

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 Guidebook you will find comments by individual associations regarding ConsensusDOCS 240. 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 240*

Standard Form of Agreement Between Owner and Architect/Engineer

Comments from AGC for ConsensusDOCS 240:

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

Standard of Care (Section 2.1): A definition of the standard of care applicable to architectural and engineering services performed under this Agreement is not included in this Agreement (previous additions of AGC contracts did include such a definition). The drafters of the new Consensus documents determined that it would be better for the design professionals to be held to a standard imposed on them by their own profession, rather than one defined by this Agreement.

Contractors and Owners should not modify this Agreement by adding language that would hold any design professional to a standard of care that is above that which is customary and normal for design professionals in the same time and location, because that might result in the unintended consequence of voiding errors and omissions coverage available to the respective design professionals.

Relationship of the Parties (Section 2.2): This provision requires the Architect/Engineer (A/E) to accept the relationship of trust and confidence in exercising its skill and judgment in furthering the interests of the Owner and expressly affirms the A/E's representation that it possesses the requisite skill, expertise, and licensing to perform the required services. The new language is preferable, but it should be noted that it was not included in the previous AGC 240 Owner-Designer professional Agreement, no longer published.

Conflicts of Interest (Section 2.4): This section expressly sets forth ethical expectations that include the A/E's avoidance of conflicts of interest, and contingent fees and gratuities from the Contractor. This language is preferable, but note that it is different from language in previous editions of AGC contracts.

Costs for Errors and Omissions: The Agreement does not include a provision included in the previous AGC 410 Design-Build Agreement which provided for the allocation of responsibility to the A/E for the costs of any errors and omissions exceeding an agreed upon percentage of the

* 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.

A/E's total compensation. The elimination of this provision in this location highlights the need for the Owner and A/E to formalize and come to an Agreement upon the exclusions to be enumerated under Section 5.4, Limited Mutual Waiver of Consequential Damages. Special attention should be paid to the expanded language contained in Section 5.4. The terms of Section 5.2, relating to damages flowing from delays by the A/E, should also be considered.

Construction Documents (Section 3.2.5): This paragraph very succinctly states, "The Construction Documents shall completely describe all work necessary to bid and construct the Project." This effectively addresses the dilemma which Contractors have faced in recent years of having to provide Work that the A/E might argue was "inferred" by the Construction Documents.

Construction Phase Services (Section 3.2.8): This section includes two Construction Phase Services, including "(3) prepare design documents in connection with Change Orders, and (4) respond to Contractor requests for information." These services have been added since the phasing out of the old AGC contracts.

Section 3.2.8.5 has been modified by the omission of language related to the review of Subcontractor requisitions, but that language has been added to a new listing of clarifications defining what representations are being made when the A/E certifies an application for payment in new Section 3.2.8.6.

Additional Compensation: Subparagraphs .22 through .25 of Section 3.2 are included as additional services which are eligible for additional compensation. Note this improvement in including these services, which were not included in previous editions of the AGC 240.

Confidentiality (Section 3.10): This section further clarifies how the Owner and A/E should treat confidential information shared with one another, and it requires the Owner and A/E to "specify those items to be treated as confidential", and requires them to "mark them as 'Confidential'". This improved language is different than previous language in the now defunct AGC 240.

Owner's Financial Ability to Pay: The 240 does not include a provision to require the Owner to provide evidence of the Owner's financial ability to pay for the A/E's Services, upon written request of the A/E. Note A/E's and General Contractors using this Consensus document may wish to add such a provision back into the Agreement, or obtain such evidence of sufficient content to satisfy this concern prior to signing this Agreement.

Limited Mutual Waiver of Consequential Damages (Section 5.4.1.1): This section makes the Limited Mutual Waiver of Consequential Damages applicable to, and makes it survive after, any termination of the Agreement. This improved language was not included in the previous AGC 240, which is now defunct.

Statutory Interest/Late Payment (Section 6.3.6): This section provides the A/E with compensation in the form of statutory interest on any late payments to the A/E from the Owner. This improved language was not included in the previous AGC 240, which is now defunct.

Indemnity, Insurance and Waiver of Subrogation (Article 7): General Contractors and any A/E's working for the Owner under this new Agreement are advised to have their legal counsel and surety and insurance professionals review and modify if necessary, the language set forth in this

section. Many states have enacted legislation that affects the applicability and enforceability of indemnification and liability limiting contract language. This language is substantially different than previous language in the now defunct AGC 240.

Dispute Resolution (Article 9): The dispute mitigation, mediation, and resolution procedures are intended to facilitate resolution in the most cost-effective manner.

Miscellaneous Provisions (Article 10): This provision accommodates the advent of the frequent use of Electronic Documents, and the issues surrounding rights to copy and make use of tangible and electronic versions of documents describing the Work involved in a Project. This improved language is substantially different than previous language in the now defunct AGC 240.

Comments from COAA for ConsensusDOCS 240:

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

Review of Contractor's Submittals (Subparagraph 3.2.8.1): Add to the end of the first sentence "or as otherwise provided in the specifications."

Processing Changes in the Work (Subparagraph 3.2.8.2): The A/E ought to be responsible for preparing design documentation for change orders (ASIs, etc.) and soliciting change order prices not just for evaluating the cost proposal.

Limited Mutual Waiver of Consequential Damages (Section 5.4): 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.

Insurance (Sections 7.2–7.3): You should 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.

Miscellaneous Provisions (Article 10): Owners should receive Ownership of all project documents including copyrights and that the contract be amended to provide for that alternative.