

ConsensusDOCS Guidebook



April 2, 2008 Edition

Copyright © 2007

by

ConsensusDOCS LLC

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without permission in writing from the publisher. Requests for permission to make copies of any part of this publication should be mailed to:

Permissions

ConsensusDOCS

2300 Wilson Blvd., Suite 400

Arlington, VA 22201

All of the organizations that participated in creating ConsensusDOCS would like to thank the following contributors to this initial guidebook:

AGC

Phil Beck, Smith, Currie & Hancock LLC

George Burkoski, Holland & Knight LLP

Nicole DeMatteis, Hurtado, S.C.

J. William Ernstrom, The Walsh Group

Jim Frey, J.S. Alberici Construction Co., Inc.

Dirk Haire, Holland & Knight LLP

Kim Hurtado, Hurtado, S.C.

Tom Kelleher, Smith, Currie & Hancock LLC

Stan Martin, Holland & Knight LLP

Kevin Peartree, Ernstrom & Dreeste, LLP

Brian Perlberg, AGC of America

Bob Pratt, Demand Construction Services, Inc.

Jessica Salmoiraghi, AGC of America

Stan Sklar, Bell, Boyd & Lloyd LLP

Eric L. Wilson, Phelps Development, LLC

ASA

Performed by Staff

COAA

Ted Argyle, Ada County

Boyd Black, University of Illinois at Chicago

Jerry Bodenhamer, Cumming Corporation

Vincent “Chip” Boylan, Hilb Rogal & Hobbs of Metropolitan Washington

Sara Beiro Farabow, Seyfarth Shaw, LLP

Jack Miller, Retired

John Sier, Kitch Drutchas Wagner Valitutti and Sherbrook, PC

Joe Sprys, General Motors

Jim Teahan, PMA Consultants, LLC

Alan Watson, PM Vision, Jr.

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 300. 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 300*

Standard Form of Tri-Party Agreement for Collaborative Project Delivery

Overview:

ConsensusDOCS 300 represents a new approach to construction contracting and project delivery—one that is founded upon an integrated, collaborative approach to design and construction, and a greater alignment of the interest of all project participants with the overall success of the project. Construction has long been a fragmented process separated into disciplines of design, fabrication, construction and operation. Unfortunately, the traditional way of doing business has too often been married with an adversarial ethos; a zero-sum approach that focused on lowest cost and risk shedding. The ConsensusDOCS program as a whole is a dramatic initiative against the adversarial and old way of doing business.

A number of influences are now driving the evolution of the construction industry—schedule compression, technology, realignment, globalization and economic integration. The rise of new information technology may be foremost among these factors. The tools of construction are not only becoming faster and smarter, but they require greater collaboration among project participants to reap their full potential. Building Information Modeling (BIM) is but one example.

ConsensusDOCS 300 provides the contractual framework for a truly collaborative interaction between an Owner, a designer and a constructor. A tri-Party Agreement, the Owner, designer and constructor sign the Agreement at the inception of the project, binding them to collaborate in the planning, design, development and construction of the project and a sharing of project risks and rewards different than traditional project. Lean construction principles underlying design and construction are used to drive out waste. Representatives of the three Parties manage the project through consensus decision-making. While the designer retains ultimate design responsibility in accordance with state licensing laws, the constructor and specialty Contractors and suppliers participate in the development of the project design. There is no guaranteed maximum price or lump sum.

The approach and contractual framework of ConsensusDOCS 300 is not appropriate for everyone or every project. All the Parties should be willing to surrender their specific agendas to do what is in the best interest of the project. A Party that cannot shed itself of the “old school”,

* 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

traditional and adversarial approach to design and construction will not succeed in using the ConsensusDOCS 300 model.

General Considerations:

The user of ConsensusDOCS 300 should keep a number of basic considerations in mind:

- This is a tri-Party Agreement, meaning the Owner, Designer and Constructor all sign the Agreement at the earliest possible stage of the project. The intent is to assemble the collaborative project team at the very beginning of the project, not in a piecemeal fashion.
- The three Parties, together with any critical specialty Contractors and suppliers, truly collaborate throughout design and construction, providing input that will improve the quality, cost and timeliness of the project delivery.
- Lean construction principles apply to the work of the entire Collaborative Project Delivery Team. These principles include:
 - True collaboration among all project participants
 - Strengthening and Aligning the relationships and interests of the Parties to the project
 - Project participants making commitments to work and schedule that can be relied upon by others, and that drive out waste in the form of RFIs, changes and rework
 - Focusing on what is best for the project as a whole and not just certain component parts
 - Seeking constant improvement through continuous assessment and implementation of “lessons learned”.
- The project is managed by a management group comprised of senior representatives of the Owner, Designer and Constructor. (Article 4).
- To the greatest extent possible, project decisions are made by consensus. When consensus cannot be reached, the Owner retains the ability to make a determination in the best interest of the project. (Section 4.6).
- In addition to the collaborative elements of necessary for this approach, ConsensusDOCS 300 also contains where appropriate many of the elements found in other ConsensusDOCS standard forms.

Unique Considerations

- **Project Target Cost Estimate:** There is no lump sum or guaranteed maximum price established for the project that can create competing interests and counterproductive behavior among the Parties. Instead, the Parties establish a Project Target Cost Estimate under Article 8 that serves as the benchmark for measuring the project’s overall success, the performance of each Party and to what extent each will participate in any savings or losses.
- **Project Risk Allocation:** Under Section 3.8, the Parties mutually agree upon an approach to risk allocation. The options include:
 - **Safe Harbor Decisions:** The Parties release each other from any liability resulting from project decisions that are collaboratively made the Management Group.

- Traditional Risk Allocation: Under this approach each Party remains liable for its own negligence and breaches of contract or warranty, subject to optional specific, agreed-upon (fill in the blank) limitations of liability for the Designer and Constructor.
- Target Value Design: Cost and schedule are design criteria the Designer should consider (Section 3.6). For their part, the Constructor and Trade Contractors should support the Designer's efforts by continuously looking for ways to create value through improved quality, constructability, reduced capital or life cycle costs, for example. (Section 6.13). This is not traditional constructability review but design fully informed by the efforts of the Constructor and critical Trade Contractors and suppliers.
- Incentives and Risk Sharing: Under Article 11, The Management Group develops a financial incentive program to encourage and reward superior performance among the project participants. The criteria are not merely financial, but recognize quality, safety, innovation and teamwork. The Parties should also discuss and agree upon how savings (Section 11.4) and losses (Section 11.5), measured against the Project Target Cost Estimate, will be shared among them. Under Section 11.6, the amount of the Designer's and Constructor's respective fees can serve as a cap on the extent of the losses those Parties will bear.
- Right to Audit: Collaborative project delivery, without a lump sum or GMP, should be based on transparency of decisions and open-book accounting. Article 19 requires the Designer and Constructor to maintain full and detailed accounts subject to inspection and a final accounting.
- Dispute Resolution: Disputes should be resolved collaboratively through the Management Group, but when they are not, the Parties can elect to use a project neutral or dispute review board to mitigate the costs, time and overall impact of disputes. Elimination of or early resolution of disputes are key components of driving out waste in the project.