

# ConsensusDOCS Guidebook



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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 410. 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 410\***

## **Standard Design-Build Agreement and General Conditions Between Owner and Design-Builder (Where the Basis of Payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price)**

### **Overview**

Parties generally agree that the design-build delivery method has many benefits. But design-build Agreements contain different risks from traditional delivery methods. In order for a design-build project to be successful, the design-build Agreement should effectively define and allocate the risks associated with one Party assuming the responsibility for the design and construction of the project.

ConsensusDOCS 410 is a balanced document that is reflective of the market. It reflects the collaborative efforts of Owners, Contractors, design-builders, Subcontractors, engineers, and sureties. The Agreement is an improvement from previous standard design-build Agreements. It addresses risks associated with relatively new construction issues, such as the use and maintenance of electronic data, while clarifying several risk provisions common to most standard form design-build Agreements. For example, this Agreement simplifies claim procedures, identifies excusable compensatory damages, and adopts the limited consequential damages provision that has become popular among Contractors and Owners.

A few key provisions are highlighted below:

Ownership of Documents (Paragraph 3.1.8): The Parties have the option of "checking-the-box" as to the Ownership of copyrights for the project's "Documents." Documents include all documents, drawings, specifications, and electronic data and information. The Parties have the option of defining "electronic data" in Article 4.6. The Agreement allows the Parties to include a negotiated fee for the Ownership of copyrights. Unless the Parties agree otherwise, copyright Ownership for all documents remains with the Design-Builder.

Electronic Documents (Section 4.6): The Agreement recognizes the importance of electronic data and documents in the design and construction process. Article 4.6 allows the Parties to develop a project-specific protocol to facilitate the sharing of electronic data. Among other things, the protocol is intended to: define the scope of electronic data and identify the types of electronic documents the Parties expect to use; manage the sharing and coordination of

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electronic data; identify electronic formats that are acceptable to the Parties; establish security parameters for electronic data; and create mechanisms for storing and retrieving electronic data. Because there are many potential sources of electronic data and programs that manipulate electronic data, the Parties are encouraged to develop a protocol to fit their specific needs.

Labor Relations (Section 5.5): If applicable, Users should insert here or attach as exhibit as necessary any conditions, obligations or requirements relative to labor relations and their effect on the Project. Legal counsel is recommended.

Delays in the Work and Delay Claims (Section 6.3): Owners and Contractors expressed dissatisfaction with forms that failed to identify examples of compensable delay. Article 6.3 expressly lists events that give rise to compensable delays. This is a significant improvement over standard form Agreements that leave the Parties to determine for themselves whether excusable delays are compensable or not. The Agreement also provides a more detailed list of excusable delays – those delays caused by events beyond the Parties' control. Examples of excusable delays include traditional force majeure events, such as fire, terrorism, and governmental actions, and Owner-caused delays, such as Owner changes, Owner-authorized delays, and Owner-ordered re-sequencing of the work.

Limited Waiver of Consequential Damages (Section 6.5): The right to claim consequential damages is a contentious point in many contract negotiations. Article 6.5 enables the Parties to list consequential damages that are not waived. Article 6.5 allows for reimbursement of consequential damages otherwise recoverable under applicable insurance policies. In this regard, the Agreement provides a "limited" waiver of consequential damages that recognizes the allocation of risks among the Owner, Design-Builder, and their insurers.

Claims for Additional Cost or Time (Section 9.6): The Design-Builder's notice of a claim should be made within 21 days after the occurrence, or recognition of the occurrence, whichever is later. The Design-Builder's written documentation supporting the claim should be submitted within 21 days after its notice. The Owner's response to the claim should be made within 14 days after the Owner receives the Design-Builder's documentation. The Agreement eliminates guesswork when an Owner fails to respond; the Owner's failure to respond is deemed a denial.

Termination (Article 12): The Agreement's termination provisions protect the Owner in the event of the Design-Builder's default while providing protections against unwarranted terminations-for-cause. Termination for cause requires two levels of notice. First, the Owner may perform the Design-Builder's obligations if the Design-Builder fails to begin to cure contractual deficiencies after 7 days' written notice. Second, after an additional 7 days' written notice to both the Design-Builder and the Design-Builder's surety, the Owner may terminate the Agreement if the Design-Builder fails to cure or commence and continue to cure during the period. Any termination that does not follow Article 12.2's termination-for-cause procedures is deemed a termination-without-cause under Article 12.3. Under Article 12.3, the Owner should pay the Design-Builder for all work executed, all proven loss, cost, or expense in connection with the Work, and all demobilization costs. Payment to the design-builder is to a penalty, but rather reflects a Contractor's lost business opportunity.

Dispute Resolution (Article 13): The Agreement offers the Parties a number of dispute resolution procedures in lieu of judicial litigation. First, the Parties are encouraged to conduct direct good

faith discussions to resolve the dispute. After direct discussions, the Parties have the option of dispute mitigation with a project neutral/dispute review board or mediation. If the Parties choose dispute mitigation, the project neutral/dispute review board will create a nonbonding finding that the Parties may use in a subsequent binding proceeding.

If the Parties do not choose dispute mitigation, the Parties "shall endeavor" to mediate the dispute. Mediation should be complete within 45 business days of the first discussion between the Parties. Mediation is not required.

The Agreement allows the Parties to choose between arbitration and litigation as the binding resolution procedure. Arbitration or litigation is a last resort if mitigation or mediation fails to resolve the dispute.

## Comments from AGC for ConsensusDOCS 410:

(Additional comments on this document can be found on AGC's website at [www.agc.org/contracts](http://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 Parties (Section 2.1): This section requires the Design-Builder to proceed "on the basis of trust, good faith and fair dealing" and take all actions "reasonably necessary" to perform "in an economical and timely manner." Under Article 3, the Design-Builder "shall exercise reasonable skill and judgment in the performance of its services."

Standard of Care (Section 2.2): The Agreement removes the architect/engineer's standard of care from the former and no longer published AGC 410 Section 2.2. CAUTION: 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.