ConsensusDocs Guidebook
AGC Member-Only Comments
Created by the AGC Contract Documents Forum

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AGC Comments for ConsensusDocs 200:

Definitions (§2.1): This section expresses the contracting parties' duty of good faith and fair dealing. While this duty is implied in many jurisdictions, it is not implied in all jurisdictions. This section does not intend to create a fiduciary relationship between the contracting parties. If the Constructor doubts how a particular jurisdiction might interpret this section, it should add that no fiduciary relationship is intended.

Parties' Relationship (§2.1.1): The Constructor agrees not to act on behalf of, or in the name of, the Owner. The Constructor may wish to include a parallel term stating the Owner parties agree not to act on behalf of, or in the name of, Constructor, or to interfere in Constructors' relationship with its subcontractors and suppliers.

Design Authority and Responsibilities (§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). Therefore, under *Spearin*, an Owner who provides a design to the Constructor warrants the design, if followed, will be adequate. For design-bid-build delivery, a Constructor who receives Owner-issued design information must carefully consider how – if at all – to assist the design process. For example, §3.15 identifies any scope of work where the contract delegates design to the Constructor. The more involved the Constructor is in the design process, the more like the Constructor erodes the *Spearin Doctrine* and exposes itself to potential design-based liability with different legal risks, timelines, procedures, and insurance needs. Carefully consider the effect of specifying and/or performing any design responsibilities. Also, pay particular attention to any performance specifications (whereby the Constructor promises the Work will function as intended), equipment selections, Owner-dictated vendor usage, and the like in the context of §2.3. Similarly, post-award actions such as Constructor-initiated value-engineering changes may alter the Constructor's design risk. In addition, the Constructor should avoid contract language that disclaims or shifts the risk of design flaws to the Constructor when it played no part in the preparation of the design. If the Constructor wishes to unequivocally state it has no design role, it can add the word "expressly" between "services" and "delegated" in subsection (a) and delete subsection (b).

ConsensusDocs do not give the Design Professional the role of intermediary or initial design-maker between the Owner and the Constructor. This is intentional and based on the drafters' view of optimum relationship building and project delivery. Instead, ConsensusDocs establish a direct line of communication between the contracting parties.

Contract Documents (§2.4.4): The definition of "Contract Documents" should be carefully reviewed. As a best practice, the Constructor may wish to include all information that the Owner provided under §4.3.1 as a Contract Document.

Contract Time (§2.4.6): The Constructor may revise this section to define "Contract Time" as the period between Date of Commencement and Substantial Completion, particularly if the contracting parties intend to base liquidated damages on that milestone alone. In that instance, the contracting parties should check "shall not apply" at §6.4.2, meaning no liquidated damages apply for Final Completion, the logic being the Project already allows for beneficial occupancy.

Law (§2.4.15): This definition uses "enacted" as opposed to "effective". When a law is enacted, but the actual rules or application are in-process or unclear, the Constructor may prefer to use both terms, agreeing to comply with Law that is both "enacted and in effect" at the time of Agreement.

Insurance Deductibles (§2.4.18): Insurance deductibles are eliminated as an Overhead item and not included as an item for the cost of the Work purposes as a job cost. Some Constructors consider a paid deductible as a cost of the Work. The ConsensusDocs drafters believe this is a best practice because it is presumed that the risk of paying insurance deductibles would be included in bid prices.

Subcontractor vs. Supplier (§2.4.23 and § 2.4.26): The definitions of "Subcontractor" (§2.4.23) and "Supplier" (§2.4.26) potentially overlap. To assist with buy-out, the Constructor may wish to distinguish these terms. Suppliers who perform no on-site work may resist incorporation of certain risk terms or insurance requirements that an Owner requires for Subcontractors and on-site work.

General Responsibilities (§3.1.1): Note, obligations in this subsection are spread throughout the ConsensusDocs 750 Subcontract Agreement in sections 3.14, 3.2.1, 3.1.2, 4.1, and 4.3.

Coordination with Work of Owner and Others (§3.2.1): To clarify responsibility for damage caused by Owner or its separate contractors, the Constructor may wish to add: "Owner agrees that any damage to Constructor's Work caused by the work of Owner or Others shall be corrected by Owner without any cost or expense to Constructor."

Coordination with Work of Owner and Others (§3.2.2): The Constructor should carefully consider whether it will agree to "cooperate" with the Owner's separate contractors, or to "coordinate" that work. Even then, the Constructor should consider whether such coordination responsibility includes Constructor's efforts only or coordinating the entire work of several parties – which could be problematic as the Constructor has no contract control over the Owner's separate contractors. To that effect, the Constructor may wish to change "Parties" to "Owner". It also may wish to strengthen a case for equitable adjustment in the last sentence by deleting "In accordance with §6.3" and changing "may be equitably adjusted" to "shall be equitably adjusted.".

Coordination with Work of Owner and Others (§3.2.3): The Constructor may wish to revise this section to make its obligations apply to both Parties, particularly if the Owner has some or all coordination responsibility under §3.2.2 (see above).

Coordination with Work of Owner and Others (§3.2.4): On a Project with pre-existing work by others, the Constructor should consider reserving claims for latent defects that the Constructor could not have discovered despite exercising reasonable care. After the second sentence, the Constructor may wish to add: "The Constructor's obligations in this subsection do not extend to latent defects." Note that the Owner has similar rights regarding latent defects at §9.8.6.

Warranty (§3.8.1): The Constructor should carefully consider its warranty obligation, specifically regarding design-build work. For example, while common to warrant construction work is "free from material defects", design work typically is evaluated according to a professional standard of care. In the third sentence, the Constructor may wish to clarify that "construction Work shall be free from material defects" and expressly refer to designer standard of care in §3.15.

Warranty (§3.8.2): The Constructor shall assist the Owner in pursuing warranty claims to the extent that the Constructor would have followed the selection criteria.

Correction of Work within One Year (§3.9.1): The Constructor is to be notified of defective work during the warranty period and given the option to correct the Work even after the Correction of Work period expires.

Correction of Work Within One Year (§3.9.7): The Constructor may wish to revise the last sentence to limit Owner backcharge remedy to "any diminution in value of the Project caused by such Defective Work, or the cost to correct the Defective Work, whichever is less." This alternative encourages the Parties to act appropriately if repair costs are less than diminished value.

Safety (§3.11.4): The Constructor should consider which Party places property insurance, such as Builder's Risk, as the quality and cost of that insurance product may affect the breadth of coverage and, in turn, who should bear the risk for uncovered damage. If the Owner is placing property insurance, the Constructor should negotiate what that policy should cover and capture those expectations in the construction contract – including what the deductibles are, and who should pay for the deductibles and under what circumstances – as these matters best establish the framework for risk and repair obligations.

Submittals (§3.14.1): Construction contracts commonly require the Constructor to perform the Work per approved submittals, yet also strictly follow the Contract Documents. Those two concepts can conflict. Here the Constructor must obtain a change order for any differences between an approved submittal and the Contract Documents. This process can be cumbersome,

especially when the submittal process is used to clarify ambiguities or conflicts in the Contract Documents. The Constructor may wish to revise this section, removing the change order requirement for clarifications, and more clearly defining the circumstances when a change order is required if specific approval was given in a submittal response.

Submittals (§3.14.2): Timeliness of submittal response is an important issue that can impact the Constructor's ability to perform. The Constructor may wish to change "with reasonable promptness" to a more specific standard, such as "with reasonable promptness but in no event more than [X] days".

Design Delegation (§3.15): When taking design responsibility (See §2.3), the Constructor should also consider §3.15. This section states that the Contract Documents may make the Constructor responsible for designing a particular system or component. The Constructor should be careful to assume only the extent of design responsibility for which it is comfortable and has appropriate insurance (See also §10.7).

Financial Information (§4.2): For purposes of §4.2, the Parties can use ConsensusDocs 290.1 (Owner Financial Questionnaire). ConsensusDocs 290 (Guidelines for Obtaining Owner Financial Information) provides additional guidance for requesting the owner's financial information. If the Owner argues against such provisions, the Constructor may offer to limit its right to demand financial information after work starts to only those situations when payment is missed, or an event occurs that puts the Owner's ability to make future payments in reasonable doubt. Further, the Constructor may wish to revise the last sentence to require the Owner to disclose any additional terms, approvals, authority constraints, or limits imposed on it by Project lenders or others.

Worksite Information (§4.3): The unmodified language of this section does not classify all Owner-provided information as Contract Documents that can be relied upon (as in the 2007 edition of ConsensusDocs). Therefore, the Constructor's examination should be limited to Contract Documents, or the definition of Contract Documents should be revised and expanded to include Owner-provided information. Otherwise, the Constructor could be in a position of relying on Owner-provided information that is disclaimed and therefore unreliable. The Constructor should take great care in identifying all Contract Documents in §4.3 and §14.1, including all worksite information they need to rely upon.

Worksite Information (§4.5): The Legal Description is important if the Constructor needs to record a lien and identify the specific property involved. Consider adding a legal description to §4.5.

Worksite Information (§4.3.4): Prior revisions changed "relevant" to "required" for a more objective and narrower standard for requests. However, the Constructor may wish to revert to the prior standard if appropriate.

Building Permit, Fees, and Approvals (§4.4): Constructors may consider more specifically delineating the responsibility for obtaining and paying for permits and fees related to the Work. Respective obligations are contained in sections 3.17.1 and 4.4.

Paper Contract Documents (§4.6): Depending on how the ConsensusDocs 200.2 is used and completed, the need to provide a hard copy of the Contract Documents could potentially be eliminated.

Documents in Electronic Format (§4.6.1): Electronic documents are increasingly used by the industry. This provision requires a protocol to be established relating to the use of such documents. Constructors are strongly encouraged to use the protocol in Consensus Docs 200.2 to ensure that all the Parties clearly understand the risks associated with using electronic documents to a contract. At a minimum, the 200.2 can allow Constructors to rely upon e-mails and faxes, if the document is completed to indicate such a desire. However, if the only available set of Owner-provided plans is in an electronic format, then the Constructor should make clear that it is not responsible for design errors that originated before transmission.

Owner's Representative (§4.7): As a best practice, the Constructor should insist the Owner's representative is a specific person identified by name and take care that all-important contractually required communications, such as notices and claims, are directed to that designated representative in the exact timeframe and manner required by contract.

Owner's Right to Clean Up (§4.9): The Constructor may wish to add "reasonable" before "cleanup measures," expand "two (2) Business Days'" to something longer, such as "five (5) Business Days" and include a reasonableness requirement for the cleanup procedure and the time required to implement same. Also, Constructors should consider changing "allocate the cost among those responsible" to more specific wording such as "assess only the specific cleanup costs caused by Constructor to Constructor and the specific cleanup costs caused by Others to those Others." This could avoid an Owner equally dividing and assessing all cleanup costs among all involved entities without regard to whom failed to follow cleanup procedures. Alternatively, the Constructor may wish to replace §4.9 with terms whereby the Constructor is responsible for cleanup of trash and debris resulting from its Work but not be responsible for trash and debris resulting from the work of Others.

Cost of Correcting Damaged or Destroyed Work (§4.10): A Constructor may wish to change "may seek an equitable adjustment" in the last sentence "shall be entitled to an equitable adjustment", as here the party responsible for the damage is the Owner or Others, which is a defined term that includes Owner's separately contracted contractors.

Award of Subcontracts and Other Contracts for Portions of the Work (§5.1.1): The Constructor may wish to further define "promptly" such as "but in no event later than [X] days after Owner's receipt of the Subcontractor list."

Award of Subcontracts and Other Contracts for Portions of the Work (§5.1.1): The Constructor may wish to add a right to reject certain vendors based on its past experience; for example, "The Constructor may reasonably object to and refuse any Owner-directed vendor usage, which it shall communicate to Owner in writing."

Date of Commencement (§6.1): The default Date of Commencement is the contract signing date unless otherwise noted. Should the scheduled time period of commencement and the contract signing date differ, the Parties need to specify that here. For example, if the time for completion of the work starts at Notice to Proceed, that should be identified.

Schedule of the Work (§6.2): This section requires submission and periodic update of a critical-path method schedule identified as the "Schedule of the Work" and defined in §2.4.22. Assuming the Schedule of the Work is not attached as Exhibit A to the Contract (see 2.4.1.1), it must be submitted before the Constructor's first application for payment. If Exhibit A contains a simple baseline, milestone, or preliminary schedule, a more detailed critical path method schedule must be submitted before the first application for payment pursuant to this section. Note that this section does not require the use of a particular software format, or whether the schedule will be submitted in hard-copy or electronic form, or whether the schedule must be resource-loaded as those matters can be agreed upon by the Parties as part of the administration of the Project. The schedule required by this section does require that all activities required for the performance of the Work be identified along with float values that will affect the critical path.

As a general proposition, depending on the jurisdiction, the float for any given activity may be used by the Owner or Constructor on a "first come, first served" basis without liability, irrespective of the events which led to its use. However, the Owner's use of float increases the Constructor's risk of causing a delay in completing the Project. The elimination of float from certain activities reduces the Constructor's flexibility to re-sequence, reschedule, or extend activities (*i.e.*, use the originally scheduled float) at its discretion without extending the Project's overall completion date. Constructors may consider adding language to this section or §6.3 to precisely delineate rights, responsibilities, and remedies regarding the use of float by the parties. This is particularly true on larger or more complex projects. The revised language, which allows the Constructor control of the use of the float, provides an alternative risk allocation that may be desirable for certain projects.

Another potential issue regarding the use of float may exist concerning schedule gains earned by the Constructor during the Project. Constructors may also wish to consider modifying the language in sections 6.2 or 6.3 to reserve for themselves the right to use the float created by

schedule gains created by early completion of critical path activities throughout the Project (i.e., the difference between the contractual completion deadline and the completion of the last critical path activity). Comprehensive language may also have the effect of reserving the Constructor's right to early completion or cutting off the Owner's argument that it has the right to delay prompt determination of the Constructor's delay notices under the theory that, even though an impact occurred, a time extension ultimately may not be necessary because of the float created by the Constructor's schedule gains. To avoid that scenario, the Constructor may wish to clarify that the Constructor controls the use of all of the float on the Project for its benefit.

Schedule of the Work (§6.2.2): In the last sentence, the Constructor may wish to change "may seek an equitable adjustment" to "shall be entitled to an equitable adjustment", as the schedule impact would be Owner-directed.

Delays and Extensions of Time (§6.3.1): The Constructor may wish to revise this section or §6.5, as applicable, to address concurrent delay, including how primacy (the first delay) affects liability. In some jurisdictions, concurrent delay is addressed by allowing the Constructor an extension of time but not additional compensation.

Delays and Extensions of Time (§6.3.1 and § 6.3.2): The Covid-19 pandemic outbreak illustrates how events outside the Project can disrupt supply chain and shipping/transportation expectations. Parties may be aware that such delays are possible but hope to avoid them. The Constructor may wish to revise "transportation delays not reasonably foreseeable" to "transportation and material or equipment delivery delays not reasonably avoidable" and, at §6.3.2, change "through (d)" to "through (e)" as compensable events. The Parties also may wish to address price escalation and delivery and supply chain issues by incorporating ConsensusDocs 200.1. AGC member are encouraged to consider use of the AGC epidemic rider which can be found as a member resource here.

Notice of Delay Claims (§6.4): This section contains two optional Liquidated Damages provisions. Opinions on Liquidated Damages differ – some prefer the certainty as long as liquidated damages are stated to be the Owner's "sole and exclusive" delay remedy; others prefer actual delay costs as long as the Owner waives consequential damages, particularly its loss of use. The Constructor who prefers Liquidated damages should carefully consider whether liquidated damages apply to one milestone (e.g., Substantial Completion) or multiple milestones (e.g., Substantial Completion and Final Completion); if Liquidated Damages for multiple milestones should add together or stack, and whether overall Liquidated Damages exposure should be capped, as without such a limit liquidated damages conceivably could result in a late Project being delivered for below-cost.

Limited Mutual Waiver of Consequential Damages (sections 6.5 and 6.5.1): The Parties agree to waive Consequential Damages except for Liquidated Damages, damages covered by contract-required insurance, and other mutually agreed items. A consequential damages waiver usually is

very beneficial to the Constructor, so any exceptions (even the ones listed above) should be carefully considered. For example, whether to allow Consequential Damages covered by insurance involves such considerations as who is providing insurance, what insurance is required, and how, if at all, responsibility for deductibles is assigned. There is precedent in the construction industry to waive consequential damages without any insurance exception. Those damages often depend upon the Owner's business dealings with non-Constructor Parties – matters over which Constructor has limited or no control. If the Parties elect to use this term for insurance-covered items, the Constructor may wish to limit it to matters "covered **and paid for** by insurance…."

Section 6.5 also waives consequential damages resulting from the termination of the contract. To prevent acts of bad faith, the Constructor may wish to exclude damages for an Owner's wrongful termination. This revision is consistent with §11.5.3, where the Constructor is entitled to "any proven loss, cost, or expense in connection with the Work…" when it terminates the contract for Owner default. Again, the Constructor is encouraged to carefully evaluate these terms and any changes made to them, as §6.5.1 requires their adoption in lower-tier agreements.

Early Completion Incentive (New Section 6.7): For Projects where the Parties wish to incentivize early completion, the following standard language developed by the ConsensusDocs drafters may be inserted:

> "6.7 AWARD INCENTIVE. The maximum amount of incentive shall be _____. To receive an incentive award based upon early completion, the Constructor must provide the Owner written notice of its intent to achieve completion early no later than 60 days before the contract date of Substantial Completion. If achieved, the Contract Price shall be adjusted by Change Order to reflect the Constructor's incentive award. Incentive award payment will be made upon receipt of a proper application for final payment after executing that Change Order."

Price (Article 7): The Parties should clarify whether Contract Price includes or excludes sales tax. If Constructor's price is based on any clarifications, exclusions, or assumptions, those should be stated in the Agreement. A potential place for that is adding an "Exhibit C" to §2.4.1.1 for "Price Clarifications & Exclusions."

Allowances (§7.2.2): The Constructor may wish to revise the last sentence to change "may seek an equitable adjustment" to "shall be entitled to an equitable adjustment", as an allowance, by definition, is reconciled to actual cost.

Change Order/No Obligation to Perform (§8.1.3): This addition derives from §7.7 of ConsensusDocs 750 and provides a consistent approach for the parties to memorialize changes in writing before proceeding with changed work, which is designed to reduce disputes about the scope and cost of such work later.

Interim Directives (§8.2.2): An Owner must pay 50% of the cost estimate if a dispute occurs over whether work is within scope. This provision allows an important balance for a Constructor to maintain financial viability while allowing an Owner to retain legitimate claims in dispute.

Determination of Cost/Cost of the Work (§8.3.4): While the ConsensusDocs 200 is a lump sum agreement, a more extensive delineation of the Cost of the Work is now included to clarify and help Parties avoid disputes regarding the cost of the work for changes. This language was derived from existing language in the ConsensusDocs 500 Construction Management At-Risk agreement with some appropriate minor modifications. The Constructor should fill in any blanks for overhead and profit percentages. Failure to do so may be viewed as a waiver of overhead and profit on changes. The Constructor also may consider negotiated rates for supervision, labor, equipment, insurance premiums, or other items instead of the proposed language in §8.3.4.

Incidental Changes (§8.5): This language was taken from §7.9 of the ConsensusDocs 750. This added language provides greater clarity for the Project participants and provides a consistent approach across the ConsensusDocs family of contracts.

Progress Payments/Applications (§9.2.1): In the fourth sentence, the Constructors may wish to change "fifteen (15) Days after accepting such application" to "fifteen (15) Days after receiving such application" This revision addresses confusion as to "accepting" which conceivably could mean receipt, review, and approval – a much longer timeframe. Note, that some jurisdictions have prompt payment statutes shorter than the proposed fifteen-day pay cycle, requiring further revisions here.

Lien Waivers and Liens/Partial Lien Waivers and Affidavits (§9.2.3.1): The Constructor may wish to add at the end of this section, "In the event, the Law of the state in which the Project is located requires a particular lien waiver form, the Constructor shall use that form even if the statutory form is not unconditional."

Lien Waivers and Liens/Removing Liens (§9.2.3.2): The Constructor may wish to delete this provision or clarify its obligation to remove liens, for example, stating the Constructor is required to remove a lien provided the Owner already has paid for that specific work. If concerned that the thirty-day timeframe for lien removal is too short, the Constructor may revise this section to require its commencement and diligent prosecution of a remedy, including satisfying the lien, obtaining a lien release bonding per statute, or any other reasonable financial arrangement allowed by law (such as a common-law bond, etc.).

Retainage (§9.2.4.1): Retainage is important to ensure payment flows in a fair and equitable manner. The Owner may 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-

Constructor, the Constructor should consider modifying the ConsensusDocs 750 in a consistent manner for its payments to subcontractors.

Retainage (§9.2.4.3): The Constructor may wish to change "may release" to "shall release" to mandate retainage release for completed subcontractor work. Further, some jurisdictions have laws that control retention release and timing, requiring additional revisions to this section.

Adjustment of Constructor's Payment Application (§9.3.2): This is an added clarification to incentivize insurance coverage. Insurance coverage removes an Owner's ability to withhold payment from the Constructor for a covered loss.

Adjustment of Constructor's Payment Application (§9.3.3): The Constructor may wish to exclude instances when it bills for a subcontractor's work but intends to use those funds to pay for supplemental labor or correction of subcontractor's work performed by others. The Constructor may propose to subject this exception to an Owner's prior approval.

Adjustment of Constructor's Payment Application (§9.3.6): An Owner can withhold payment based on "reasonable evidence" that the cost to complete the Work exceeds the unpaid balance of the Contract Price. However, disputes may arise concerning changes in the Work. Because the Constructor is required to continue Work during certain disputes under §12.1, this can result in a scenario where an Owner's refusal to execute Change Orders is, at least in part, the reason why the contract balance appears insufficient to complete the Project. The Constructor may wish to delete this provision or exclude reasonably disputed changes or claims.

Adjustment of Constructor's Payment Application (§9.3.7): This provision allows an Owner to withhold payment if a third-party files a claim unless a Constructor 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. The Constructor may wish to delete this section to allow for a scenario where it disputes a subcontractor claim. At the least, the Constructor may wish to provide more specificity and clarity here regarding adequate security. For example, if a payment bond is in place, no additional security should be required besides consent to payment by the surety after acknowledging the claim's existence. If it is a lien claim, the Constructor can bond around the lien in accordance with applicable statutory requirements. This section also should clearly state that if the specified security is provided, the Owner is obligated to make payment.

Some Constructors report the abuse of the right to withhold payment, even after adequate security has been provided. Also, a Constructor should ensure that this provision is consistent with the Constructor-Subcontractor Agreement, as provided in ConsensusDocs 750 §8.2.7.

Payment Delay (§9.5): While §9.2.1 defines the payment due date, the Constructor may wish to change "may seek an equitable adjustment" in the second sentence to "shall be entitled to an

equitable adjustment.”. The rationale for this change is because the Constructor did not cause the delayed payment.

Failure to Achieve Substantial Completion (§9.6.1): The Owner may want to seek the assistance of its Design-Professional to compile such a list.

Final Completion and Final Payment/Constructor Acceptance of Final Payment (§9.8.7): If the Constructor fails to identify unsettled claims with its Final Payment application, those claims are waived once the Constructor is paid. The Constructor may wish to delete this section or revise it as follows: "Unless Constructor has provided written notice of unsettled claims before, or contemporaneously with, its application for final payment, its acceptance of final payment constitutes a waiver of such claims."

Indemnity (§10.1): Indemnity can be considered in two steps: (1) who is protected; (2) what types of claims they are protected from. While many states have laws that limit the extent of defense and indemnity on construction projects, the Constructor should be careful not to contractually overextend either the list of parties it protects or the types of claims it indemnifies those parties from. The Constructor should not agree to defend or indemnify non-essential Owner-related parties, arguably, design professionals or the Owner’s separate contractors. A best practice is to delete such parties from this clause. Also, here the Parties’ indemnity obligation is limited to the extent of the Party’s negligence and covers only insurable risks, i.e., personal injury (including death) and property damage. Therefore, ideally, the protected parties match the entity/entities the Constructor has agreed to name as Additional Insured under its Commercial General Liability (CGL) policy.

Indemnity (§10.1): Given the reciprocal indemnity obligations in the ConsensusDocs forms, and the pure comparative causation standard, there is not a duty to defend. The Parties should add a defense obligation to subcontracts and supply agreements, as it is not contained in the standard language. Ideally, a party will not want to fund defense out-of-pocket; if an Owner insists on a defense obligation, a best practice is for the Constructor to include a similar obligation in its subcontracts, who in turn can do the same. A CGL insurance policy, once triggered per its terms, typically will provide defense to named insureds who tender a claim to the insurance carrier. Note that policies with a self-insured retention typically will not provide defense until that retention amount is incurred. In that instance, the Parties may wish to clarify that the obligation to provide defense applies before satisfaction of the retention amount, even if self-funded.

Indemnity (§10.1.3): The concept of waiving workers’ compensation immunity – that an injured worker cannot pursue the employer that paid its workers’ compensation insurance premiums – should be considered when defining defense and indemnity obligations. Some states require that this waiver be expressed in a certain way to make the waiver effective. The Constructor should take care to ensure its subcontracts contain such waiver language.

Insurance (§10.2.1): This language provides a mechanism to ensure the proper procurement of insurance. This same approach exists in the ConsensusDocs 750 Subcontract (§9.2) and appears here to provide a more consistent approach across the ConsensusDocs family of contracts.

Property Insurance (§10.3.1.1): The Constructor should consider who provides property insurance, such as Builder's Risk, and its extent of coverage. Some items listed here may not be commercially or reasonably available, depending on the region. Further, even if an Owner provides Builder's Risk, it may be an insufficient product that fails to enroll the Constructor and all sub-tiers or allows the insurance carrier to pursue any losses from the responsible party. This, in turn, may necessitate additional or supplemental insurance. An Owner may prefer to place property insurance, such as Builder's Risk, on the basis that it better understands the potential losses caused by damage to work-in-progress. The issue of property insurance can become more complicated when Work is performed in an existing structure. In that instance, the Parties should clearly define how property insurance will or will not cover damage to the existing structure. Again, the goal is to determine the most suitable insurance product and not assume that any property or Builder's Risk policy will be sufficient.

Along with these considerations, the Constructor should consider who pays for the deductible when neither party is the primary cause of the loss. §10.3.2 states that the party that is the primary cause of a Builder's Risk claim is responsible for the deductible. However, if neither party is the primary cause (e.g., hail, riot, etc.), then the default rule in the ConsensusDocs 200 is the party that procured the Builder's Risk policy will pay the deductible. The Parties should consider this an allocated risk and consider language to clarify that the Owner cannot recover this deductible through indemnity.

Property Insurance (§10.3.5): Constructors and Owners should carefully consider allocating risk for damage to existing structures. This section provides that the Constructor accepts this risk (to the extent of its CGL coverage). However, the Parties may consider allocating that risk to the Owner's existing property insurance carrier instead of to the Constructor's CGL carrier. For example, in the case of a renovation to an occupied structure, the potential liability to the Constructor in damages to the Owner's existing structures and injuries to occupants may considerably exceed the Constructor's CGL coverage. In that situation, it may be beneficial for the Owner and Constructor to share the risk by allocation of the property loss risk to the Owner's property insurance carrier and the personal injury loss to the Constructor's CGL carrier. Alternatively, the Parties may agree to increase the Constructor's CGL coverage under §10.4 to a greater amount sufficient to cover the potential losses. In that case, the Owner compensates the Constructor for the additional premium cost.

Additional General Liability Coverage (§10.4): An Owner should decide whether to require the Constructor to purchase additional insured coverage for the Owner. If so, the Owner can then determine if 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 the Constructor agrees, this should be accomplished by striking “operations” in this section and then check both boxes.

Any additional cost incurred by the Constructor for purchasing additional insured or OCP coverage shall be paid by the Owner.

Notice to Cure a Default (11.2): The Constructor may wish to add to the end of this section: "If Owner believes Constructor has materially breached the Contract, the Owner shall provide Constructor with written notice which states the reasons Owner believes Constructor has materially breached the Contract." This is to document the specific reason(s) for breach, in part, so they cannot change later.

Termination by Owner for Convenience (§11.4): If an Owner elects to terminate for convenience there is a premium payment, which the Parties need to specify here. This payment is not a penalty, but instead reflects a Constructor’s lost business opportunity. This section is carefully crafted to balance the Parties’ respective interests and risks. When using this risk allocation option, the Parties might consider whether the termination premium declines as the Project progresses, with the concept being that the Constructor’s lost opportunity cost decreases as well the longer the Constructor is on the Project.

Dispute Mitigation and Resolution (Article 12): This article helps mitigate claims and encourages early dispute resolution by first requiring direct discussions between the Parties. Afterward, the parties may use either a previously selected Project Neutral or a Dispute Review Board (DRB). If the parties decide not to use a Project Neutral or DRB, the issue 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 DRB can be introduced as evidence at a later binding adjudication of the matter.

Work Continuance and Payment (§12.1): The Parties are obligated to continue to perform their obligations under the contract. Thus, the Constructor continues to perform its work under the contract, and the Owner continues to make payments to the Constructor for those amounts not in dispute.

Direct Discussions (§12.2): If 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 that moves from field representative to those representatives with greater authority to resolve the dispute; then if the 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 (§12.3): Initially, the Parties can select either a Project Neutral or DRB for the mitigation procedure. The Project Neutral/DRB is subject to a separate retainer agreement between the Parties. It is obligated to issue a nonbinding finding 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 (§12.5): 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 borne by the non-prevailing Party as determined by the Neutral. If the parties choose litigation, the Constructor should consider whether a mutual jury waiver is in its best interest; this may benefit a Constructor from out of town.

Suppose the parties select arbitration as the binding dispute resolution. In that case, the Constructor should consider what, if any, limitations should be placed on the arbitration proceedings or any other procedural guidelines or limitations in the proposed arbitration rules (*e.g.*, how will discovery be limited, how will the process be streamlined to ensure a prompt resolution, how many arbitrators will serve on the panel, and how will the arbitrators be appointed, etc.).

Binding Dispute Resolution/Arbitration (§12.5.1): The ConsensusDocs Drafters made this rather significant revision to help encourage settlement of potential litigation of claims. Users may wish to provide a definition of the prevailing party. The force and effect of such definition may vary based on state law. One possible example is as follows:

> "If a party claiming a right to payment of an amount in dispute is awarded all or substantially all of such disputed amount, then such claiming party shall be the prevailing party. If a party defending against such claim is found to be not liable to pay all or substantially all of the disputed amounts claimed by the claiming party, then the party so defending against such claim shall be the prevailing party. If both parties prevail with respect to different claims by each of them, then the party who is prevailing with respect to the substantially greater monetary sum shall be deemed the prevailing party; otherwise, if both parties prevail with respect to monetary sums on different claims, neither of which sums is substantially greater than the other, the tribunal having jurisdiction over the controversy, claims or action shall in rendering the award determine in its discretion whether either party should be entitled to recover any portion of its attorney fees."

An alternative provision that may help facilitate better settlement offers is as follows:

> "In the event of any arbitration or litigation involving the parties, the prevailing party shall be awarded its share of the arbitration costs, arbitrator compensation, and its

attorneys' fees and expert witness fees. For the purpose of the application of this provision, the prevailing party shall be determined by the arbitrator(s) [or judicial decisionmaker for court proceedings] as follows. The prevailing party shall be that party whose last written settlement position (demand/offer) made before the commencement of the arbitration hearing(s) [or trial] is closest to the final award rendered by the arbitrator(s) [or judicial decisionmaker]. In order to be considered for the purpose of this provision, any settlement position (demand/offer) must be in writing and must have been delivered by certified mail to the other party. It is the intent of this provision for the arbitrator(s) [or judicial decisionmaker] to identify the true party prevailing in any arbitration [or judicial] proceeding. To that end, in the event that a settlement position has not been taken by a party seeking relief, i.e., the claimant, the arbitrator(s) [or judicial decisionmaker] shall consider the settlement demand to be the full relief requested in the arbitration demand [or latest version of the Complaint in a judicial proceeding]. In the event that a settlement position has not been taken by the respondent, the arbitrator(s) [or judicial decisionmaker] shall consider the offer to be a complete rejection of the relief requested by the claimant. Where there are mixed claims and counterclaims, the determination of the prevailing party shall be within the discretion of the arbitrator(s) [or judicial decisionmaker] consistent with the intent of this provision."

Venue (§12.5.2): Binding dispute resolution is held in the location of the Project unless the Parties otherwise agree. This is intended as a compromise to avoid each Party proposing that dispute resolution proceedings take place in the location of its own principal office. Further, the place of the Project should be convenient in that, conceivably, the actual Project site(s), physical evidence, and at least some witnesses are located there or nearby.

Multiparty Proceeding (§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. This will assist the consolidation of related dispute resolution proceedings involving other parties, such as design professionals or Subcontractors.

Lien Rights (§12.7): The ConsensusDocs 200 dispute resolution procedures do not intend to limit the Constructor's lien rights unless the Parties agree to add language that expressly waives such rights. Note that certain jurisdictions do not allow prospective lien waivers as a matter of law.

Existing Contract Documents [§14.1(d)]: This information relates to Owner-provided "worksite information" in §4.3 of ConsensusDocs 200 standard language; not all Owner-provided information is considered a Contract Document, an issue addressed in guidance for §2.4.4 and §4.3 above. This subsection also relates to whether Owner-provided information can be relied upon as a Contract Document. The Constructor should review this section carefully and include any other documents, industry standards or specifications, etc., that the Constructor believes important for the Project. The Constructors also should familiarize themselves with any

documents and information the Owner has included in this section, as the Constructor will be bound by those documents as they form part of the contract. Any listed Owner-provided information to which the Constructor objects (for example, documents that are listed but were not provided or reasonably obtainable, etc.) should be removed.