

BIM Contracting Made Easy: The ConsensusDOCS 301 BIM Addendum

**Newly launched addendum clearly
defines roles and risks of BIM contracts**

ONE OF THE BIGGEST CONCERNS contractors and others have about using building information modeling is the fear that the legal framework is too unsettled. Thanks to ConsensusDOCS, that concern can now be put to rest.

ConsensusDOCS 301 BIM Addendum was launched on June 30 as the first standard-form document ever to comprehensively address BIM. This document has been endorsed by 17 organizations and admirably achieves its primary goal of helping construction professionals safely and efficiently implement BIM now.

One concern about BIM is whether it blurs the lines between design and construction. Is the designer responsible for the means and methods of construction? Does the contractor assume some responsibility for design?

The BIM Addendum answers these questions with a resounding “no.” The BIM Addendum preserves the traditional distinction between design and construction because the parties maintain their traditional roles. The contractor is still responsible for the means and methods of construction, and the design professional is still responsible for design.

GMP Projects

The BIM Addendum was drafted for use on as many projects as possible. Accordingly, the drafters of the addendum used a guaranteed-maximum-price project, the most common project-delivery method appropriate for BIM, as a starting point.

Although the BIM Addendum is best suited for projects where construction is priced using a negotiated GMP contract (with significant

Richard H. Lowe
ATTORNEY-AT-LAW
Jason M. Muncey
ATTORNEY-AT-LAW



Richard Lowe is a partner in the Trial Practice Group in the Philadelphia office of law firm Duane Morris LLP. He concentrates on construction and commercial litigation and construction law, handling complex construction litigation, arbitration and mediation matters. As chair of AGC's BIM Forum Legal Subforum and of the ConsensusDOCS BIM Taskforce, Lowe led a national effort to craft the BIM Addendum.

Jason Muncey is an associate in the Trial Practice Group in the Philadelphia office of Duane Morris LLP. He practices litigation with an emphasis on construction, commercial, securities and antitrust disputes. Muncey is a 2006 graduate of the University of Virginia School of Law and a summa cum laude graduate of St. Mary's College of Maryland, where he was elected to Phi Beta Kappa.

CONSENSUSDOCS GARNER INDUSTRY PRAISE

During the past year, thousands of companies have signed on to purchase ConsensusDOCS, standard contracts designed by representatives from 22 construction associations to advance projects and ensure fairness to all parties.

“I'm overwhelmed with the level of interest,” says Brian Perlberg, senior counsel for construction law and contract document programs for the Associated General Contractors of America. “It has exceeded our expectations.”

Perlberg adds that he expects to see acceleration in the use of the documents as more construction professionals obtain good results with them.

“ConsensusDOCS reflect the future of the industry, where you have the owner, contractor or construction manager and design team working together in a collaborative environment to deliver the best possible project at a cost-effective price,” says Terry Wooding, executive vice president of Petra Construction Corp., North Haven, Conn. “The documents contain language that tends to make a project work that way.”

The verbiage aims to increase project efficiency and fairly allocate risk to all parties, letting the party best able to control or mitigate the risk be responsible for it.

“The prime benefit of ConsensusDOCS is it moves to a more balanced approach,” says Eric Hedlund, senior vice president and Arizona district manager for Sundt Construction, Tempe, Ariz., which began using the documents this summer with owners and subcontractors.

Hedlund says he frequently meets with skepticism when introducing the documents, but things change once he reviews the provisions with an owner.

Wooding finds the endorsement of multiple industry associations helpful in securing document acceptance. “One owner at a time making the industry aware of the documents is the key,” Hedlund says. “The real emphasis here is a consensus built among contractors, subcontractors, owners and designers [who] have had input into a document contract. No one party walks away with everything they thought important.”

ConsensusDOCS are available for purchase in packages or individually at www.consensusdocs.com, with discounts offered to members of the organizations participating in the documents' development.

BY DEBRA WOOD

preconstruction services), it can be adapted to projects using traditional delivery methods such as design-bid-build.

In addition, the addendum is intended for use with owner/design professional and owner/contractor standard-form agreements widely used in the industry, such as the ConsensusDOCS 200. Rather than rewriting the standard-form agreements to which construction professionals have become accustomed, the addendum augments terms of the standard-form agreement to which it is attached.

However, as the addendum commentary makes clear, this commitment to BIM does not mean that the parties must share a common contingency (such as envisioned in the ConsensusDOCS tri-party 300 agreement) to use BIM and the BIM Addendum.

Ease of Use

The addendum intends to make BIM as easy to use as possible. The drafting process included input not only from contractors but also from designers, owners, suppliers, fabricators, subcontractors, sureties, insurers, the National Institute of Building Sciences and construction

lawyers, including many from the American College of Construction Lawyers.

As such, the addendum is intended to be fair and balanced and not require much revision to satisfy owners, contractors and design professionals alike. The addendum also represents what most observers believe to be best practices in the use of BIM techniques and technology.

All Things Considered

The BIM Addendum is comprehensive, outlining all requirements and issues that, as well as the functions, processes and roles that must be addressed for a BIM project to succeed. Many of these are mapped out in what the addendum identifies as the BIM Execution Plan.

The BIM Addendum requires—as soon as practical but not later than 30 days after the latter of the execution of either the owner/architect agreement or the owner/contractor agreement—all project participants “meet, confer and use their best efforts to agree upon the terms of or modifications to the BIM Execution Plan.”

The BIM Execution Plan is a detailed checklist for project participants to consider

as they map out responsibilities, requirements and processes in greater detail than was set out in the addendum.

Rather than attempt to lay out all of the BIM-related responsibilities and requirements up front, the addendum recognizes that many parties may not be ready to define every facet of BIM at the time the addendum is executed. Instead, it provides a mechanism, the BIM Execution Plan, where the parties can address crucial issues later on.

Perhaps the most important issue the BIM Execution Plan addresses is how much project participants will rely on data from the virtual models, especially the dimensional accuracy of models contributed by project participants. A three-dimensional model may implicitly contain more information than the contributor of the model intends to convey.

Unintended consequences can result from a project participant's reliance on a particular dimensional aspect of a model, even as the creator of that model did not intend that dimensional aspect of the model to be relied upon by the project participants. To address this risk, the BIM Addendum provides three "check boxes" that parties may use in the BIM Execution Plan to identify the level of reliance that project participants may place on models.

In the information management section of the document, the BIM Addendum also sets forth the minimum information-technology-related functions that must be performed and the IT-related roles that must be filled in order for a BIM project to be successful. The drafters borrowed heavily from the NIBS standards, and, in doing so, adopted what they believed to be best practices in the exchange and management of electronic data.

Intellectual Property Rights

The current generation of standard-form documents does not adequately address the intellectual-property rights inherent in three-dimensional models. The BIM Addendum fills this void by prescribing a framework for the recognition and licensing of intellectual-property rights inherent in three-dimensional models.

Under the framework set forth in the BIM Addendum, a license to reproduce, distribute, display or otherwise use a party's model for the only purposes of the project is granted upstream and downstream to all parties working on the project.

Also, the BIM Addendum is the first standard-form document to recognize that someone other than the design professional, such as the contractor or subcontractor, may have intellectual-property rights in the project.

The BIM Addendum is an exciting new standard-form document intended to enable contractors, design professionals and owners to use BIM techniques and technology by successfully managing the risks and responsibilities associated with BIM. By comprehensively addressing the myriad contractual issues associated with the implementation of BIM, the addendum makes BIM contracting a manageable effort. ■