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Warning – A Mutual Waiver of Consequential Damages Could Be One-Sided

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[Consequential Damages](#)

Contractors are often focused on correctly estimating the cost to construct a project and obtaining the contract award. Reviewing the terms of the contract sometimes takes a back seat. Laxity may set in when the contract is based on a recognized industry form, particularly with provisions that were not modified. One example could be the mutual waiver of consequential damages.

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Many contracts have clauses described as a mutual waiver of consequential damages. Contractors may believe this is fair, puts them on an equal footing with the owner and protects them from having to be responsible for the owner's consequential damages. However, this may be a fallacy because owners will claim a broad exception. Many of those same contracts have liquidated damages clauses where the liquidated damages rate is based on a projection of costs considered to be consequential damages. Owners will take the position that liquidated damages are recoverable despite the mutual waiver clause.

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Both the AIA (A201-1997 General Conditions) and the ConsensusDocs (200 Standard Agreement and General Conditions Between Owner and Contractor, 2011, revised 2014) forms of agreement include mutual waiver of consequential damages provisions:

AIA:

§ 15.1.6 CLAIMS FOR CONSEQUENTIAL DAMAGES

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

1. damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

2. damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

CONSENSUSDOCS:

6.6 LIMITED MUTUAL WAIVER OF CONSEQUENTIAL DAMAGES. Except for damages mutually agreed upon by the Parties as liquidated damages in section 6.5 and excluding losses covered by insurance required by the Contract Documents, the Owner and the Contractor agree to waive all claims against each other for any consequential damages that may arise out of or relate to this Agreement, except for those specific items of damages excluded from this waiver as mutually agreed upon by the Parties and identified below. The Owner agrees to waive damages, including but not limited to the Owner's loss of use of the Project, any rental expenses incurred, loss of income, profit or financing related to the Project, as well as the loss of business, loss of financing, loss of profits not related to the Project, loss of reputation or insolvency. The Constructor agrees to waive damages, including but not limited to loss of business, loss of financing, loss of profits not related to this project, loss of bonding capacity, loss of reputation or insolvency. The provisions of this section shall also apply to the termination of this Agreement and shall survive such termination. The following are excluded from this mutual waiver: _____.

The concept is that both the owner and the contractor agree to give up the right to recovery of consequential damages. Further, although consequential damages are not defined, both of these standard clauses list specific types of damages that are included in the waiver. The conundrum is this: if the very types of consequential damages waived were used in the calculation of the liquidated damages rate and that liquidated damages rate is recoverable by the owner, is there truly a mutual waiver of consequential damages? Put another way, is the concept of a mutual waiver of consequential damages provision fundamentally at odds with a liquidated damages clause?

Surprisingly, there are no court decisions on this issue. In examining the AIA mutual waiver of consequential damages provision, there is room for both the owner to argue that liquidated damages may be recovered and for the contractor to take the opposite position. The key wording in the AIA provision is: "Nothing contained in this Section 15.1.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents." An owner will seize on this as an exception to the waiver by claiming the phrase "when applicable" means that liquidated damages are fully recoverable whenever the rate is applicable to the claim asserted (typically a delay).

A contractor could argue that this language is for clarification purposes, but does not vitiate the mutual waiver. To that end, a contractor may point to at least three factors. First, the section does not contain clear and definite language that a carve-out to the waiver was effectuated, such as by employing wording 'notwithstanding anything in this section to the contrary' or 'specifically exempted from the foregoing'. Second, a contractor could argue that the words "when applicable" are a limitation on the liquidated damages rate itself so that only applicable (i.e., non-consequential) damages included in the rate are recoverable. Third, the definition of liquidated damages under the law could be cited by a contractor as a reason to bar enforcement of the rate to the extent it includes consequential damages. While the precise definition may vary from state to state, liquidated damages are generally considered to be an estimate made at the time the contract is entered into of the actual damages that may

result from a breach of the contract where the exact amount of damages to be incurred cannot be calculated. From a contractor's perspective, if consequential damages are excluded under the contract, then they cannot form a part of the estimated actual damages to be incurred and, therefore, a liquidated damages rate premised on consequential damages is not a proper rate.

The ConsensusDocs mutual waiver is different from the AIA's. For one thing, the ConsensusDocs provision is entitled a "Limited Mutual Waiver of Consequential Damages". For another, the ConsensusDocs provision has language carving out liquidated damages as an exception: "except for ... liquidated damages ... except for those specific items of damages excluded from this waiver. . . .").

While the purpose of this article is to examine the interplay between a mutual waiver of consequential damages clause and a liquidated damages clause, another issue that may arise is what types of damages are waived. Both the AIA and the ConsensusDocs provisions list specific types of damages included in the waiver, but neither gives a complete list nor defines consequential damages. Again, the definition of consequential damages is a matter of state law. But while each state may have a general definition, the exact types of damages categorized as consequential is not completely settled.

Even if a mutual waiver of consequential damages provision is considered to have an exception for liquidated damages based on any type of projected damages, the mutual waiver may still have value to the contractor. With a mutual waiver in place, consequential damages in the form of liquidated damages may be recoverable by an owner only for delays but not for construction defects found after completion, for example.

As with other contract provisions, a mutual waiver of consequential damages clause should be carefully considered. The provisions in a standard contract form may be negotiated and modified, if both the contractor and owner think it necessary to do so.

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OSHA Changes Bring Increased Penalties and Risk of Criminal Prosecution **[Christopher M. Horton](#), Associate, [Smith Currie & Hancock, LLP](#)**

Since 1990, penalties for violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act) have remained the same. However, two important developments in the winter of 2015 have put a spotlight on OSH Act enforcement. Due to these developments, all construction industry employers, whether developers, contractors, subcontractors, materialman or otherwise, should review their worker safety policies and procedures to place a renewed emphasis on worker safety. Otherwise, the risks have increased to a level that could be disastrous.

Statutory Framework for Enforcement of Recent Changes

On November 2, 2015, President Obama signed into law the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. 114– 74, 701. The Act requires federal

agencies to adjust their civil money penalties to reflect the increase in inflation and cost-of-living beginning August 1, 2016. The Act rescinded an exemption that previously disallowed inflationary adjustments for violations of the OSH Act. As of August 1, 2016, OSHA has adjusted the level of civil money penalties through an initial “catch-up adjustment.” OSHA is further mandated to adjust its penalties annually for inflation. States that have assumed responsibility for development and enforcement of their own occupational safety and health standards must increase their penalties so that they are at least as effective as federal penalties.

On July 1, 2016, OSHA published an Interim Final Rule, which details the increased level of civil money penalties. Since the consumer price index has risen roughly 80 percent since 1990, the last time OSH Act penalties were adjusted, OSHA has increased the civil penalties for OSH Act violations by 78 percent. Any citations issued by OSHA after August 1, 2016 will be subject to the new penalties, unless the violation occurred before November 2, 2015. All employers should be aware of the following adjustments to the civil penalties for OSH Act violations that became effective on August 1, 2016:

Willful or Repeated Violations – The maximum penalty for willful or repeated violations has increased from \$70,000 per violation to \$124,709 per violation. The minimum penalty has increased from \$5,000 to \$8,908.

Serious and Other-than-Serious Violations – The maximum penalty for serious violations and violations that are determined not to be serious has increased from \$7,000 per violation to \$12,741 per violation.

Failure to Abate – The maximum penalty for failure to correct a violation(s) for which a citation has been issued has increased from \$7,000 per day beyond the abatement date to \$12,471 per day beyond the abatement date.

A New Focus on Criminal Prosecution

On December 17, 2015, the U.S. Department of Justice (DOJ) and U.S. Department of Labor (DOL) issued a memorandum of understanding for criminal prosecutions of worker safety laws, including the OSH Act. The memorandum of understanding is the most recent initiative by the DOJ and DOL intended to increase the frequency and effectiveness of criminal prosecutions under the OSH Act. The goal is to increase sanctions that corporate executives may face for violations of OSHA. As the Assistant Secretary for Occupational Safety and Health, Dr. David Michaels, noted, “strong sanctions are the best tool to ensure that low-road employers comply with the law and protect workers lives. More frequent and effective prosecution of these crimes will send a strong message to those employers who fail to provide a safe workplace for their employees.”

Under the new memorandum of understanding, the DOJ’s Environment and Natural Resources Division and U.S. Attorneys’ offices will work with OSHA to investigate and prosecute worker endangerment violations. While worker safety statutes generally provide for only misdemeanor penalties, the memorandum of understanding encourages prosecutors to charge employers with federal crimes under Title 18, such as obstruction of justice, conspiracy, false statements, and witness tampering, and environmental offenses, such as Clean Air Act violations, Clean Water Act violations, and Resource Conservation and Recovery Act violations. The memorandum of understanding tasks OSHA to cross train, coordinate, and share information with various other federal agencies, including the EPA. This initiative clearly allows for the government to turn a workplace safety investigation into a much broader examination of a company’s compliance with Federal laws and regulations.

What These Developments Mean for Employers

On September 17, 2015, the Bureau of Labor Statistics released its census of Fatal Occupational Injuries for 2014 and the results showed that the rate of fatal workplace injuries in 2014 was 3.3 per 100,000 full-time workers, the same as the final rate for 2013. These statistics, coupled with the developments regarding workplace safety enforcement, make it clear that the Federal government has a renewed interest on workplace safety.

The increased focus by the government on workplace safety necessarily means that there will likely be more OSH Act criminal prosecutions in 2016 and beyond. Employers should be additionally wary because, based upon the memorandum of understanding, the Federal government will be investigating more than just OSH Act violations, under certain circumstances. This brings into question not just employers OSH Act compliance but also its compliance with other environmental and workplace safety laws and regulations.

It also means an increased amount of money that employers will pay in civil penalties for OSH Act violations. In FY 2015, OSHA issued approximately \$142 million in civil penalties. States issued an additional \$73,000,000. Based on the increases in penalties, the amount of civil penalties will rise to \$253 million and \$130,000, unless the higher penalties have a significant deterrent effect.

With these new developments, employers should be extra diligent in ensuring that they remain in full compliance with all applicable OSH Act regulations. Further, to the extent an employer's policies and procedures have not been updated recently, the employer should consider updating sooner rather than later.

Smith, Currie & Hancock LLP is a national boutique law firm that has provided sophisticated legal advice and strategic counsel to our construction industry and government contractor clients for fifty years. We pride ourselves on staying current with the most recent trends in the law, whether it be recent court opinions, board decisions, agency regulations, current legislation, or other topics of interest. Smith Currie publishes a newsletter for the industry "Common Sense Contract Law" that is available on our website: www.SmithCurrie.com.

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A Contractor's Primer on Changed Conditions

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A. Introduction

This article analyzes one of the greatest risks contractors face: differing site conditions. It discusses the reasons for contract provisions regarding differing site conditions and how to identify them. It also explains how these provisions operate and how they may affect contractors and owners on every construction project. Finally, the article outlines strategies for contractors to recover for or avoid the costs incurred when differing site conditions emerge.

B. Background

Historically, one of the greatest threats to a contractor's success on a project has been the potential for unknown subsurface conditions to arise, disrupt plans, ruin schedules and

eviscerate budgets. For example, if a contractor encounters unanticipated rock on a project, the contractor's productivity will decrease while his costs increase. The project likely will become more complex, and the equipment needed to complete it will be more expensive. But these are not the only consequences — unforeseen conditions may delay and create inefficiencies in other work on a project.

In common law, the contractor bore the risk of unanticipated subsurface conditions and the effects they had on the scheduling and costs of a project. Because contractors were obligated to complete their work without additional compensation — regardless of the severity or expense imposed by the unanticipated conditions — they would include contingencies in their pricing. In effect, their bids were gambles on the presence of subsurface conditions. If none arose, the contractor enjoyed windfalls. However, if truly severe conditions arose and were outside the scope of the contingencies, contractors were left unprotected and perhaps empty-pocketed.

To address this imbalance, differing site conditions clauses were developed. More than 50 years ago, the federal government first developed a differing site conditions clause that shifted the risks of unanticipated subsurface conditions to the owner. The provisions allowed contractors to bid the project based on (1) the subsurface information provided to them by owners and (2) the conditions disclosed by a reasonable site investigation. In theory at least, owners were able to receive bids uninflated by contingencies for site conditions, and contractors were able to receive compensation for the increased costs that resulted if differing site conditions were later discovered.

For example, section 52.236-2 of the Federal Acquisition Regulation (FAR), titled "Differing Site Conditions," provides that if a contractor encounters a differing site condition, he must, before the condition is disturbed, promptly provide written notice to the contracting officer of any subsurface physical condition that differs materially from those indicated in the contract or those that are of an unusual nature and differ materially from those ordinarily encountered. Upon receiving the notice, the contracting officer must investigate the site. If the conditions do materially differ and cause an increase or decrease in the contractor's cost or time for performing the work, an equitable adjustment must be made. This approach is now also embedded in the leading form contracts as well.

C. The Types and Characteristics of Differing Site Conditions

There are two types of differing site conditions. The first type, "Type 1" conditions, cover subsurface or other conditions at the site that differ materially from those indicated in the contract documents. To obtain relief from the effects of a Type 1 condition, the contractor must prove that the condition materially differs from what was indicated in the contract documents. Variances may arise in a number of ways. For example, assume that a certain material, Type X rock, is not indicated in the contract documents, but is later encountered. Or, Type X rock could be in the contract documents, but its quantity, character or behavior varies from what is indicated. These differences would all constitute variances. But any variation — whether qualitative or quantitative — must be material in order to merit Type 1 categorization. For example, on a project in Maryland County, an underground utility contractor expected some rock based on the borings, but it expected only 10 percent of the excavation to be affected, not 50 percent, as was encountered.

Variances may also arise in the form of direct inaccuracies (e.g., the boring locations are 50 feet away from the locations depicted in the drawings), misleading information, or inaccurate information.

Inferred conditions, such as those inferred from the design features of a contract, can also constitute Type 1 conditions. On a project in central Pennsylvania for the construction of a sewage treatment plant, the drawings depicted a uniform pattern of caissons under concrete tank structures. These drawings were indicative of the expectation that solid rock would not be encountered at or near the surface, as it ultimately was. Another contract in western Pennsylvania called for holes for soldier piles to be drilled with rock-augering equipment. However, the ground was not in fact augerable, and it rejected even state-of-the-art percussive drilling equipment. To penetrate the rock, the contractor had to use a special and rare super-hammer. Using this equipment — of which there were only 10 in the world — was not a strategy predictable under the contract documents.

In Type 1 situations, certain courts have narrowly defined what information the contractor may rely on, construing the term “contract documents” narrowly. See, e.g., *Cruz Constr. Co. v. Lancaster Area Sewer Auth.*, 439 F. Supp. 1202 (E.D. Pa. 1977) (holding that the exculpatory clause of a contract, which noted that the boring information contained therein was solely for the use of the owner and that its accuracy was not guaranteed, expressly precluded the contractor from relying on it); *J. E. Brenneman Co. v. Commonwealth, Dep’t of Transp.*, 56 Pa. Commw. 210, 424 A.2d 592 (Pa. Commw. 1981) (rejecting a contractor’s reliance on contract provisions when the contract stated that the subsurface information contained therein was obtained for the exclusive use of the owner and not part of the contract documents for bidding purposes).

Disclaimer clauses, however, have only limited effect in federal government contract situations. These disclaimers have been consistently disregarded by the Court of Claims and federal contract administrative boards on the ground that modifying or deleting the differing site conditions clause is the proper way to place the risk on the contractor, rather than by including disclaimers. See *Metcalf Constr. Co. v. United States*, 742 F.3d 984 (Fed. Cir. 2014) (holding that the contract did not place the risk of errors in the pre-contract documents on the contractor and noting that the FAR provision exists to take some of the gamble of subsurface conditions out of the bidding process by allowing the parties to deal with conditions when the work begins and more accurate information is available).

The second type of changed conditions, or “Type 2” conditions, are unknown physical conditions of an unusual nature that differ materially from those ordinarily encountered and generally recognized as inherent in the work of the character called for in the contract. Type 2 conditions are alleged less frequently than Type 1 conditions and are more difficult to prove. To recover on Type 2 conditions, a contractor does not need to compare the conditions encountered with the conditions outlined in the contract documents. Instead, the contractor must prove that the condition encountered was unknown, unusual and materially different from the conditions reasonably anticipated.

A survey of cases suggests that, to qualify as a Type 2 condition, a contractor must expect to encounter the condition in fewer than 10 percent of cases. Although this is not a bright-line rule, it may be a rule of thumb. An example of a Type 2 condition arose in a case in western Pennsylvania, where a rig operator with 20 years of experience in the industry testified that the rock encountered — and not anticipated — was the hardest he had ever seen and was so hard that it was impenetrable by rock augers, rotary tricones and oilfield hammers. Another condition qualified for Type 2 categorization when an expert concluded that the presence of an artesian water condition experienced at a site had less than a 1 percent chance of occurring in the area. The rarity and unexpectedness of these conditions provided the basis for the argument that they were Type 2 conditions.

D. Site Investigation Clauses

In the federal contract situation, a typical site investigation clause generally requires only that the contractor conduct a reasonable investigation of the site and discover only what a reasonable, experienced and intelligent contractor could discover, rather than what a trained geologist or other specialized expert might be able to discover.

These clauses do not require the contractor to anticipate conditions that a geotechnical engineer would anticipate. For instance, in the Maryland case discussed above, the owner presented a geotechnical engineer who, through references to specialized topographical maps and local engineering textbooks, argued that the inferences that the contractor drew from the boring logs were wrong. However, the key issue in the case was what a reasonable contractor would anticipate, not what a geotechnical engineer would anticipate. Over the course of the engineer's two-day deposition, he was asked to execute an anticipated rock profile that was based on boring logs and field notes that he had prepared in light of his recent site investigation. His profile was thoroughly at odds with where the rock was actually encountered, and — not surprisingly — the case settled shortly thereafter.

These clauses also typically do not require the contractor to conduct independent technical investigations and obtain subsurface boring and core samples. Instead, the contractor will be required to show that he reviewed boring logs, examined the cores themselves if available, and, if there was reason to, walked the site and took into account rock outcroppings. It is imperative that the contractor document this field investigation and record his findings and conclusions. At trial, a photograph or video is worth a thousand words — maybe more.

E. Strategies to Employ When a Differing Site Condition Emerges

If a contractor uncovers a differing site condition on a project, he can avoid the associated pitfalls by employing a handful of strategies and safeguards. First, the contractor should promptly notify the owner about the condition before it is disturbed and allow the owner to address the situation and possibly modify the design. This allows the owner and his engineer to investigate, consider possible redesigns to mitigate costs, and, if necessary, to track the condition's impact on performance.

Failure to provide prompt notice can be fatal. However, federal government contract cases have held that constructive notice — proof that the government became aware of the condition prior to notice — may mitigate the effect of late notice.

Second, the contractor must document the condition by photographing, surveying, measuring or even videotaping it. Recording any relevant measurements and locations will be incredibly helpful if disputes arise. At a trial or hearing, these recordings are priceless.

Third, the contractor should consider enlisting the services of a geotechnical expert before conditions are disturbed to document the nature of the condition and how it varies from what was expected. This also relates to trial strategy: An expert will be more effective if he can base his testimony on first-hand experience rather than on suppositions, pictures and second-hand information. For example, in one case, by calling in a geotechnical expert immediately after uncovering the differing subsurface condition, we were able to document the quantum and nature of the condition and establish definitively that the boring locations were 40 feet away from the location shown on the site plan. The owner ended up overruling his engineer and paying for increased efforts expended as a result of the differing condition within 10 days of receiving notice of its existence. In another case, because we enlisted the help of a geotechnical expert right away, we were able to dig test pits, monitor rising water levels, and establish that the contractors had encountered an unusual artesian condition rather than just ordinary subsurface water.

Moving promptly to establish proper and convincing proof can lead to an early resolution or, at the very least, limit the possibility at trial of conflicting factual testimony over the nature, extent and severity of the problems encountered. The simplicity of these strategies should not discount their worth or effectiveness.

F. Conclusion

Differing site conditions have impeded progress, ruined profit projections, disrupted projects, and even bankrupted contractors. With a better understanding of the contract language that is available to mitigate their effects, and strategies to employ when these conditions arise, there now exists a strategy for managing this still very dangerous risk.

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2016 Revisions to ConsensusDocs

[Phillip E. Beck](#), Partner, [Smith Currie & Hancock, LLP](#)

In December 2016, the **ConsensusDocs** coalition will publish revised editions of a number of the flagship ConsensusDocs design and construction industry contract forms. These comprehensive revisions to various key ConsensusDocs documents represent the culmination of: (1) thousands of volunteer hours invested by the ConsensusDocs Content Advisory Council (“CCAC”, the ConsensusDocs drafting body, which represents all segments of the design and construction industry) and the tireless efforts of the ConsensusDocs staff¹; (2) the significant contributions and support of the 40-plus member organizations which now comprise the growing ConsensusDocs coalition; and (3) the invaluable feedback of the industry participants, attorneys, and other construction professionals who utilize, and have now “road-tested”, the ConsensusDocs family of documents.

Overview

In many respects, these “2016 revisions” are a reflection of the design and construction industry they serve. For example, the 2016 revisions incorporate into the documents and the projects which utilize them: (1) greater collaboration among project participants; (2) a broader menu of project delivery options, including more robust use of Integrated Project Delivery (“IPD”); (3) greater flexibility in terms of the roles of individual project participants; (4) the embracing of new technologies, and the potential benefits to be derived from their proper use; (5) greater nimbleness and agility in responding to the unique needs of individual projects and

¹ Melissa Beutler (2015 - 2016) and Bob Pratt (2016 - 2017), who succeeded the author as CCAC Chairs, and all CCAC members deserve special recognition for the development of these new and improved forms, as do Brian Perlberg, Carrie Ciliberto, and the rest of the ConsensusDocs staff, who have guided and supported this effort.

situations; (6) lean construction principles; (7) greater awareness of the need to embrace green and sustainable principles in the design and construction process; (8) the rapidly-evolving use of Building Information Modeling (BIM); (9) the industry's demand for greater emphasis on dispute avoidance and a more efficient dispute resolution process; (10) increasing pressure on the industry to improve efficiency; (11) industry participants' desire to embrace and unleash the power of innovative construction techniques; (12) the desire for shorter and more succinct contract forms, where practicable; (13) the parties' need to be able to tailor standard contract documents to fully address the unique project requirements encountered on Federal Government projects; (14) the need to address Public-Private Partnerships ("P-3") and other innovative project delivery and project financing solutions; (15) changes which have occurred in the insurance industry and the insurance products and protections which are now commercially available; (16) a continuing effort to achieve ever-increasing clarity and transparency, and (17) recent legal developments.

Moreover, the 2016 revisions accomplish all of these things while remaining true to ConsensusDocs' original principles of: (1) reflecting a consensus of all project stakeholders, (2) promoting the best interests of the project and the design and construction industry as a whole, rather than the self-interest of individual project participants, and (3) utilizing industry best practices, plus a clear and fair allocation of risks, to achieve better projects. This is quite a feat!

The Evolution of ConsensusDocs

ConsensusDocs came into existence in September of 2007. The birth of ConsensusDocs was the cover story in the September 24, 2007 edition of *Engineering News-Record*. One thing which distinguishes ConsensusDocs from its primary competitor, the American Institute of Architects ("AIA") standard construction industry contract forms, is the fact that it was always intended that the ConsensusDocs forms would be revised on an as-needed basis, rather than on a predetermined and infrequent revision cycle, such as the ten-year cycle on which the AIA's flagship AIA Document A201 General Conditions is revised (new editions of which are published once every ten years, in years ending with a seven). In fact, the ConsensusDocs organization's published procedures call for the documents to be reviewed and updated as necessary, and no less frequently than every five years, in recognition of the fact that the industry and the demands placed upon it are constantly evolving.

True to this intent, numerous new forms have been added to the ConsensusDocs family of documents since 2007, and a number of revisions have been made to many of the existing forms in the nine years since then. 2016, however, is special in that it was targeted by ConsensusDocs as a year to publish the second wave of comprehensive revisions to the major flagship documents. The resulting publication of revised ConsensusDocs forms surrounding ConsensusDocs' ninth birthday represents the culmination of an initiative which has been years in the making.

Forms Affected

In November of 2015, ConsensusDocs published its revised BIM Addendum (ConsensusDocs 301); and in January of 2016, ConsensusDocs published a revised Tri-Party Integrated Project Delivery Agreement (ConsensusDocs 300), along with a companion IPD Joining Agreement (ConsensusDocs 396), as well as a new Owner and Energy Consultant Agreement (ConsensusDocs 842). The changes to the ground-breaking ConsensusDocs BIM and IPD documents implemented in late 2015 and early 2016 reflect the quickly-evolving industry best practices for the implementation of BIM technology and the increasingly-popular IPD project delivery method.

In late 2016, ConsensusDocs will publish revised editions of the following additional flagship documents: ConsensusDocs 200 (Standard Agreement Between Owner and Constructor); ConsensusDocs 205 (short form version of ConsensusDocs 200); ConsensusDocs 240 (Standard Agreement Between Owner and Design Professional); ConsensusDocs 750 (Standard Subcontract Form); and ConsensusDocs 751 (short form of ConsensusDocs 750). While none of the revisions to these forms reflect a major shift in the philosophy or guiding principles behind ConsensusDocs, they do include significant revisions and improvements designed to keep the documents abreast with changes in the design and construction industry, the insurance industry, industry best practices, the law, technology, and terminology.

Major Changes

Some of the major changes which will appear in the 2016 edition of these ConsensusDocs forms pertain to the following issues:

1. **Termination for Convenience:** The circumstances under which a termination for convenience is permitted and the circumstances under which a termination for default can be converted to a termination for convenience, as well as the potential consequences of doing so, are revised.
2. **Schedule:** References are added to Critical Path Method Scheduling concepts and basic principles.
3. **Changes:** There is a change in terminology from “Interim Change Directive” to “Interim Directive” in order to accommodate changes with no time or cost impact, and the definition of this term is expanded to encompass Owners’ written directives.
4. **Indemnification:** Indemnification is now required for intentional acts (for which there may be no insurance coverage), and a clearer, narrower definition of “Others” is incorporated.
5. **Insurance:** The forms are revised so that the default is for the Constructor, rather than the Owner, to purchase the Builder’s Risk Insurance Policy, because many contractors want to manage this risk (and pass the cost along to the Owner) in order to ensure that proper coverage is obtained and because this often results in a lower cost – the parties can still elect to have the Owner provide this coverage instead if they wish. An option has also been provided for requiring pollution liability insurance coverage.
6. **Bonding:** The penal sum of Payment and Performance Bonds will no longer automatically float with changes to the contract amount.
7. **Payment:** There are changes to the definition of “Cost of the Work” applicable to work performed on a cost-reimbursable basis, as well as changes concerning contingent payment.
8. **Dispute Resolution:** The forms now provide a check-the-box option for the parties to use to select who will administer any mediation, with the American Arbitration Association remaining the default.
9. **Owner/Design Professional Relationship:** Language which could have been interpreted to create a fiduciary relationship between the Owner and its Design Professional has been eliminated.

10. **Miscellaneous:** Other changes include a general cleanup of the documents for clarity, brevity, and consistency across documents.

Summary

Despite having only recently turned nine years old, ConsensusDocs already has compiled an impressive resume. And, ConsensusDocs is continuing to gain traction within the industry. Proponents of its primary competitor brag that one of the advantages of the AIA Documents is the century-long track record of court decisions interpreting them. But ConsensusDocs aspires to be understood by industry participants without the need for judicial guidance or intervention, and aspires to facilitate better projects, not litigation. Good contract documents should reflect and promote the objectives of the parties as a whole, and advance the best interests of the project. To do so, they must remain relevant and fresh in order to stay abreast of current industry best practices and new developments. The 2016 ConsensusDocs revisions represent another major step toward that goal. While no contract can guarantee a successful project, good contracts can assist the contracting parties to build better projects. And, as its logo suggests, using ConsensusDocs is “Building a Better Way”.

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Project Case Study

Wesbelt United Stationers Storm Damage Rebuild, Columbus, OH



Contract Used:

- ConsensusDocs 410 -Owner and Design-Builder Agreement (Cost of Work Plus Fee with GMP)
- ConsensusDocs 450 - Design-Builder and Subcontractor Agreement

Project Contractor: [Brexton Construction, LLC](#)

Project Description: The project consists of an existing one-story warehouse building approximately 229,000 sf. The building was damaged by a wind storm...[Read More](#)

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Please email [Lynette Nichols](#) if you would like to share your construction project to the ConsensusDocs Project History page.

You need to include: Project name, Contracts Used, Name of the Owner, Name of the Developer, Name of the Developer, Name of the Project Design Professional, Name of the Project Contractor, a Project Description, a short Testimonial, and a Project Photo.

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