

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 AGC 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

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 a summary of AGC’s position regarding particular contract documents. Organized by ConsensusDOCS numbers, each segment contains comments or recommended modifications, sometimes with an overview. ConsensusDOCS contracts covered in the initial release of this 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 and Recommendations regarding ConsensusDOCS 200.1*

Potentially Time and Price-Impacted Materials

Overview

The ConsensusDOCS 200.1 Potentially Time and Price-Impacted Materials Amendment is a standardized, three-page Amendment that provides an Owner and Contractor a baseline price and calculation method for potential adjustments to material prices. When material price fluctuations are a concern, the Amendment provides a sensible framework for Owners and Contractors to protect themselves against construction material prices volatility. Only commodities specifically identified in Schedule A can potentially be adjusted up or down, and Parties may limit the amount of price adjustment. Moreover, appropriate documentation for adjustments is required and do not include overhead and profit. Amendment A also addresses time extensions in the event of a project delay caused by scarcity or delivery delay.

Parties should take the following issues into consideration. The Amendment is intended to be completed and executed contemporaneously with the construction contract. Because the Amendment is intended to be flexible and to cover many different kinds of construction materials, calculation methods are merely suggested (established market or catalog prices; actual material costs; material cost indices; or other mutually agreed upon method) and no single method is deemed to be the default method. The Parties should agree upon a baseline price and adjustment method. This amendment is a tool to use in the negotiations, but it should be modified by the Parties to reflect the project circumstances.

If the document is used in the Owner-Contractor Agreement, then the document should be used in the subcontract Agreements. This document can also be used in other Agreements such as the ConsensusDOCS 410 Design-Build or the ConsensusDOCS 500 Construction Management At-Risk Agreements.

* 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

Comments from AGC for ConsensusDOCS 200.1:

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

General Contractors should advocate for the use of this amendment when material price fluctuations are a concern. This innovative contracting tool is designed to eliminate a contingency premium in a Contractor's bid. Another contracting alternative to the 200.1 that assists in eliminating materials price contingency is for an Owner to pre-purchase materials.

Decreases in Price (Section 3.1): Contractors should be aware that this balanced document also carries the possibility that prices fall, and would thereby decrease payment.

Price Increase Limit (Section 3.3): If this fill-in-the blank section is mutually agreed upon by the Parties, then the amount of decrease or increase is capped. However, doing so eliminates some of the benefit of a Contractor eliminating contingency in submitted bid amounts.

Comments and Recommendations regarding ConsensusDOCS 200.2*

Electronic Communications Protocol Addendum

Overview

The Electronic Communications Protocol Addendum is unique in the construction industry, comprehensively setting standards, processes and protocols that Parties will use to facilitate the accurate and secure transmittal of Electronic Communications among them during their Project. It is ideally intended to be completed no later than at the time the Owner and Contractor are preparing their Agreement, but may be entered into by amendment to an existing contract at any time. The 200.2 is a flexible document that can be used in any ConsensusDOCS Agreement or in other contract Agreements.

The Addendum sets expectations about who will be required to comply with Addendum requirements in Section 2.0. If Subcontractors and Material Suppliers will be required to conform their communications to this Addendum, the Contractor should make sure to attach a complete copy of it as an Exhibit to the Agreement between Contractor and Subcontractor (ConsensusDOCS 750).

The Agreement places the primary responsibility for shaping Electronic Communications exchange on three representatives designated by the Contractor, Architect and Owner respectively. These may be in-house employees knowledgeable about computer usage or experts retained for the Project, as needed. In Section 3.0, this IT Management Team is given the power to develop means and methods of handling Electronic Communications during the Project consistent with the overall requirements imposed in the rest of the Addendum.

Section 4.0 helps the Parties to thoroughly explore and identify what types of files will be shared among them, the hardware and operating systems on which electronic communications will be exchanged, the software types and versions, backup protocols and transmission and access requirements, including the types of devices that may be used to gain access to Project records kept electronically. The Parties will need to know what software will be used for various Project activities and identify the hardware and other system configuration that is necessary to run that software so that everyone using the Electronic Communications can access the data generated in the desired format(s). The Addendum does not presume any specific package of System Parameters will be used, but rather allows the Parties to sculpt them based on their needs. If all

* 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.

communications on the Project will be exchanged electronically via a tiered-access Project website with a real-time webcam, and virtual modeling will be used as the primary design tool, a much more elaborate system will need to be described than if the Parties want to simply exchange securely transmitted e-mails among themselves and that is the extent of the Electronic Communications.

If the Parties retain a Third Party Service Provider, the process of archiving or keeping copies of Electronic Communications exchanged among them may be part of the package of services being purchased. If not, in Section 6.0., the Parties should pay particular attention to developing backup copies of their Electronic Communications – both to protect against loss of data as a result of their computer systems failing during the Project, as well as to ensure compliance with recently updated Federal laws regarding retention of electronically generated records.

The Parties should discuss in Section 7.0 how they can revise documents capable of being revised after they are originally created and shared, and how they will keep track of those revisions. Some software programs allow for detailed metadata to be generated that automatically tracks changes and the Party generating them. Where this is not the case, an express transmittal record confirming Version Control Information as provided in Section 7.2 will be extremely important or limits should be placed on each Party's ability to revise others' documents and data.

Under Section 8.0, each Party is responsible for complying with the System Parameters and for the accuracy of data and documents furnished as part of their own Electronic Communications. The Addendum is silent about responsibility for errors that occur in spite of compliance with all System Parameters and other Addendum requirements.

Comments from AGC on ConsensusDOCS 200.2:

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

Introduction (Section 1.0): Even if a Contractor wishes to rely only on information transmitted by e-mail and fax, a Contractor should strongly consider use of this document. Otherwise Contractors would be operating at their own risk in relying on e-mails and faxes.

IT Management Coordinator (Section 3.3): The person appointed in this section is the day-to-day supervisor and administrator of Electronic Communications and is charged with assisting the Parties to cause their Electronic Communications system to comply with the Addendum requirements. Unless the Contractor's computer knowledge is quite limited, the Contractor should consider having the person appointed as Coordinator within the Contractor's employ, although the Contractor typically will want to pass the costs for such duties to the Owner in Section 3.3.2 or include them elsewhere as part of recoverable general conditions expenses in the Agreement between Owner and Contractor. The Coordinator will work with any Third Party Service Providers (who furnish Internet software programs or hosted site services used by the Parties), the Webmaster (who handles the operation of the Project website), and the Model Facilitator (who updates model data for virtual design or building information (3-D) modeling), if any on this particular Project.

Security/Encryption Requirements (Section 4.6): These provisions should be carefully considered. If the Contractor does not have knowledgeable in-house staff capable of developing firewalls or other protections, the Contractor may want to recommend outsourcing the development of these protections.

Contract Documents (Section 5.0): This section identifies which types of Contract Documents will be exchanged via electronic means and be binding on the Parties. The Contractor can take advantage of being able to rely on the comparatively swift method of e-mail exchange to bind the Owner to Change Orders, or the Architect to responses to requests for information, by making sure those types of documents may be exchanged electronically. The level to which hard copy should thereafter be exchanged will vary with the sophistication of the Parties (and their lenders, title companies, etc.) and with the sophistication of the System Parameters selected. If the Contractor's Subcontractors are not required to have a computer system compliant with the System Parameters, but design documents will be conveyed solely electronically, for example, the Contractor will need to think through providing access to a compliant computer terminal at the Project site or the Contractor's home office to which the Subcontractors can have access.

The Contractor will want to carefully discuss their role in the evolution of Project virtual modeling or other shared Electronic Communications tools with the Owner and Architect and reflect responsibilities relating specifically to its use by modifying Section 7.1.1 as needed.

Responsibility for Compliance (Section 8.0): Contractors and all Parties may prefer to expressly waive liability among them where such an event occurs as a means of inducing the Parties to robustly rely on Electronic Communications.

If a Third Party Service Provider will be used, their contract for the Project should be attached to the Addendum so any specific requirements for use of their services or website are made known and all Parties are bound to comply with them.

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 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.

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.

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

* 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.

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)

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.

Comments and Recommendations regarding ConsensusDOCS 500* Standard Agreement and General Conditions Between Owner and Construction Manager (Where the Basis of Payment is a Guaranteed Maximum Price with an Option for Preconstruction Services)

Comments from AGC for ConsensusDOCS 500:

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

Design Authority and Responsibilities (Section 2.3 and 3.1.6): 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 Construction Manager 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 Construction Manager 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 Construction Manager. In addition, Construction Managers should be wary 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.

Definition of Overhead (Sections 2.4.10 and 3.8.3): The definition of "Overhead" includes cost incurred on any insurance policy and costs related to the correction of defective work. Under many standard industry contract forms, these costs are considered Cost of the Work, subject to the Guaranteed Maximum Price. The Contractor may consider altering this provision if its cost structure does not classify this type of cost as an overhead cost.

Constructability Review (Section 3.2.5): The Construction Manager should be aware of its obligation to perform a conscientious constructability review of the drawings and specifications and report any errors or omissions it discovers in the drawings or specifications.

Preconstruction Services (Sections 3.3.1 and 7.5): The Agreement provides the cost of Preconstruction Services is not included in the Guaranteed Maximum Price, but is to be paid as a

* 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.

separate payment. Often, Owners would prefer to have Preconstruction Services included in the Guaranteed Maximum Price and paid when the Project financing closes. The manner in which Preconstruction Services will be paid for should be addressed during the negotiations and the Agreement should be reviewed or modified to confirm that it is consistent with the treatment of payment for Preconstruction Services agreed to between the Parties.

Clarifications and Assumptions (Section 3.3.4): This provision requires the Owner to cause the Architect/Engineer to revise the drawings and specifications to the extent necessary to reflect the clarifications, assumptions and allowances on which the GMP is based. The Construction Manager should diligently ensure these revisions are made to avoid confusion concerning the scope of the Work included in the GMP.

Anticipation of Design Development (Section 3.3.5): The Construction Manager should be aware of the obligation imposed by this provision to provide in the GMP for further development of the Contract Documents if the Contract Documents are not complete when the GMP proposal is submitted.

Allowances (Section 3.3.7): Allowances include the cost of materials, equipment and installation, but not Overhead and profit. Therefore, the Construction Manager should be aware that no mark-up will be allowed on the cost of allowance work.

Submittals (Section 3.4.7): This provision calls for the Owner to review and approve Submittals. If the Owner is going to authorize the Architect/Engineer to review and approve Submittals, this provision should be modified to provide for that process.

As-Built Drawings (Section 3.4.8): The Construction Manager should be aware of the requirement to designate the format to be used to prepare the as-built drawings called for by this provision.

Correction of Defective Work (Section 3.7.4): The Construction Manager is to be notified of defective work discovered by the Owner following the expiration of the warranty period, but prior to the expiration of the applicable limitations period, and given the option to correct the defect in the Work or allow the Owner to proceed to correct the defect and charge the Construction Manager for the cost of correction.

Professional Services (Section 3.16): When taking on design responsibility (See Section 2.3), the Construction Manager should also consider the provisions of Section 3.16 that obligate it to obtain professional services from licensed design professionals and to require the design professionals to stamp the design and carry E&O insurance as specified in Section 11.8.

Digitized Documents (Section 4.6.1): Electronic documents are increasingly being used by the industry. If electronic documents are to be the primary source of design documents for the Project, this provision may need to be modified to accurately describe the manner in which Contract Documents are to be provided. This provision requires a protocol to be established relating to the use of electronic documents. Construction Managers are strongly encouraged to use the protocol set forth in ConsensusDOCS 200.2 to ensure that the risks associated with the use of electronic documents are clearly understood by all the Parties to a contract. At a

minimum, the 200.2 can allow Construction Managers to rely upon e-mails and faxes, if the document is completed to indicate such a desire.

Labor Relations (Section 5.4): This provision calls for the insertion of any special provisions that apply to labor relations for the Project. This provision should be completed to address the labor relations situation that will apply to the Project.

Schedule of the Work (Section 6.2): This provision requires submission of Schedule of the Work prior to submission of the first application for payment. Depending on the size and complexity of the Project, it may not be feasible to prepare a complete Project Schedule prior to submission of the first application for payment. In that event, this provision should be modified to require submission of an interim 90 or 120 schedule prior to submission of the first application for payment, and a reasonable time for submission of the complete Project schedule.

Liquidated Damages (Section 6.6): Section 6.6 is an optional liquidated damages provision, which allows the Parties to elect whether to provide for liquidated damages. Although AGC members generally view liquidated damages negatively, and AGC advises Construction Managers to take extreme caution before electing to provide any liquidated damages in this section, liquidated damages are generally a better risk management arrangement than leaving the Construction Manager potentially exposed for actual damages related to delayed completion, which can be highly speculative and excessive. 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 that allows the Owner to recover liquidated damages, but otherwise bars both Parties from collecting consequential damages, is not truly mutual. If liquidated damages are elected, the Construction Manager should recognize that the limited mutual waiver of consequential damages provision contained in Section 6.7 is not truly mutual. To make the provision truly mutual, it can be modified to also provide for a stipulated payment to the Construction Manager for delays in completion of the Project caused by the Owner. In addition, Construction Managers should not agree to liquidated damages measured from final completion because the Owner generally does not suffer delay damages following Substantial Completion because the Owner has beneficial use of the Project following Substantial 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) to be paid for each day completion is delayed if the Parties elect to provide for liquidated damages. If liquidated damages are included in the Contract, the Construction Manager may want to include a cap to the total amount of liquidated damages that may be assessed, which should be no more than a percentage of the fee to be earned by the Construction Manager.

Limited Mutual Waiver of Consequential Damages (Section 6.7): The Parties agree to waive claims for consequential damages except for items specified in Section 6.6. A mutual waiver of consequential damages benefits the Construction Manager if the waiver is truly mutual, meaning that liquidated damages are not specified in Section 6.6. Regardless of whether liquidated damages are included in the Contract, the waiver of consequential damages claims is beneficial to eliminating the potential for speculative unlimited claims that may be asserted relating to late completion or other problems that may develop with the Project. The waiver of consequential damages claims also benefits the Owner by eliminating potential claims by the Construction

Manager for lost profits or the ability to pursue other work that may be caused by an Owner-caused delay to the Project.

Interim Directed Change (Section 9.2.2): An Owner is required to pay 50% of cost estimate if dispute occurs over the cost to be incurred in performing an Interim Directed Change. This provision allows for payment of an important balance for a Construction Manager during the process of agreement on the cost to be incurred in performing an Interim Directed Change issued by the Owner.

Disputed Change (Sections 9.3.3 and 9.3.4): If there is a dispute over whether certain work is included in the scope of the Project, these provisions indicate that the Owner must direct the Construction Manager in writing to proceed with the disputed Work, and must pay the Construction Manager 50% of the Construction Manager's estimated cost to perform the disputed work, pending resolution of whether the work is extra work. These provisions allow the Construction Manager some financial relief while the work is being performed, and create an incentive for both Parties to promptly resolve the question of whether the work is required.

Retainage (Section 10.2.4.1): This provision is important so that Construction Managers may ensure that payment flows in a fair and equitable manner. The 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.

Retention Bond (Section 10.2.4): This provision allows for the issuance of a retention bond or other security in lieu of retention. Retention bonds are not commonly used and would impose an additional cost to the Project. Depositing securities in escrow in lieu of retention is often used on state and municipal projects, and may be a viable vehicle for the elimination of retention.

Adjustment of Construction Manager's Payment Application (Section 9.3.7): This provision allows an Owner to withhold payment if a third party files a claim, unless a Construction Manager furnishes the Owner with adequate security in the form of a Surety bond, letter of credit or other collateral or commitment sufficient to discharge such claims if established. Construction Managers 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 Construction Manager should be required to bond around the lien in accordance with applicable statutory requirements.

Some Construction Managers report abuse of the right to withhold payment, even after adequate security has been provided.

Punchlist Holdback (Section 10.6.4): The Construction Manager may want to consider reducing the amount of the punchlist holdback to a lesser percentage, in the range of 125–150% of the cost of completing the punchlist work following Substantial Completion.

Indemnity (Section 11.1): The Parties' indemnity obligation is limited to the extent of the Parties' negligence and covers 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. Construction Managers 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 Construction Manager'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 Construction Manager'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 11.1–11.3): Given the reciprocal indemnity obligations in the ConsensusDOCS forms, and the pure comparative causation standard, there is not a duty to defend. A Construction Manager who is liable under the indemnity provision is obligated to reimburse the indemnified Party for that Party's legal fees to the extent of the Construction Manager's percentage of liability (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 Construction Manager vis-à-vis the Owner, or of a Subcontractor vis-à-vis the Construction Manager. For some Construction Managers, the desire to invoke a Subcontractor's duty to defend will outweigh the Construction Manager's desire not to have to defend the Owner. Construction Managers 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 Construction Manager's insurance program.

Terrorism Coverage (Section 11.3.2.1): This provision authorizes the Construction Manager to obtain insurance coverage to cover the risk of physical loss resulting from Terrorism, if the Owner declines to provide the coverage. As an alternative, the Contract can be modified to shift to the Owner the risk of physical loss resulting from Terrorism.

Additional Liability Coverage (Section 11.5): An Owner should decide whether to require the Construction Manager 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 Construction Manager, this should be accomplished by striking "operations" in this section and then checking both boxes.

Any additional cost incurred by the Construction Manager for purchasing additional insured or OCP coverage shall be paid by the Owner and should be included in the Guaranteed Maximum Price.

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 Construction Manager's lost business opportunity. This section is carefully crafted to balance Construction Managers' and Owners' interests and risks.

Dispute Mitigation and Resolution (Article 13): This article focuses on mitigation of claims by directing direct discussions between the Parties. It then allows 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 13.1): The Parties must continue to perform their obligations under the contract, pending resolution of any dispute. Thus the Construction Manager continues to perform its work under the contract and the Owner continues to make payments to the Construction Manager for those amounts not in dispute during the pendency of any dispute resolution proceedings.

Direct Discussions (Section 13.2): 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 multiple step approach which moves from field representative to those representatives with greater authority in an effort to resolve the dispute. 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 15 days of the first discussion, it moves to mitigation.

Mitigation and Mitigation Procedures (Section 13.3): 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.

Mediation (Section 13.4): If the Parties do not select a mitigation procedure in Section 13.3, disputes that are not resolved through the direct discussions called for under Section 13.2 shall be submitted to mediation. The Parties have the option of using the Construction Mediation Rules of the American Arbitration Association, or selecting another set of mediation rules, which may be more convenient than using those of the American Arbitration Association.

Binding Dispute Resolution (Section 13.5): 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 13.5.2): Binding Dispute Resolution procedures shall be at the location of the project unless the Parties agree they shall be elsewhere.

Multi-party Proceedings (Section 13.6): 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 13.7): Nothing contained in the dispute resolution procedures is to limit any lien rights unless expressly waived.

Comments and Recommendations regarding ConsensusDOCS 750*

Standard Form of Agreement Between Contractor and Subcontractor

Comments from AGC for ConsensusDOCS 750:

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

The Consensus Document 750, Standard Form of Agreement Between Contractor and Subcontractor, introduces several changes from the previous and now defunct AGC 650. Those changes are outlined below:

Avoidance of Conflicts: A new Section 2.2.1 is added discussing the avoidance of conflicts of interest between Contractor and Subcontractor and adds a warranty that neither Party has paid or received any contingent fees or gratuities to or from the other Party, which flows down to their agents, officers and employees.

Electronic Communications: Section 2.3.1 sets out a written protocol for the exchange, storage and retrieval of electronic documents (which can be used in conjunction with new Consensus Document 200.2, the Electronic Communications Addendum.) The Contractor will want to craft a protocol with the Owner tailored to anticipated Project communications and then make sure Subcontractors follow the same protocol during performance of the Project. In the event that litigation results and e-discovery becomes an issue, preservation of electronic information by all Parties consistent with their agreed-upon protocol can help limit the Contractor's liability.

Standard of Care (Section 3.2): This section lowers the standard of care for the Subcontractor in performing its responsibilities under the Agreement from "best skill and judgment" to "diligent efforts." This can be modified if a higher standard is established in the Agreement between Owner and General Contractor.

Correction of Defects (Section 3.15): This section adds language that now explicitly sets forth a remedy for the Contractor, but it first requires 48 hour notice during which the Subcontractor has the opportunity to cure defects or deficiencies in the Subcontractor's Work that damages the Contractor's Work or Owner's property.

* 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.

Owner Furnished Information (Section 4.4): This section now provides that, to the extent the Owner provides a warranty regarding Owner-furnished information, the Subcontractor may prosecute a claim in Contractor's name for the use and benefit of Subcontractor regarding breach of that warranty. The Subcontractor may ask to see information identified in the Agreement between Owner and Contractor that is included within the information the Owner warrants.

Time and Cost Adjustments (Section 5.2): This section now explicitly allows for an increase in the Subcontract Time and Subcontract Cost if Contractor's schedule changes impact the Subcontractor's schedule and costs. The Contractor will want to make sure to include a "no damage for delay" provision instead of this section in instances where the Agreement Between Owner and Contractor does not allow the Contractor to recover additional costs as a result of delay.

Liquidated Damages (Section 5.5): This section adds a new provision regarding delay liquidated damages and provides an explicit flow-down provision related to a mutual waiver of consequential damages in the Agreement between Owner and Contractor. Note that any damages for which the Contractor is liable under that Agreement are not consequential damages for the purposes of the waiver of consequential damages in the Subcontract Agreement.

Pay-if-Paid (Section 8.2.5): This section contains a contingent payment provision to the Subcontractor such that payment is due from the Contractor to the Subcontractor within 7 days of Owner's payment to Contractor. Note: this section mirrors the common law of most states in that it provides for payment to the Subcontractor within a reasonable time if, through no fault of the Subcontractor, the Owner fails to timely pay the Contractor. Contractors should check applicable law carefully before modifying this section as a "pay if paid" clause shifting risk of receiving payment to the Subcontractor may not be fully enforceable. Some AGC members believe that a "pay-if-paid" clause equitably shares the risk of Owner non-payment, while other specialty members view such provisions as unreasonably withholding payment to Subcontractors.

Because a consensus could not be reached by the ConsensusDOCS drafting organizations on including a pay-if-paid provision, AGC continues to offer publication of the AGC 655 Subcontract (1998 edition) that contains a pay-if-paid clause. The ConsensusDOCS 750 can be modified to incorporate a pay-if-paid clause by adding the following to the beginning of Section 8.2.5:

"Receipt of payment by the Contractor from the Owner for the Subcontract Work is a condition precedent to payment by the Contractor to the Subcontractor. The Subcontractor hereby acknowledges that it relies on the credit of the Owner, not the Contractor for payment of Subcontract Work."

Payment Application Notification (Section 8.2.7): This section now provides for a 7-day period for Contractor to provide written notice to Subcontractor of any disapproval or nullification of all or part of Subcontractor's payment application. This provision did not previously appear in AGC subcontracts.

Indemnification (Section 9.1): This section has new language providing Subcontractor indemnification to Contractor, Architect/Engineer and Owner for all claims for bodily injury and

property damage, other than to the work itself, which mirrors standard commercial general liability insurance coverage language. This section also allows for the Subcontractor to be reimbursed for the percentage of liability in the claim attributable to the negligent acts or omissions of the Owner, Contractor and Architect/Engineer. Such reimbursement was not previously included in the previous and defunct AGC 650 or 655 Subcontracts. The Contractor will want to carefully review insurance obligations in the Agreement Between Owner and Contractor to make sure any special obligations imposed on the Contractor are similarly imposed on the Subcontractor so there is no gap in insurance coverage for these types of losses.

Additional Insured: Several new sections (9.2.11-9.2.11.1) provide “check the box” options creating the Subcontractor’s duty to provide additional liability coverage, the listing of the Contractor as an additional insured on Subcontractor’s CGL policy (which was not addressed at all in the AGC 650) and whether the Subcontractor has a duty to provide Owners’ and Contractors’ Protective Liability Insurance (“OCP”) (Subparagraph 11.5.2.2): If OCP coverage is selected, a Contractor may desire additional insured protection for completed operations in addition to OCP coverage. This can be accomplished by striking “operations” in this section and then checking both boxes. Note: any additional cost incurred by the Subcontractor for purchasing such coverage shall be paid by the Contract, which should be reimbursable by the Owner if a consistent option is chosen in the ConsensusDOCS 200 Owner-Contract Agreement.

Time and Price Adjustments (Section 10.3): This section now explicitly provides for Subcontractor to receive an adjustment to its Time and Price via Change Order to the extent the Agreement Between Owner and Contractor permits the Contractor to receive such adjustments. Thus, the Subcontractor may seek to review the Owner-Contractor Agreement when negotiating the Subcontract to confirm when cost and schedule adjustments are permitted. The ConsensusDOCS provision is consistent with ConsensusDOCS 200.

Contractor Termination (Section 10.4): In this section, the Subcontractor also receives some new protection in the case of the Contractor being terminated by Owner for cause, through no fault of the Subcontractor. Previously, the AGC 650 applied to any Owner termination regardless of whether it was for cause or convenience. Now, the Subcontractor is entitled to recover from the Contractor reasonable costs arising from the termination of the Subcontract, including overhead and profit on Work not performed. The new ConsensusDOCS provision is consistent with ConsensusDOCS 200.

Dispute Resolution (Section 11.5): The Dispute Resolution provisions in Section 11.5 have undergone several modifications, most notably now explicitly imposing a duty of direct discussions and good faith negotiations on the Parties regarding a dispute. In the event that good faith discussions do not resolve the conflict, then mediation and “binding dispute resolution” follow. Again, a fill-in-the-box option is provided, allowing for either arbitration or litigation. Notably, Section 11.6 has now been modified to place the responsibility for binding dispute resolution on the non-prevailing Party, but attorneys’ fees are no longer explicitly called out as a recovery costs. Parties in states where common law imposes a duty to explicitly list the recovery of attorneys’ fees in a contract should be on guard when negotiating this section and should modify it accordingly to provide for the recovery of attorneys’ fees, if desired.

Comments and Recommendations regarding ConsensusDOCS Performance Bonds (Consensus DOCS 260, 470, 471 and 706) and Payment Bonds (Consensus DOCS 261, 472, 473, and 707):

Overview

The ConsensusDOCS bond forms are clear, direct and written in terms for which there is a common understanding in the construction industry. As with other ConsensusDOCS forms, the intent was to keep the bond forms as simple as possible while also treating each party fairly.

Comments (from the Surety & Fidelity Association of America) for ConsensusDOCS Performance Bonds (ConsensusDOCS 260, 470, 471, and 706):

The condition of the Performance Bond is that the contractor performs the work. If the contractor defaults, and is declared in default by the owner, the Surety has three options, subject to the penal sum of the bond: (a) to complete the work, (b) to arrange for a new contractor to complete the work, or (c) to waive its right to complete and reimburse the owner for excess costs of completion.

The trigger of the surety's obligations, that the contractor be in default and be declared in default, has been used in a number of standard form bonds and has a well understood meaning. See, for example, *L&A Contracting Company vs. Southern Concrete Services, Inc.* 17 F.3d 106 (5th Cir. 1994) and *Elm Haven Construction Limited Partnership v. Neri Construction LLC.*, 376 F.3d 96 (2nd Cir. 2004).

Comments (from the Surety & Fidelity Association of America) for ConsensusDOCS Payment Bonds (Consensus DOCS 261, 472, 473, and 707):

A claimant under the bond must be in privity with the contractor or with a first tier subcontractor. A Claimant not in privity with the contractor must give notice of its claim within 90 days of the last date it furnished labor, material or equipment for which claim is made. Any suit must be filed within one year from the last date the claimant furnished labor, material or equipment. These provisions are similar to those of the federal Miller Act, 31 U.S.C. §3131, *et seq.*, and most state public works bond statutes.

Notably absent from the Payment Bond are any terms to micro manage the process of making or responding to a claim. A Claimant in privity with the contractor does not have to provide any notice. Unlike some other standard payment bond forms, there is no provision specifying how the surety is to respond to a claim, thereby avoiding the opportunity for erroneous court decisions such as *National Union Fire Insurance Company v. David A. Bramble, Inc.* 879 A.2d 101(Md. 2005) in which the court interpreted the bond to provide that the surety's failure to respond to a claim within 45 days by stating the amount in dispute waived any right to contest the claim.