language is modified in the Owner-Contractor, Contractors should consider modifying the ConsensusDOCS 750 in a consistent manner.

Adjustment of Contractor’s Payment Application (Section 9.3.7): This provision allows an Owner to withhold payment if a third Party files a claim, unless a Contractor furnishes the Owner with adequate security in the form of a surety bond, letter of credit or other collateral or commitment which are sufficient to discharge such claims if established. Contractors should provide more specificity regarding adequate security. If there is a bond in place, no additional security should be required besides consent to payment by the surety after acknowledging the existence of the claim. If it is a lien claim, the Contractor should be required to bond around the lien in accordance with applicable statutory requirements.

Some Contractors report abuse of the right to withhold payment, even after adequate security has been provided. Also, a Contractor should ensure that this provision is consistent in the Contractor-Subcontractor Agreement, as provided in ConsensusDOCS 750 Section 8.2.7.

Indemnity (Section 10.1): The Parties’ indemnity obligation is limited to the extent of the Party’s negligence and cover only insurable risks, i.e., personal injury (including death) and property damage. Either Party is entitled to reimbursement of defense costs paid in excess of that Party’s percentage of liability for the underlying claim. Contractors should be vigilant during contract negotiations, and should only agree to broaden risks covered (if requested by the Owner) with

full knowledge and understanding of the impact of a broader standard on the Contractor's anticipated profitability and fee.

Indemnitees also include the Architect/Engineer, and "Others." The term "Others" should be defined or stricken if not defined, from the Contractor's standpoint, as it represents a potential broadening of the indemnity obligation to persons or companies who the Parties may not have actually intended to benefit from the indemnity.

Duty to Defend (Section 10.1): Given the reciprocal indemnity obligations in the ConsensusDOCS forms, and the pure comparative causation standard, there is not a duty to defend. A Contractor who is liable under the indemnity provision should reimburse the indemnified Party for that Party's legal fees (which may as a practical matter create a willingness to defend). But as a matter of contract obligation, there is no duty to defend of the Contractor vis-à-vis the Owner, or of a Subcontractor vis-à-vis the Contractor. For some Contractors, desire for a Subcontractor's duty to defend will outweigh the Contractor's desire not to have to defend the Owner. Contractors will need to assess this aspect of the indemnity carefully, and discuss it with their risk managers or brokers, in order to assure themselves that the proper stance is taken on this issue relative to the Contractor's insurance program.

Additional Liability Coverage (Section 10.5): An Owner should decide whether to require the Contractor to purchase additional insured coverage for the Owner. If so, the Owner can then decide whether it wants to choose additional insured coverage or Owners' and Contractors' Protective Liability Insurance ("OCP"). If an Owner selects OCP coverage, an Owner may desire additional insured protection for completed operations in addition to OCP coverage. If agreed upon by the Contractor, this should be accomplished by striking "operations" in this section and then checking both boxes.

Any additional cost incurred by the Contractor for purchasing additional insured or OCP coverage shall be paid by the Owner.

Owner's Termination for Convenience (Section 11.4): If an Owner elects to terminate for convenience there is a premium payment. This payment is not a penalty, but rather reflects a Contractor's lost business opportunity. This section is carefully crafted to balance Contractors and Owners interests and risks.

Dispute Mitigation and Resolution (Article 12): This section focuses on mitigation of claims by directing first, direct discussions between the Parties followed by allowing the Parties to use either a previously selected project neutral or a dispute review board. If the Parties decide not to use a project neutral or dispute review board the issue then goes to mediation followed by a binding dispute resolution process of the Parties' choosing. If the process goes this far any decision made by the project neutral or the dispute review board can be introduced as evidence at a binding adjudication of the matter.

Work Continuance and Payment (Section 12.1): The Parties are obligated to continue to perform their obligations under the contract. Thus the Contractor continues to perform its work under the contract and the Owner continues to make payments to the Contractor for those amounts not in dispute.

Direct Discussions (Section 12.2): In the event the Parties cannot reach an Agreement about the matter in dispute, they are obligated to engage in “good faith” negotiations at the next level in a step approach which moves from field representative to those representatives with greater authority in an effort to resolve the dispute; then if resolution is not achieved within five business days of the first discussion, it moves to the next level of senior executives and if resolution fails within fifteen days of the first discussion, it moves to mitigation.

Mitigation and Mitigation Procedures (Section 12.3): Initially the Parties have the option to select either a Project Neutral or Dispute Review Board for the mitigation procedure. The Project Neutral/Dispute Review Board is subject to a separate retainer Agreement between the Parties and is obligated to issue nonbinding finding(s) within five business days of referral of the dispute. If Parties do not check either of the fill-in-the-blank options, then the procedures provided in this section are not required.

Binding Dispute Resolution (Section 12.5): In previous AGC contract Agreements, the dispute resolution section was a separate Exhibit. The ConsensusDOCS includes this section in the contracts and includes fill-in-the box options. If mediation fails to resolve a dispute, the Parties submit the matter to binding dispute resolution using either the current Construction Industry Rules of the American Arbitration Association or litigation in a state or federal court. The Parties, however, are free to select another set of rules. The costs of the binding dispute resolution process are to be borne by the non prevailing Party as determined by the Neutral.

Venue (Section 12.5.2): Binding Dispute Resolution procedures shall be the location of the project unless the Parties otherwise agree.

Multi Party Proceedings (Section 12.6): Appropriate provisions are to be included in all other contracts relating to the Project to provide for joinder or consolidation of such dispute resolution procedures.

Lien Rights (Section 12.7): Nothing contained in the dispute resolution procedures is to limit any lien rights unless expressly waived.

Comments from the Construction Owners Association of America (COAA) for ConsensusDOCS 200:

(Additional comments on this document can be found at COAA's website, www.coaa.org, in the members-only area.)

Design Authority and Responsibilities (Section 2.3): The language of Section 2.3 raises concerns about having to coordinate design work provided under the construction contract with the design provided by the project's Architect/Engineer. Many contracts will require engineering or other design services from the Contractor. Those design expectations should be clearly identified in the pertinent technical specification. Other design services will be a function of the construction means and methods selected by the Contractor (e.g. falsework, shoring, etc.). Owners should be able to expect that the Contractor will perform all Work shown on, or reasonably inferable from, the Contract Documents without having to separately delineate what design services are included in the scope of Work. Owners should modify this paragraph to accurately reflect the Owner's expectations of the scope of Work to be performed by the Contractor. In many cases, deleting this paragraph 2.3 would provide more clarity.

Ownership of Construction Documents (Paragraph 2.3.1): The design professional's contract should be written to the effect that the Owner owns the final delivered construction documents. If that's the case, paragraph 2.3.1 then should be rewritten so that the Owner, not the Architect/Engineer, is granting a license to the Contractor and its Subcontractors to use the documents. If that's not the case, and the Architect/Engineer owns the final delivered construction documents, the Owner should ensure that appropriate licenses for use have been obtained from the Architect/Engineer for the Contractor and its subs. This paragraph should reflect the appropriate Ownership of the documents.

Responsibility for Performance (Paragraph 3.3.4): COAA recommends deleting 3.3.4. It doesn't add anything that Section 8.2.1 doesn't already provide.

Correction of Work Within One Year (Paragraph 3.9.2): Delete the last sentence of this section

Unknown Site Conditions (Paragraph 3.16.2): COAA recommends deleting the second- and third-to-last sentences and replacing them with the following: "Upon receipt of the Contractor's written notice, the Owner will investigate the conditions. If the Owner determines that a concealed or unknown site condition exists, the Owner will issue an Interim Directed Change pursuant to paragraph 8.2 providing the Contractor direction on how to proceed. If the Owner determines that a concealed or unknown site condition does not exist, the Contractor shall continue with the Work as shown in the Contract documents.

Worksite Information (Section 4.3): Owners may want to modify this language to specifically disclaim the accuracy of information provided to the Contractor. COAA recommends that local legal counsel be consulted to draft appropriate language modifying paragraph 4.3 in those instances.

Owner's Representative (Section 4.7): Few Owners give their representative the complete authority that Paragraph 4.7 requires. COAA recommends revising the language of Paragraph

4.7 to say that the Owner will define, in writing, the authority that has been granted to its representative.

Contingent Assignment of Subcontracts (Subparagraph 5.5.1.2): Owners should consider deleting the term “and obligations” from this paragraph. COAA recommends that local legal counsel be consulted to eliminate the Owner’s exposure to Subcontractors for preexisting claims against the Contractor.

Limited Mutual Waiver of Consequential Damages (Section 6.6): The ConsensusDOCS mutual waiver of consequential damages provision represents a positive departure from similar provisions found in other contract forms commonly used in the industry. Consequential damages are one of the most important subjects for an owner to be familiar with in the construction context. COAA highly recommends that every owner seek the advice of competent local construction counsel prior to executing this contract containing waivers of consequential damages. Owners should assess the consequential damages risks associated with each project. Potential outcomes of the assessment could include, but are not limited to, a decision that the risks are small and consequential damages can be waived, that the risks can be captured through liquidated damages, or that the risks are such that the Owner is not willing to waive consequential damages.

Interim Directed Change (Paragraph 8.2.1): COAA recommends adding the following sentence to Paragraph 8.2.1: “The Contractor shall proceed with the Work of an Interim Directed Change immediately upon its issuance.

Claims for Additional Cost or Time (Section 8.4): Owners should consult local legal counsel regarding the exposure of the Owner to potential claims by Subcontractors being passed through by the Contractor. The Owner may want to include the following additional language in paragraph 8.4: "Prior to submitting any claim by a Subcontractor for additional compensation, the Contractor shall have examined any such claim and verified its accuracy and completeness, and the Contractor shall have identified any Claim or portion of the Claim that is not the responsibility of the Owner."

Contractor Acceptance of Final Payment (Paragraph 9.8.7): COAA recommends deleting 9.8.7.

Insurance (Sections 10.2–10.5): COAA recommends that its members review with competent local counsel or risk managers especially coverage limits and the additional insured provisions. Failure to carefully contemplate the handling of these exposures could result in significant unanticipated losses.

Bonds (Paragraph 10.7.1): COAA recommends deleting the sentence starting with “Any increase in the contract price ...” and then the next sentence that starts with “Up to such 10% amount...”

Contractor’s Right to Terminate (Paragraph 11.5.3): COAA recommends amending 11.5.3 to read ... “or any proven immitigable loss, cost or expense...including all demobilization costs.

Comments from the American Subcontractors Association, Inc. (ASA) for ConsensusDOCS 200:

(Additional comments on ConsensusDOCS can be found on ASA's website at www.asa.org.)

Contractor's Responsibilities (Article 3):

The scope of work should be limited to all work actually indicated in the plans and specifications which was the subject of the Contractor's bid.

Contractors should not ordinarily accept responsibility for design. When design services are requested, the delegation should be specific and should include all design and performance criteria. Contractors should be responsible for promptly reporting defects they actually discover, but cannot be responsible for other design defects that it is claimed they "should have" recognized, or for design requirements that violate code standards.

Clear lines of authority to authorize payments and changes should be established in the general conditions.

One-sided terms that deny a Contractor any right to collect damages for delay, often called "no-damage-for-delay" clauses, are unacceptable. Mutual waivers of consequential damages, such as the Contractor's extended home office overhead and the Owner's loss of use or added financing expenses, are beneficial and encouraged. A Contractor may reserve the right to assess a Subcontractor for a share of liquidated damages actually paid to the Owner, but only to the extent such share is proportionate to the fault of the Subcontractor in causing a delay.

A Contractor's warranty should provide that work is free of defects and performed in workmanlike manner, but should exclude defects inherent in the design or specified materials, ordinary wear and tear, improper maintenance, abuse, modifications, and implied warranties. A Contractor's warranty should have a time limit which should run from either substantial completion or issuance of a certificate of occupancy to the Owner, whichever is earlier. A Contractor's warranty should reserve the right of the Contractor to notice and an opportunity to cure any claimed breach of the warranty, by providing for waiver of any warranty claims where the Contractor is not provided an opportunity to cure.

Expenses claimed as backcharges should not be incurred before notice, and reasonable opportunity to cure, are provided to a Contractor. Backcharges should be billed within a reasonable time and not saved until the end of the project.

Deadlines for claims should be based on actual knowledge of facts giving rise to a claim (rather than constructive knowledge) and should permit a reasonable time for claims; time extensions should be required for all causes reasonably beyond the Contractor's control; price adjustments should include the entire cost of delays not caused by Contractor (including overhead) and should include a reasonable amount of overhead and profit for extra work. A Contractor should have the right to payment for any extra work that is performed at the Owner's direction, provided that the Contractor confirms verbal instructions in writing before starting work.

A Contractor may be required to conduct a site visit, make observations, and report discovered discrepancies, but should not have an affirmative duty to discover problems in the site conditions

or design that a person in the Subcontractor's trade would not ascertain by a reasonable, visual inspection. Contractors should be entitled to rely on the accuracy and completeness of the plans and specifications, and on the accuracy of reports of conditions furnished by the Owner.

Approved submittals should bind the Owner in the same manner as the specifications which are "contract documents."

Owner's Responsibilities (Article 4): A Contractor should have access to complete project financing information, including change orders, in order to evaluate its risk of nonpayment. Disclosures that demonstrate adequate project financing are a necessary condition to a commencement or continuation of a Contractor's performance.

See ASA comments under Article 3 pertaining to Contractor site visits.

See ASA comments under Article 3 pertaining to clear lines of authority.

Contract Time (Article 6): See ASA comments under Article 3 pertaining to one-sided terms that deny a Contractor any right to collect damages.

See ASA comments under Article 3 pertaining to deadlines for claims.

Changes (Article 8): See ASA comments under Article 3 pertaining to deadlines for claims.

Payment (Article 9): See ASA comments under Article 3 pertaining to clear lines of authority.

Owner payments to the Contractor should be held in trust for the Contractor's Subcontractors and suppliers. The Contractor should be provided a firm deadline of not more than seven days by which it should disburse funds it receives from the Owner for payment of Contractor's Subcontractor's and suppliers. The Owner should expressly preserve its authority to pay a Subcontractor directly who is not paid by the Contractor.

Past due payments should bear interest at a reasonable rate, so long as payment delay is not the fault of the Contractor. A Contractor should reserve an express right to stop work for non-payment whenever non-payment is not the Contractor's fault, upon reasonable notice and opportunity to cure, including costs of shut-down, delay and start-up. A Contractor should be entitled to payment for suitably stored materials.

Language requiring one Party to sign waivers in whatever form is considered suitable by the other Party is generally unacceptable. Any waiver form should be specified before the contract is signed, should be conditional on payment (except for payments already received), should not apply to funds still held as retainage, and should not apply to claims unrelated to the payment security rights of the Contractor.

General conditions should require Contractors to provide copies of any payment bond to Subcontractors on request, and should expressly exempt steps to preserve lien rights from any dispute resolution requirements.

Retainage should be due on substantial completion, less only those amounts sufficient to pay for punch list items. Substantial completion should be objectively defined as the time when the project is sufficiently complete to be occupied or utilized, such as when a certificate of

occupancy is issued. Final payment should not constitute a waiver of claims previously asserted in writing and still pending at the time of final payment.

Indemnity, Insurance, Waivers and Bonds (Article 10): Hold-harmless terms should be limited to bodily injury and property damage (other than the Work itself). Such terms should also be limited to provide indemnity only to the extent of the Contractor's negligence, and should provide for payment of attorneys' fees rather than including a duty to "defend." Ideally, hold harmless terms flow in both directions and provide mutual obligations to indemnify the other Party to the subcontract against the consequences of the indemnitor's own negligence.

See ASA comments under Article 3 pertaining to one-sided terms that deny a Contractor any right to collect damages.

Any requirements to name additional insureds on any of the Contractor's liability insurance policies, and any waivers of subrogation for claims covered by the Contractor's liability insurance policies (particularly workers compensation), are unacceptable. Requirements to provide special notices of policy cancellation or policy non-renewal often cause great difficulties and friction although they have never been shown to provide any benefits to anyone, and are also unacceptable. Requirements for continuation of coverage beyond the policy period, in the absence of a binding commitment from an insurer to provide that coverage, are also unacceptable. Separate liability insurance to cover the Owner and the Contractor for liability arising from "general supervision" of the project, such as Owners and Contractors Protective Liability Insurance ("OCP" - CG 00 09) or Project Management Protective Liability Insurance ("PMPL"—CG 31 15), may be required in lieu of any requirements to name additional insureds or to waive subrogation on the Contractor's liability insurance policies. The Owner or Contractor should be responsible to purchase all-risk property insurance including coverage for the interests of Subcontractors in installed work and in materials delivered, suitably stored or in transit.

Suspension, Notice to Cure and Termination of the Agreement (Article 11): See ASA comments under Article 3 pertaining to Contractor site visits.

Where termination is not due to the Contractor's default, then the Contractor should be entitled to its contract damages, i.e., profit and overhead on uncompleted work, plus all expenses related to termination (such as termination of subcontracts and attorneys' fees), plus payment for work completed and expenses for labor and materials to the date of termination.

The Contractor should be entitled to claim time and price adjustments for any suspension of work which is not the fault of the Contractor. The Contractor should be able to terminate the contract for unreasonably long suspensions measured in the aggregate, and not by consecutive days. Terms restricting recovery where work "would have been" suspended anyway due to Contractor's fault merely restate common law requirement for causation.

See ASA comments under Article 4 pertaining to Contractor access to project financing information.

Dispute Resolution (Article 12): Early mediation of disputes is beneficial and should be a condition precedent to the use of any other dispute resolution procedure. Should mediation not resolve a dispute, arbitration by an industry professional such as an architect, engineer,

Contractor or Subcontractor is always preferable to litigation before a judge or jury. Arbitration should always be conducted subject to the terms of the written subcontract, so specific contract terms can assist Contractors to ensure that arbitration will provide a quick and efficient mechanism for resolving disputes. For example, contract terms can expressly provide that “The award shall be made within nine months of the filing of the notice of intention to arbitrate (demand), and the arbitrator(s) shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by Agreement of the Parties or by the arbitrator(s) if necessary.” (Drafting Dispute Resolution Clauses—A Practical Guide, AAA 12/7/2000.) Or, contract terms may require direct participation by the Parties (not merely through their representatives) for

- selection of the arbitrator (to ensure an industry professional is selected),
- any Agreement or ruling to permit a continuance, and
- any Agreement or ruling to permit any discovery (particularly depositions, which add considerable time and expense) beyond the discovery of information contemplated by Rule F-7 of the AAA’s Construction Industry Arbitration Rules, Fast Track Procedures in fast track cases (no claim or counterclaim exceeds \$75,000), or Rule R-22 of the AAA’s Construction Industry Arbitration Rules, Regular Track Procedures in regular track cases (\$75,001-\$500,000), or Rule L-4 of the AAA’s Construction Industry Arbitration Rules, Procedures for Large, Complex Construction Disputes.

See ASA comments under Article 9 pertaining to general conditions requiring Contractors to provide copies of any payment bond to Subcontractors on request.

Miscellaneous Provisions (Article 13): Contracts should provide that the appropriate venue for dispute resolution procedures such as litigation or arbitration is the place where the project is located, and also that the law of the place where the project is located shall govern.

Contract Documents (Article 14): See ASA comments under Article 3 pertaining to scope of work limitations.