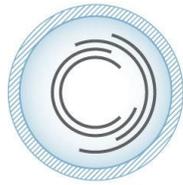


ConsensusDocs™
BUILDING A BETTER WAY

ConsensusDocs Guidebook

August 2013 Edition



ConsensusDocs™
BUILDING A BETTER WAY

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by

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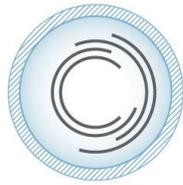
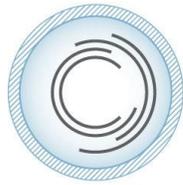


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Introduction to the ConsensusDocs Guidebook

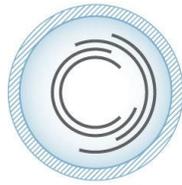
ConsensusDocs is the product of leading construction associations, dedicated to identifying and utilizing best practices in the construction industry for standard construction contracts. The 37 participating associations represent Design Professionals, Owners, Constructors, Subcontractors, and Sureties that literally spell the DOCS in ConsensusDocs. ConsensusDocs contracts and forms attempt to fairly and appropriately allocate risks to the Party in the position to manage and control the risk. The practices articulated in the documents are forward-thinking, and may not always represent the status quo, but rather a better path forward to achieve project results. The goal of the multi-disciplined drafters was to create documents that best place the Parties to a construction contract in a position to complete a project on time and on budget with the highest possibility of avoiding claims.

By starting with better standard documents that possess buy-in from all stakeholders in the design and construction industry, you reduce your transaction time and costs in reaching a final Agreement. By using fairer contracts helps eliminate unnecessary risk contingencies and thereby better pricing. In addition, “fill-in-the-blanks” are intended to lead to productive discussions about how particular risks should be allocated on specific projects before a contract is finalized. Also, the ConsensusDocs catalog includes complete “families” of documents for each project delivery method that provide a coordinated set of Agreements and complimentary administrative forms. There also are short form agreements that address the Owner-Constructor (205), the Owner-Design Professional (245), and the Constructor-Subcontractor contractual relationships in a more abbreviated manner than do the standard Agreements (ConsensusDocs 200, 240, and 750).

In this Guidebook you will find comments by individual associations regarding particular contract documents. These comments are organized by numeric sequence of the ConsensusDocs contract documents. The overview sections highlight issues and innovative features of the documents generally. Association comments are expressions by an association to its association membership. These comments highlight provisions or alert their membership to consider possible project-specific modifications to a consensus standard Agreement or form.

Please note that there has been a significant number of editing changes and section renumbering between the 2007 and 2011 versions that give the appearance that more substantive changes were made in the 2011 update than is actually the case. Consequently, a highlight sheet of changes was created to better pinpoint substantive changes. The 2011 update highlights sheet can be found [here](#) for free on the internet.

Lastly, the ConsensusDocs coalition organizations and ConsensusDocs staff are deeply indebted to the hard work of the many the seasoned professionals who contributed countless hours in the creation of the ConsensusDocs contracts as well as this Guidebook. Their collective experience represents hundreds of years of practical experience in the construction field. Contributor names can be found at the conclusion of this Guidebook.



Comments and Recommendations regarding ConsensusDocs 200* Agreement and General Conditions Between Owner and Constructor (Lump Sum)

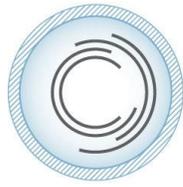
Overview:

Some general characteristics of the ConsensusDocs 200:

- Integrates the general terms and conditions with the contractual Agreement
- Emphasizes the primacy of the Owner-Constructor relationship and focuses on clear communication pathways as well as developing and maintaining positive relationships. The Design Professional is removed from the dispute process between Owner and Constructor
- Refers to General Contractors as a Constructor, which is a better reference term for an entity that adds value throughout the process rather than an indistinguishable commodity
- Clarifies that the Owner is responsible for design and design coordination; while the Constructor is responsible for design elements only if specifically noted. In that situation the Owner should supply all performance and design criteria
- Defines overhead (section 2.4.12) in a more detailed and clear manner to assist in finalizing change orders and the associated costs (see section 8.3.1.3) and would avoid disputes during the course of the project
- Clarifies that Parties specifically name authorized representatives (section 3.4.4 for Constructors; section 4.7 for Owners); the Constructor also names a safety representative (section 3.11.3)
- Provides a clear and extensive definition of Cost of the Work, even though this is a lump sum agreement to facilitate potential change orders without disputes
- Establishes how electronic information exchanges may be relied upon.
- Establishes dates of Substantial Completion and Final Completion

* This publication is designed to provide information in regard to the subject matter covered. It is published with the understanding that the publisher, endorsers of ConsensusDocs and contributors to this Guidebook are not engaged in rendering legal, accounting, or other professional services. If legal advice or other professional advice is required, the services of a competent professional person should be sought.

—From the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations



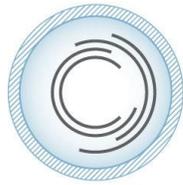
- Addresses liquidated damages by giving Parties the option as to whether to use liquidated damages (“LDs”) or not (section 6.5). The document also gives the option to use LDs both for Substantial Completion as well as Final Completion. The amount of the LDs is expressed as a lump sum amount, but the Parties may choose to use a per diem amount.
- Provides an order of precedence clause (section 14.2).

Definitions (section 2.4): Consider adding a definition of the Owner’s Program means an initial description of the Owner’s objectives that shall include budgetary and time criteria, space requirements and relationships, flexibility and expandability requirements, special equipment and systems, and site requirements.

Notification of Cancellation Insurance, ACORD Form Change (section 10.2.4):

ConsensusDocs changed the language regarding notice of cancellation of insurance in 2012 to reflect changes in the ACORD form for certificates of insurance as well as to reflect actual notice that is realistic to receive in today’s marketplace and best practices to reflect the substantive notice that parties are actually receiving if there is a cancellation of insurance coverage.

Other standard form contracts and manuscript contract documents are likely to include contract language that no longer reflects current practice. Generally, construction contracts had require that insurance policies include at least 30 days advanced written notice to the owner (or an upstream contractual party) if an insurance policy is canceled or allowed to expire. This has generally been satisfied through certificates of insurance as evidence of compliance. ACORD, the licensing company for insurance forms, has amended their certificate requirements (*e.g.* ACORD 25). Consequently, contractors and subcontractors may no longer be able to received certificates of insurance language that proclaims that the insurance company or insurance broker, should any policies be canceled before the expiration date thereof, “endeavor to mail 30 days written notice to the certificate holder.” Therefore, contractual requirements that 30 days advanced notice be included in insurance policies may not be commercially available and altering ACORD forms to purport to do so may run afoul of state law. Consequently, the current ConsensusDocs language was revised to reflect realities in today’s construction marketplace.



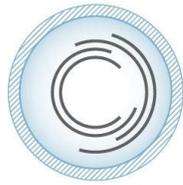
ConsensusDocs Guidebook Explanation of Notice of Cancellation Language:

Generally, construction contracts require that insurance policies include at least 30 days advanced written notice to the owner (or an upstream contractual party) if an insurance policy is canceled or allowed to expire. This has generally been satisfied through certificates of insurance as evidence of compliance. The Association of Cooperative Operations Research and Development (ACORD), the licensing company for insurance forms, has amended their certificate requirements (e.g. ACORD 25). Consequently, contractors and subcontractors may no longer be able to receive certificates of insurance language that proclaims that the insurance company or insurance broker, should any policies be canceled before the expiration date thereof, “endeavor to mail 30 days written notice to the certificate holder.” Therefore, contractual requirements that 30 days advanced notice be included in insurance policies may not be commercially available and altering ACORD forms to purport to do so may run afoul of state law. Consequently, current contract language addressing notice of cancellation for insurance policies no longer reflect the reality in today’s construction marketplace.

Consequently, a working group of experts drafted language which reflects reality, while giving the Owner sufficient notice. The language provides an owner timely third-party notification of cancellation by the insurance company as well as creates an obligation on a party to give notice of cancellation to the owner or other upstream party. Lastly, the drafted solution looks to limit costs as well time efficiency issues by allowing for electronic notification by the insurance company or the insurance broker as a designee depending who is in the best position to have such information and can give appropriate notice. In addition, reference to prompt notice is expected to be soon as practical, but in no case longer than 5 days from first learning of cancellation or nonrenewal of an insurance policy without replacement.

The ConsensusDocs proposed contractual solution differentiates between nonrenewal, cancellation, and other changes like lapses in coverage. In the case of active nonrenewal by the insurance company, the company or designee is in the position to provide advanced notice. In the case of cancellation, it is not possible for the insurance company to provide advanced notice so notice would be provided very shortly after cancellation occurs. The most common example is late payment of premium. In this case, the company may cancel if payment is not received, however, if payment is received cancellation would be rescinded and any advanced notices would also have to be rescinded causing unwarranted confusion and inefficiencies. In other cases such as a lapse in coverage, only the design builder may be aware of the lapse and therefore only the design builders could provide that notice.

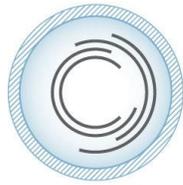
The ACORD form change impacts all standard contract documents, including the ConsensusDocs 200 and the AIA A201®, and most manuscripted construction contracts that contractually require insurance policies provide a 30-day advanced notice of cancellation. The ConsensusDocs notice of cancellation solution references where such language should be inserted into ConsensusDocs contracts (ConsensusDocs 200, section 10.2.4). However, the ConsensusDocs proposed solution is equally applicable to other contracts that are now out-of-date due to the ACORD change. The ConsensusDocs agreements were updated in 2012 to respond to today’s changing construction marketplace in a timely fashion and was deemed too pressing to wait until the next revision cycle.



Here is the change that was made. At section 10.2.1 In the 6th line, after the “and broad from property damage.” insert, “The Constructor shall maintain completed operations liability insurance for one year after Substantial Completion, or as required by the Contract Documents, whichever is longer.

~~10.2.4 The policies of insurance required under subsection 10.2.1 shall contain a provision that the coverage afforded under the policies shall not be cancelled or allowed to expire until at least thirty (30) Days' prior written notice has been given to the Constructor. The Constructor shall maintain completed operations liability insurance for one year after acceptance of the Work, Substantial Completion of the Project, or to the time required by the Contract Documents, whichever is longer. Before commencing the Work, the Constructor shall furnish the Constructor with certificates evidencing the required coverage.~~

To the extent commercially available to the Subcontractor from its current insurance company, insurance policies required under subsection 10.2.1 shall contain a provision that the insurance company or its designee must give the Constructor written notice transmitted in paper or electronic format: (a) 30 Days before coverage is nonrenewed by the insurance company and (b) within 10 Business Days after cancelation of coverage by the insurance company. Prior to commencing the Work and upon renewal or replacement of the insurance policies, the Subcontractor shall furnish the Constructor with certificates of insurance until one year after Substantial Completion or longer if required by the Contract Documents. In addition, if any insurance policy required under subsection 10.2.1 is not to be immediately replaced without lapse in coverage when it expires, exhausts its limits, or is to be cancelled, the Subcontractor shall give Constructor prompt written notice upon actual or constructive knowledge of such condition.”



Guided Choice Guidelines for ConsensusDocs:

ConsensusDocs agreements require non-binding mediation as a method for mitigating and resolving disputes. If properly used, mediation can be a quick and inexpensive dispute mitigation tool that gives parties a satisfactory result. Unfortunately, mediation is not always used effectively, and sometime Parties simply go through the motions in mandatory mediation. Other times, settlement occurs, but it is "late in the game" and close in time to a decision by a court or arbitration. By this time, with considerable expense incurred and relationships damaged, parties are often not pleased with the settlement. They are even less pleased when a court or arbitrator -- strangers to the matter -- imposes the result.

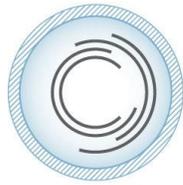
One possible way to use mediation effectively is through something that has recently been called "Guided Choice" mediation. While the name is new, the concepts embodied in Guide Choice mediation are well known to the most successful construction mediators. Users of ConsensusDocs contracts may want to utilize these mediation processes and techniques when setting up their dispute mitigation and resolution procedures. Note, however, that ConsensusDocs agreements call for the Parties to communicate directly, initially, to resolve disputes, and these sections may need to be modified. The Guided Choice process is spelled out in more detail in the following article by Paul M. Lurie: "[Guided Choice: Early Mediated Settlements and/or Customized Arbitrations](#)," *Journal of the American College of Construction Lawyers*, Vol. 7, No 2, Summer 2013.

Guide Choice mediation is used as early as possible in the dispute in which clients drive decisions and customize the mediation process. It does not require major changes to the ConsensusDocs contractual dispute resolution terms, except as noted above. Mediators help the parties customize the dispute resolution process based on their understanding of what impasses must be overcome to reach a settlement. Proper diagnosis is essential to a successful mediation process.

Instructions for use of the Guided Choice system:

As soon as a dispute arises, any of the parties to an agreement that contains a mediation provision files a request to engage a mediator as soon as possible. An initial contact with a mediator should occur even if the parties have agreed in their agreements to Direct Negotiations, Mitigation Procedures, or Design Review Boards submittals. The parties must all agree on the mediator, who should be knowledgeable with the principles in which the parties intend to utilize mediation -- in a manner consistent with the Guide Choice mediation concept.

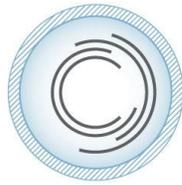
The mediator will immediately begin their diagnoses of the current impasse using private meetings or telephone interviews with the parties or their attorneys. The mediator will propose a mediation methodology designed to overcome the factors causing the impasse. Usually this process includes information exchange, meeting with experts, and identifying and meeting with key decision makers and insurers' representatives. Where all else fails in breaking impasse, the Guided Choice system may also include "certifying" questions to specially appointed arbitrators or to Design Review Boards, either on a binding or non-binding basis.



The mediator will suggest the form of the negotiation process, which may or may not include the use of a traditional "mediation day." The parties acknowledge that negotiation impasses are normal and should not cause termination of the mediation process. The parties agree to consider the mediator's suggestions for overcoming impasse. If the parties have also agreed on arbitration, they may want to agree on a customized process, including an expedited schedule. The parties can also agree to select an arbitrator[s] and target hearing dates without incurring the substantial costs of actual arbitration preparation. The mediation process can and should continue even if an arbitration hearing is scheduled or even commences.

The appointed mediator and the parties, and if applicable their lawyers, should agree to principles, which includes a commitment to expeditiously exchange information that an adverse party considers necessary to evaluate its settlement position; to follow the mediator's recommendations to overcome any impasse in negotiations that may occur during the mediation process; and whether or not the parties have previously agreed to arbitrate disputes that have not settled, to consider customizing the arbitration process to resolve the dispute with a reasonable expenditure of time and money. Contemplating arbitration should be considered an aid to the settlement process and not inconsistent with mediation.

The mediation process is voluntary and no party can be legally forced to agree to anything other than participating in the mediation. Mediation efficiently allows parties to continually evaluate the strengths and weaknesses of their settlement positions, as well as reflect on whether their best interests are served by settling or proceeding to a court or arbitration decision which come with less predictable outcome.



AGC Comments for ConsensusDocs 200:

Preamble: Job number and Account code were added to all ConsensusDocs agreements in this revision cycle as a helpful administrative tool if applicable.

Design Authority and Responsibilities (section 2.3): Under the *Spearin Doctrine*, the Party responsible for furnishing the completed design impliedly warrants its sufficiency and adequacy. *United States v. Spearin*, 248 U.S. 132 (1918). Constructors need to carefully consider the effect of specifying any design responsibilities in this fill-in-the-blank section. Also, a Constructor should pay particular attention to the ramifications of performance specifications, equipment selections, preparation of shop drawings, and the like in the context of section 2.3. Similarly, post-award actions such as Constructor initiated value-engineering changes may alter the Parties' responsibilities for the adequacy of the design of a particular system on the project. These actions may shift risk for design responsibilities to the Constructor. In addition, Constructors should be weary of modifications that add disclaimers to shift the risk of design flaws to a Party that was not responsible for the preparation of the design.

Exhibits (section 2.4.1.1): The User is expected to create these referenced exhibits as applicable. These exhibits contain information that is largely based on a project and company specific information that varies. The Parties are encouraged to create other exhibits as appropriate and list the exhibits in this subsection.

A named exhibit, exhibit B for labor relations was eliminated in this edition. Users are encouraged to include an exhibit addressing labor relations and their effect on the Project, if applicable. Legal counsel is recommended.

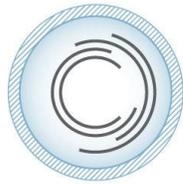
Law Effective Date (section 2.4.14): "Enacted" is new language as opposed to effective. The drafters believe this change is a best practice because those bidding on a project are on notice of a change in the law once it is enacted, as opposed to the effective, which would occur later.

Insurance Deductibles (section 2.4.18): Insurance deductibles are eliminated as an Overhead item and not included as an item for 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.

Changed Work (section 2.4.20.2): This subsection was moved to appear in alphabetical order.

General Responsibilities (section 3.1.1): Users may want to note that the obligations in the ConsensusDocs 750 Subcontract contain similar obligations as this subsection but they are spread throughout the agreement at sections 3.14, 3.2.1, 3.1.2, 4.1, 4.3.

Responsibility for Performance (section 3.3.1): The first sentence was eliminated because it was redundant with 3.3.2.



Reference to applicable Laws (section 3.3.2): Note that the reference to lowercase laws (undefined) is used here to be more broad reference to applicable laws.

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

Correction of Defective Work (section 3.9): The Constructor is to be notified of defective work during the warranty period and given the option to correct Correction of work even after the Correction of Work period expires.

Submittals (section 3.14.1): This additional language is only to clarify that such extra work does not merit additional charges.

Professional Services (section 3.15): When taking on design responsibility (See section 2.3), the Constructor should also consider the provisions of section 3.15 that obligates it to obtain professional services from licensed design professionals and to require the design professionals to carry E&O insurance as specified in section 10.8.

Changed Time or Price due to a Change in Law (section 3.17.3): Moved to subsection 3.21.1.

Owner Provided Information (section 4.3): After Owner strike “pursuant to section 4.3” and substitute “that are Contract Documents.” Owner provided information is now not necessarily considered contract documents. Therefore, Constructor’s examination should be limited to documents which are designated contract documents. Otherwise, Constructors could be in a position of having to essentially rely on owner provided information that is disclaimed and therefore unreliable.

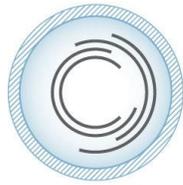
Reference was eliminated because revised section 4.3 only allows Constructor to rely on information that is designated as contract documents. Project participants should take care in identifying contract documents in 14.1.

Legal Descriptions (section 4.3.1): Language related to legal descriptions was moved from 4.3.3.

Owner Provided Information (section 4.3.3): Changed “relevant” to “required” for a more objective and narrower standard for requests. An Owner may find it desirable to provide such information.

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

Documents in Electronic Format (section 4.6.1): Electronic documents are increasingly being used by the industry. This provision requires a protocol to be established relating to the use of such documents. Constructors are strongly encouraged to use the protocol in Consensus DOCS 200.2 to ensure that the risks associated with use of electronic documents are clearly understood by all the



Parties to a contract. At a minimum, the 200.2 can allow Constructors to rely upon e-mails and faxes, if the document is completed to indicate such a desire.

Labor Relations (section 5.4): Labor Relations was deleted and moved into an elective exhibit, see comments notes above at 2.4.1.

Date Commencement (section 6.1): It is common for the scheduled time period of commencement and the agreement signing date to be different. Parties need to specify if this is the case for this project. The default Date of Commencement will be the signing date of the agreement.

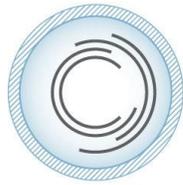
Liquidated Damages (section 6.5): Section 6.5 is an optional liquidated damages provision, which allows the Parties to elect whether or not to provide for liquidated damages. In general, AGC members view liquidated damages negatively, and advise Constructors to take extreme caution before electing to provide any liquidated damages in this section. Liquidated damages are intended to compensate the Owner (and serve as a substitute for) the Owner's actual delay damages, such as lost revenues. Thus, a contract which allows the Owner to recover liquidated damages, but otherwise bars both Parties from collecting consequential damages, is not truly mutual; it allows the Owner to have its cake and eat it too. If liquidated damages are elected, the Constructor should recognize that the limited mutual waiver of consequential damages contained in section 6.6 is not truly mutual. In addition, Constructors should not agree to liquidated damages measured from final completion.

Note that this section contains blanks for the Parties to fill in to establish the appropriate dollar amounts (one tied to substantial completion and one tied to final completion) if the Parties elect to provide for liquidated damages. The amount of the LDs is expressed as a lump sum amount but the Parties may choose to use a per diem amount.

Limited Mutual Waiver of Consequential Damages (section 6.6): The Parties agree to waive consequential damages except for items specified in 6.5. A mutual waiver of consequential damages benefits the Constructor if the waiver is truly mutual, meaning that liquidated damages are not specified in section 6.5.

Setting aside the interplay between liquidated damages and a "mutual" waiver of consequential damages, the Parties should also carefully consider whether liquidated damages are, themselves, desired. Many sophisticated General Contractors today desire, and may even insist upon, the inclusion of a liquidated damages provision in their contracts, because – perhaps among other reasons - it allows them to better quantify their risk. Moreover, some General Contractors and Construction Managers insist that the contract provide for liquidated damages and that the liquidated damages be capped at some amount, such as one-half of the Construction Manager's fee (under a cost-plus-fee contract). By doing this, the Constructor/Construction Manager truly can attain a real limitation of damages.

Listing an item of damages in this blank space would allow for either Party to make a claim, if appropriate, for any consequential damages. If no items are listed then consequential damages not covered by insurance are waived.



Principal office and Overhead are now considered a direct project expense and therefore, are not automatically waived in a waiver of consequential damages.

Incentives (Additional possible section at 6.6.7): For those projects where an incentives clause is appropriate, the following standard language developed by the ConsensusDocs drafters could be inserted as follows:

“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 a written notice of its intent to achieve completion early no later than 60 days prior to 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 execution of that Change Order.”

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

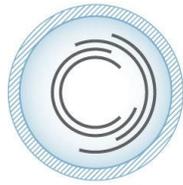
Interim Directed Change (section 8.2.2): An Owner is required to pay 50% of cost estimate if dispute occurs over whether work is within scope. This provision allows an important balance for a Constructor to maintain financial viability, while allowing an Owner to retain legitimate claims in dispute.

Cost of the Work (section 8.3.1.3): While the 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 in regard to the cost of the work for changes. This language is derived from existing language in the ConsensusDocs 500 Construction Management At-Risk agreement with some minor appropriate modifications.

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

Retainage (section 9.2.4.1): This provision is important for Constructors to ensure payment flows in a fair and equitable manner. Owner is required to release retainage applying to work of early finishing Subcontractors upon acceptance of such work. Once the work is 50% complete, the Owner shall not withhold any additional retainage. If the recommended best practice language is modified in the Owner-Constructor, Constructors should consider modifying the ConsensusDocs 750 in a consistent manner.

Insurance Coverage for Loss in Cost of the Work (section 9.3.2): This is an added clarification that a positive indication of insurance coverage of an acceptance of loss, than the loss is not a Cost of the Work.



Adjustment of Constructor's Payment Application (section 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. Constructors should provide more specificity regarding adequate security. If there is a bond in place, no additional security should be required besides consent to payment by the surety after acknowledging the existence of the claim. If it is a lien claim, the Constructor should be required to bond around the lien in accordance with applicable statutory requirements.

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

Payment Delay (section 9.5): Subsection 9.2.1 defines the payment due date.

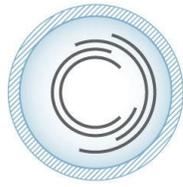
Failure to Achieve Substantial Completion (section 9.6.1): The Owner may want to seek the assistance of its Design-Professional to compile such list.

Indemnity (section 10.1): The Parties' indemnity obligation is limited to the extent of the Party's negligence and cover only insurable risks, i.e., personal injury (including death) and property damage. Either Party is entitled to reimbursement of defense costs paid in excess of that Party's percentage of liability for the underlying claim. Constructors should be vigilant during contract negotiations, and should only agree to broaden risks covered (if requested by the Owner) with full knowledge and understanding of the impact of a broader standard on the Constructor's anticipated profitability and fee.

Indemnitees also include the Design Professional, and "Others." The term "Others" should be defined or stricken if not defined, from the Constructor's standpoint, as it represents a potential broadening of the indemnity obligation to persons or companies who the Parties may not have actually intended to benefit from the indemnity.

Duty to Defend (section 10.1): Given the reciprocal indemnity obligations in the ConsensusDocs forms, and the pure comparative causation standard, there is not a duty to defend. A Constructor who is liable under the indemnity provision should reimburse the indemnified Party for that Party's legal fees (which may as a practical matter create a willingness to defend). But as a matter of contract obligation, there is no duty to defend of the Constructor vis-à-vis the Owner, or of a Subcontractor vis-à-vis the Constructor. For some Constructors, desire for a Subcontractor's duty to defend will outweigh the Constructor's desire not to have to defend the Owner. Constructors will need to assess this aspect of the indemnity carefully, and discuss it with their risk managers or brokers, in order to assure themselves that the proper stance is taken on this issue relative to the Constructor's insurance program.

Insurance Requirements (section 10.2.1): New language was added to provide a stronger mechanism to ensure the proper procurement of insurance. This approach already existed in the



ConsensusDocs 750 Subcontract section 9.2, and this addition provides a more consistent approach across the ConsensusDocs families of contracts.

Additional Liability Coverage (section 10.5): An Owner should decide whether to require the Constructor to purchase additional insured coverage for the Owner. If so, the Owner can then decide whether it wants to choose additional insured coverage or Owners' and Contractors' Protective Liability Insurance ("OCP"). If an Owner selects OCP coverage, an Owner may desire additional insured protection for completed operations in addition to OCP coverage. If agreed upon by the Constructor, this should be accomplished by striking "operations" in this section and then checking both boxes.

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

Insurance Coverages (section 11.2.1): The revisions to this section are more for formatting and language stylistic purposes. Owner supplementation is allowed by this language.

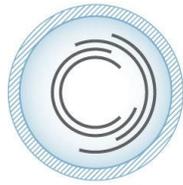
Improper Termination of Convenience (section 11.3.5): This language was added to address how an improper termination for cause should automatically be handled as a termination for convenience. This is being added to avoid potential disputes.

Owner's Termination for Convenience (section 11.4): If an Owner elects to terminate for convenience there is a premium payment, which the Parties need to specify in the blank space. This payment is not a penalty, but rather reflects a Constructor's lost business opportunity. This section is a carefully crafted to balance Constructors and Owners interests and risks.

Dispute Mitigation and Resolution (article 12): This section focuses on mitigation of claims by directing first, direct discussions between the Parties. Afterward, the parties may choose to use either a previously selected project neutral or a dispute review board. If the Parties decide not to use a project neutral or dispute review board the issue then goes to mediation followed by a binding dispute resolution process of the Parties' choosing. If the process goes this far any decision made by the project neutral or the dispute review board can be introduced as evidence at a binding adjudication of the matter.

Work Continuance and Payment (section 12.1): The Parties are obligated to continue to perform their obligations under the contract. Thus the 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 (section 12.2): In the event the Parties cannot reach an Agreement about the matter in dispute, they are obligated to engage in "good faith" negotiations at the next level in a step approach which moves from field representative to those representatives with greater authority in an effort to resolve the dispute; then if resolution is not achieved within five business days of the first discussion, it moves to the next level of senior executives and if resolution fails within fifteen days of the first discussion, it moves to mitigation.



Mitigation and Mitigation Procedures (section 12.3): Initially the Parties have the option to select either a Project Neutral or Dispute Review Board for the mitigation procedure. The Project Neutral/Dispute Review Board is subject to a separate retainer Agreement between the Parties and is obligated to issue nonbinding finding(s) within five business days of referral of the dispute. If Parties do not check either of the fill-in-the-blank options, then the procedures provided in this section are not required.

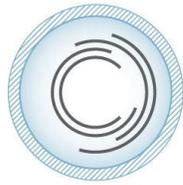
Binding Dispute Resolution (section 12.5): In previous AGC contract Agreements, the dispute resolution section was a separate exhibit. The ConsensusDocs includes this section in the contracts and includes fill-in-the box options. If mediation fails to resolve a dispute, the Parties submit the matter to binding dispute resolution using either the current Construction Industry Rules of the American Arbitration Association or litigation in a state or federal court. The Parties, however, are free to select another set of rules. The costs of the binding dispute resolution process are to be borne by the non-prevailing Party as determined by the Neutral.

Attorney's Fees and Prevailing Party (section 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 for a definition of 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.”

In 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) 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) is closest to the final award rendered by the arbitrator(s). 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) to identify the true party prevailing in any arbitration 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) shall consider the settlement demand to be the full relief requested in the arbitration demand. In the event that a settlement position has not been taken by the respondent, the arbitrator(s) 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) consistent with the intent of this provision.”

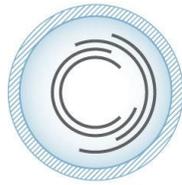
Venue (section 12.5.2): Binding Dispute Resolution procedures shall be the location of the project unless the Parties otherwise agree.

Multi-Party Proceedings (section 12.6): Appropriate provisions are to be included in all other contracts relating to the Project to provide for joinder or consolidation of such dispute resolution procedures.

Lien Rights (section 12.7): Nothing contained in the dispute resolution procedures is to limit any lien rights unless expressly waived.

Defining Contract Documents (section 14.1): This section was revised to add clarity as to what documents and information are considered contract documents and what is for informational purposes only.

Owner Provided Information as Contract Documents (section 14.1 (d)): This information relates to Owner provided information in section 4.3, however, not all Owner provided information is considered a Contract Document. This subsection determines whether the information can be relied upon as a Contract Document.



Comments regarding ConsensusDocs 200.1* Time and Price Impacted Materials

Overview:

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

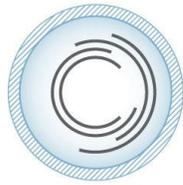
Parties should take the following issues into consideration. The Amendment is intended to be completed and executed contemporaneously with the construction contract. Because the Amendment is intended to be flexible and to cover many different kinds of construction materials, calculation methods are merely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

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

AGC Comments for ConsensusDocs 200.1:

(Additional Comments by AGC can be found on AGC's website at members only page of http://www.agc.org/galleries/members-only/AGC-only_ConsensusDocs_Guidebook.pdf for many of the ConsensusDocs documents.)

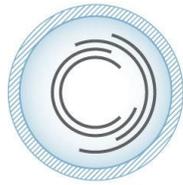
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General Contractors should advocate for the use of this amendment when material price fluctuations are a concern. This innovative contracting tool is designed to eliminate a contingency premium in a Contractor's bid. Another contracting alternative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

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

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



Comments regarding ConsensusDocs 200.2* **Electronic Communications Protocol Addendum**

Overview:

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

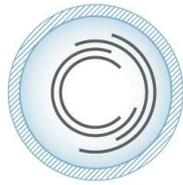
The Addendum sets expectations about who will be required to comply with Addendum requirements in section 2.0. If Subcontractors and Material Suppliers will be required to conform their communications to this Addendum, the Contractor should make sure to attach a complete copy of it as an exhibit to the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

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

Section 3.3.6: A possible clarification would be to add the following as a last sentence to this section. “The Model Facilitator may be the Information Manager (IM) as provided in section. 2.12 and article 3 of the ConsensusDocs 301 Building Information Modeling (BIM) Addendum or a party working for or with the IM to develop virtual modeling for the Project.”

Section 4.0 helps the Parties to thoroughly explore and identify what types of files will be shared among them, the hardware and operating systems on which electronic communications will be exchanged, the software types and versions, backup protocols and transmission and access

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requirements, including the types of devices that may be used to gain access to Project records kept electronically. The Parties will need to know what software will be used for various Project activities and identify the hardware and other system configuration that is necessary to run that software so that everyone using the Electronic Communications can access the data generated in the desired format(s). The Addendum does not presume any specific package of System Parameters will be used, but rather allows the Parties to sculpt them based on their needs. If all communications on the Project will be exchanged electronically via a tiered-access Project website with a real-time webcam, and virtual modeling will be used as the primary design tool, a much more elaborate system will need to be described than if the Parties want to simply exchange securely transmitted e-mails among themselves and that is the extent of the Electronic Communications.

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

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

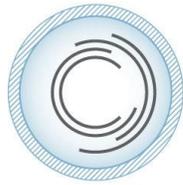
Under section 8.0, each Party is responsible for complying with the System Parameters and for the accuracy of data and documents furnished as part of their own Electronic Communications. The Addendum is silent about responsibility for errors that occur in spite of compliance with all System Parameters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

AGC Comments for ConsensusDocs 200.2:

(Additional Comments by AGC can be found on AGC's website at members only page of http://www.agc.org/galleries/members-only/AGC-only_ConsensusDocs_Guidebook.pdf for many of the ConsensusDocs documents.)

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

IT Management Coordinator (section 3.3): The person appointed in this section is the day-to-day supervisor and administrator of Electronic Communications and is charged with assisting the Parties to cause their Electronic Communications system to comply with the Addendum requirements. Unless the Contractor's computer knowledge is quite limited, the Contractor should consider having the person appointed as Coordinator within the Contractor's employ, although the



Contractor typically will want to pass the costs for such duties to the Owner in section 3.3.2 or include them elsewhere as part of recoverable general conditions expenses in the Agreement between Owner and Contractor. The Coordinator will work with any Third Party Service Providers (who furnish Internet software programs or hosted site services used by the Parties), the Webmaster (who handles the operation of the Project website), and the Model Facilitator (who updates model data for virtual design or building information (3-D) modeling), if any on this particular Project.

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

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

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

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

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



Comments regarding ConsensusDocs 205* Short Form Agreement Between Owner and Contractor (Lump Sum)

Overview:

This standard agreement was comprehensively updated in January of 2011. The revisions were made to reflect the best practices, respond to industry feedback, and provide consistent terminology within the ConsensusDocs library of documents. This document is intended to be a short form of agreement that is still comprehensive enough to satisfy the contractual requirements for many projects desiring a short form of agreement.

Exhibits (article 3): Users are expected to create project specific exhibits, and may need to add additional exhibits as appropriated.

Compliance with Laws (section 5.5): This added section makes the 205 more consistent with the 750 and 751 subcontract agreements.

Liens (section 6.3): This information is being added in this edition and also appears in the 200. Obtaining information regarding liens has become even more critical in light of today's challenging economic times.

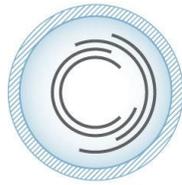
Date of Commencement (section 8.1): Insert here any special provisions concerning notices to proceed and the Date of Commencement.

Schedule of the Work Sequencing (section 9.1): This language is new language in the short form and is taken from section 6.2.2 of the 200.

Attorney's Fees and Prevailing Party (section 12.5.1): Adding that the non-prevailing party pay attorneys' fees is a rather significant revision to help encourage settlement of potential litigation of claims. Users may wish to provide for a definition of 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

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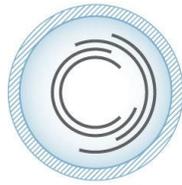


claim shall be the prevailing party. If both parties prevail with respect to different claims by each of them, then the party who is prevailing with respect to the substantially greater monetary sum shall be deemed the prevailing party; otherwise, if both parties prevail with respect to monetary sums 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 approach that may help spur better negotiation 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) 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) is closest to the final award rendered by the arbitrator(s). 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) to identify the true party prevailing in any arbitration 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) shall consider the settlement demand to be the full relief requested in the arbitration demand. In the event that a settlement position has not been taken by the respondent, the arbitrator(s) 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) consistent with the intent of this provision.”

Retainage (section 13.3): This language is now included in the short form contract and the language is taken from the CD 750 long form subcontract.



Comments regarding ConsensusDocs 235* Short Form Agreement Between Owner and Contractor (Cost of Work)

Overview:

This document was comprehensively updated in 2012, and follows the general terms and conditions of the ConsensusDocs 205, which is a short form agreement. The main difference is that this is a Cost of the Work of Agreement instead of a lump sum form of payment.

Exhibits A & B (article 4): Listed below are exhibits which are specifically referenced in this agreement. A model to create an exhibit A is now being provided, which the user should carefully fill-in and modify based on project specific information as well as specific project needs. In addition, users should consider creating other exhibits and reference them appropriately in modifying this agreement as appropriate.

Mechanics and Construction Lien Information (section 7.3): Obtaining information regarding liens has become even more critical in light of today's challenging economic times.

Section 12.2: Moved to 12.1 because this is a promise to procure obligation for insurance.

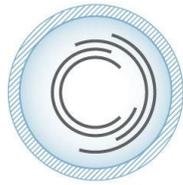
Bonds (article 13): For Cost of the Work agreements, the bond amount and premium is usually based upon the estimated cost of the work. If the estimated or actual Cost of the Work changes by more a certain percentage, than adjustments to the bond amount and penal sum should be considered in projects using bonds.

Cost of Dispute Resolution (section 17.7):

Attorney's Fees and Prevailing Party: The ConsensusDocs Drafters made this rather significant revision to help encourage settlement of potential litigation of claims. Users may wish to provide for a definition of 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

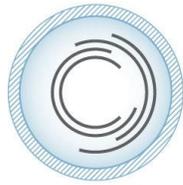
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disputed amounts claimed by the claiming party, then the party so defending against such claim shall be the prevailing party. If both parties prevail with respect to different claims by each of them, then the party who is prevailing with respect to 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.”

In 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) 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) is closest to the final award rendered by the arbitrator(s). 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) to identify the true party prevailing in any arbitration 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) shall consider the settlement demand to be the full relief requested in the arbitration demand. In the event that a settlement position has not been taken by the respondent, the arbitrator(s) 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) consistent with the intent of this provision.”



Comments regarding ConsensusDocs 240* **Agreement Between Owner and Design Professional**

Overview:

This standard agreement was comprehensively updated in January of 2011. The revisions were made to reflect the best practices, respond to industry feedback, and provide consistent terminology within the ConsensusDocs library of documents.

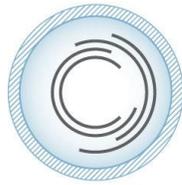
Definitions (section 2.5): Consider adding a definition of the Owner's Program means an initial description of the Owner's objectives that shall include budgetary and time criteria, space requirements and relationships, flexibility and expandability requirements, special equipment and systems, and site requirements.

Additional Services (section 3.3): In subsection 3.3.20, the reference to "3.2.8.6" should be "3.2.8.7."

Information and Services Provided by Owner (section 4.1): In subparagraph 4.1.1.3, strike "allies" and substitute "alleys."

Schedule of Exhibits (article 11): Delete the reference to "Exhibit E: Dispute Resolution Menu." This reference is being struck due to the fact that this information is already incorporated into the document (see article 8).

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AGC Comments for ConsensusDocs 240:

(Additional Comments by AGC can be found on AGC's website at members only page of http://www.agc.org/galleries/members-only/AGC-only_ConsensusDocs_Guidebook.pdf for many of the ConsensusDocs documents.)

Standard of Care (section 2.1): A definition of the standard of care applicable to architectural and engineering services performed under this Agreement is not included in this Agreement (previous additions of AGC contracts did include such a definition). The drafters of the new Consensus documents determined that it would be better for the design professionals to be held to a standard imposed on them by their own profession, rather than one defined by this Agreement.

Contractors and Owners should not modify this Agreement by adding language that would hold any design professional to a standard of care that is above that which is customary and normal for design professionals in the same time and location, because that might result in the unintended consequence of voiding errors and omissions coverage available to the respective design professionals.

Relationship of the Parties (section 2.2): This provision requires the Design Professional, which is an architect or engineer to accept the relationship of trust and confidence in exercising its skill and judgment in furthering the interests of the Owner and expressly affirms the A/E's representation that it possesses the requisite skill, expertise, and licensing to perform the required services. The new language is preferable, but it should be noted that it was not included in the previous AGC 240 Owner-Designer professional Agreement, no longer published.

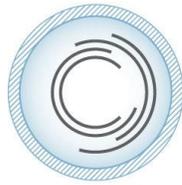
Conflicts of Interest (section 2.4): This section expressly sets forth ethical expectations that include the Design Professional's avoidance of conflicts of interest, and contingent fees and gratuities from the Contractor.

Costs for Errors and Omissions: This provision in this location highlights the need for the Owner and A/E to formalize and come to an Agreement upon the exclusions to be enumerated under section 5.4, Limited Mutual Waiver of Consequential Damages. Special attention should be paid to the expanded language contained in section 5.4. The terms of section 5.2, relating to damages flowing from delays by the A/E, should also be considered.

Construction Documents (section 3.2.5): This paragraph succinctly states, "The Construction Documents shall completely describe all work necessary to bid and construct the Project." This effectively addresses the dilemma which Contractors have faced in recent years of having to provide Work that the A/E might argue was "inferred" by the Construction Documents.

Construction Phase Services (section 3.2.8): This section includes two Construction Phase Services, including "(3) prepare design documents in connection with Change Orders, and (4) respond to Contractor requests for information." These services have been added since the phasing out of the old AGC contracts.

Section 3.2.8.5 has been modified by the omission of language related to the review of Subcontractor requisitions, but that language has been added to a new listing of clarifications



defining what representations are being made when the A/E certifies an application for payment in new section 3.2.8.6.

Additional Compensation: Subsections .22 through .25 of section 3.2 are included as additional services which are eligible for additional compensation. Note these subsections were not included as Additional Services, which were not included in previous editions of the AGC 240.

Confidentiality (section 3.10): This section further clarifies how the Owner and A/E should treat confidential information shared with one another, and it requires the Owner and A/E to “specify those items to be treated as confidential”, and requires them to “mark them as ‘Confidential’”. This improved language is different than previous language in the now defunct AGC 240.

Owner’s Financial Ability to Pay: The 240 does not include a provision to require the Owner to provide evidence of the Owner’s financial ability to pay for the A/E’s Services, upon written request of the Design Professional. Note Design Professional’s and General Contractors using this Consensus document may wish to add such a provision back into the Agreement, or obtain such evidence of sufficient content to satisfy this concern prior to signing this Agreement.

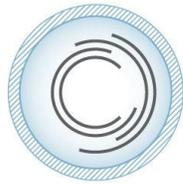
Limited Mutual Waiver of Consequential Damages (section 5.4.1.1): This section makes the Limited Mutual Waiver of Consequential Damages applicable to, and makes it survive after, any termination of the Agreement. This improved language was not included in the previous AGC 240, which is now defunct.

Statutory Interest/Late Payment (section 6.3.6): This section provides the A/E with compensation in the form of statutory interest on any late payments to the A/E from the Owner. This improved language was not included in the previous AGC 240, which is now defunct.

Indemnity, Insurance and Waiver of Subrogation (article 7): General Contractors and any A/E’s working for the Owner under this new Agreement are advised to have their legal counsel and surety and insurance professionals review and modify if necessary, the language set forth in this section. Many states have enacted legislation that affects the applicability and enforceability of indemnification and liability limiting contract language. This language is substantially different than previous language in the now defunct AGC 240.

Dispute Resolution (article 9): The dispute mitigation, mediation, and resolution procedures are intended to facilitate resolution in the most cost-effective manner.

Miscellaneous Provisions (article 10): This provision accommodates the advent of the frequent use of Electronic Documents, and the issues surrounding rights to copy and make use of tangible and electronic versions of documents describing the Work involved in a Project. This improved language is substantially different than previous language in the now defunct AGC 240.



Comments regarding ConsensusDocs 246*
Agreement Between Owner and Geotechnical Consultant

Site Damage (section 3.9): The parties should be sure to reference any known or likely to occur damages in exhibit A (description of services), as well as any exclusions to be considered NOT damages. The parties may also want to determine restoration processes (responsible party, timing, costs, etc.), if applicable, practical and/or necessary. Consultant should be sure to flow down all applicable terms and conditions to Subcontractors.

Books and Records (section 3.13): The parties may want to indicate several time periods for retaining documents. For example, you may want to retain summary reports for a longer time period than the underlying data.

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Comments regarding ConsensusDocs 298* **Joint Venture Agreement**

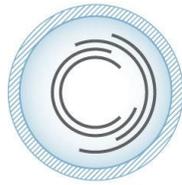
Indemnification and Wrongful Acts (section 3.2): This section is based on the assumption that the Joint Venturers wish to share their liabilities in proportion to their Percentage Interests, even if a mistake or negligence by one of the Joint Venturers caused the liability or cost. Under this approach, the indemnification in subsection 3.2.1 assures that liabilities remain split according to the Percentage Interests, except for certain defined exceptions, such as Wrongful Actions. Some parties may prefer a different model, in which each Joint Venturer bears the liabilities associated with the portion of the Work for which it is responsible to perform. It may be possible to accommodate this approach by setting up subcontracts to the Joint Venturers pursuant to exhibit A. Otherwise, if Joint Venturers are not to share losses in accordance with their Percentage Interests, this section 3.2 would need to be revised accordingly. That alternative may have the perceived advantage of letting each party take responsibility for the work it is managing, and thus avoiding one party getting stuck with part of the cost for another's mistake. However, it may have offsetting disadvantages. Determining which Joint Venturer is responsible for a particular loss could be easier in theory than in practice. Further, if one Joint Venturer can blame the other for problems and liabilities, collaboration within the Joint Venture may suffer.

Section 3.2.1(b): The standard form JV agreement presumes that a typical JV will be integrated for most or all of its work. Under the integrated model, personnel and other resources are provided by the Joint Venturer best able to meet the need, as determined by the Executive Committee, and overall profits or losses are shared according to the Percentage Interests regardless of which Joint Venturer actually performed a particular task. On projects that are following the integrated model completely, use of exhibit A is not required.

In an integrated JV, where some work is to be performed exclusively by one of the Joint Venturers, or in a line item joint venture, where the JV allocates the performance of functions and the related financial consequences among the Joint Venturers, exhibit A provides a mechanism to do so by authorizing the JV to award subcontracts to the Joint Venturers.

In certain cases the parties may wish to accomplish a similar effect without the formality of a subcontract agreement. For example, if a federal contract incorporates small business subcontracting requirements, the parties may prefer to use work orders issued by the JV, rather than subcontracts, as the mechanism to assign tasks and related financial responsibility to a given Joint Venturer. If so, the language of the standard form should be modified accordingly.

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Decisions of Executive Committee (section 4.3): The objective of the section is to promote decisions by consensus, with voting by majority of Percentage Interest used only if the parties cannot otherwise agree. In a 50-50 joint venture, where there is no majority Percentage Interest, the parties may wish to designate an alternative method for resolving an impasse. Options include designating one of the Joint Venturers or a third-party as the tie-breaker.

Capital Expenditures (subsection 4.3.2(h)): If the JV is expected to acquire substantial capital assets, such as real estate or major equipment, the parties may wish to consider drafting more detailed provisions regarding accounting methods, tax treatment, and disposition procedures for such assets.

Project Manager (section 4.6): The standard form assumes that the Project Manager will be an individual. If you want to designate a company as the PM, you may want to consider incorporating the relevant provisions of this section into section 4.5 Managing Joint Venturer.

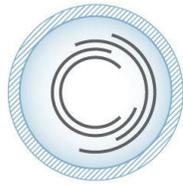
Managing Joint Venturer, Tax Matters (subsection 4.8.2): Some state laws may require a Joint Venturer to include within its own “unitary” tax filing financial information for the JV. The Joint Venturers should determine the extent to which such taxes should be reimbursable from the JV.

Responsibility for the Work (section 6.1): Joint Venturers can offer value to the JV in various ways; for example: credentials or connections that help win the project; working capital or bonding capacity; personnel; equipment; or know-how to help deliver the project. There is no easy way to compare the value of such dissimilar contributions. The standard form proposes that the Executive Committee should endeavor in good faith to keep overall contributions proportional to the Percentage Interests. If it is contemplated that a particular Joint Venturer will make a disproportionate contribution in a given area, the parties may wish to modify the language accordingly.

Election of Remedies (section 7.2): This section does not limit remedies to those expressly set forth in the Agreement. If the parties desire to limit remedies, they should modify this section to specifically limit remedies to only those included in the Agreement and specifically exclude other remedies allowed by law or equity.

Insurance (section 9.1): The best approach for handling insurance will vary greatly depending on the project, the contract, and the normal insurance programs of the Joint Venturers. This section outlines a “default” approach for how the JV’s insurance may be handled, subject to the ultimate control of the Executive Committee. The parties should not assume that the default option is necessarily best. Advice from a qualified insurance professional is strongly encouraged.

Bonds (section 9.2): This section is based on the assumption that the Joint Venturers will share responsibility for the bonding of the Project in proportion to their Percentage Interests. Sometimes this is not feasible, as when one Joint Venturer lacks the capacity to bond its portion or when the respective sureties otherwise do not agree. In such cases, the language of this section should be revised accordingly.



Notices (section 11.12): If the parties want to allow electronic communications as a proper form of notice, they should incorporate language in this section. Sample language may be found in the ConsensusDocs 200.2 Electronic Communications Protocol Addendum.

Non-Solicitation of Employees (section 11.13): The parties may want to consider including a remuneration amount if this provision is violated.

Subcontracts to the Joint Venturers (exhibit A): The standard form presumes that a typical JV will be integrated for most or all of its work. Under the integrated model, personnel and other resources are provided by the Joint Venturer best able to meet the need, as determined by the Executive Committee, and overall profits or losses are shared according to the Percentage Interests regardless of which Joint Venturer actually performed a particular task. On projects that are following the integrated model completely, use of exhibit A is not required.

In an integrated JV, where some work is to be performed exclusively by one of the Joint Venturers, or in a line item joint venture, where the JV allocates the performance of functions and the related financial consequences among the Joint Venturers, exhibit A provides a mechanism to do so by authorizing the JV to award subcontracts to the Joint Venturers.

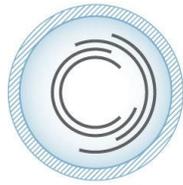
In certain cases the parties may wish to accomplish a similar effect without the formality of a subcontract agreement. For example, if a federal contract incorporates small business subcontracting requirements, the parties may prefer to use work orders issued by the JV, rather than subcontracts, as the mechanism to assign tasks and related financial responsibility to a given Joint Venturer. If so, the standard form should be modified accordingly.

Subcontract, Payments (exhibit A, section 4): The subcontract may incorporate exceptions desired by the parties from the general principle that all profits and losses are shared in accordance with the Percentage Interests. For example, the subcontract may document any special arrangements the parties intend for dividing incentive fees and/or liquidated damages.

Payments by the JV, Costs (exhibit B, section 3(a)): If the parties intend that the budget be mandatory and to exclude costs not in alignment with the budget, this section and section 3(c)(x) may need to be modified.

Payments by the JV, Costs (exhibit B, section 3(c)(i - iii)): These subsections contemplate that the staff performing the required work of the JV will be on the payroll of the respective Joint Venturers, and will not be employees of the JV itself. If the parties prefer the model of a “populated” JV, in which the JV itself is the direct employer of certain personnel, the standard form should be revised accordingly.

Payments by the JV, Costs (exhibit B, section 3(c)(x)): The Executive Committee may wish to establish reimbursement policies for certain categories of costs, for example: management services; accounting services; computer-related hardware, software or services; cell phones; vehicles or vehicle allowances; legal expenses; insurance and bond premiums; and deductible or co-insurance costs for claims related to the project.



Comments regarding ConsensusDocs 300* Tri-Party Agreement for Integrated Project Delivery (IPD)

Overview:

ConsensusDocs 300 represents a new approach to construction contracting and project delivery—one that is founded upon an integrated, collaborative approach to design and construction, and a greater alignment of the interest of all project participants with the overall success of the project. Construction has long been a fragmented process separated into disciplines of design, fabrication, construction and operation. Unfortunately, the traditional way of doing business has too often been married with an adversarial ethos; a zero-sum approach that focused on lowest cost and risk shedding. The ConsensusDocs program as a whole is a dramatic initiative against the adversarial and old way of doing business.

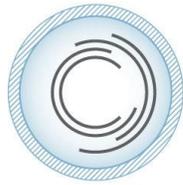
A number of influences are now driving the evolution of the construction industry—schedule compression, technology, realignment, globalization and economic integration. The rise of new information technology may be foremost among these factors. The tools of construction are not only becoming faster and smarter, but they require greater collaboration among project participants to reap their full potential. Building Information Modeling (BIM) is but one example.

ConsensusDocs 300 provides the contractual framework for a truly collaborative interaction between an Owner, a designer and a constructor. A tri-party Agreement, the Owner, designer and constructor sign the Agreement at the inception of the project, binding them to collaborate in the planning, design, development and construction of the project and a sharing of project risks and rewards different than traditional project. Lean construction principles underlying design and construction are used to drive out waste. Representatives of the three Parties manage the project through consensus decision-making. While the designer retains ultimate design responsibility in accordance with state licensing laws, the constructor and specialty Contractors and suppliers participate in the development of the project design. There is no guaranteed maximum price or lump sum.

The approach and contractual framework of ConsensusDocs 300 is not appropriate for everyone or every project. All the Parties should be willing to surrender their specific agendas to do what is in the best interest of the project. A Party that cannot shed itself of the “old school”, traditional and adversarial approach to design and construction will not succeed in using the ConsensusDocs 300 model.

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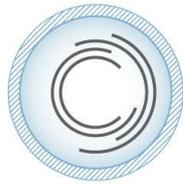
General Considerations:

The user of ConsensusDocs 300 should keep a number of basic considerations in mind:

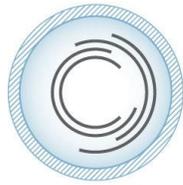
- This is a Tri-Party Agreement, meaning the Owner, Designer and Constructor all sign the Agreement at the earliest possible stage of the project. The intent is to assemble the collaborative project team at the very beginning of the project, not in a piecemeal fashion.
- The three Parties, together with any critical specialty Contractors and suppliers, truly collaborate throughout design and construction, providing input that will improve the quality, cost and timeliness of the project delivery.
- Lean construction principles apply to the work of the entire Collaborative Project Delivery Team. These principles include:
 - True collaboration among all project participants
 - Strengthening and Aligning the relationships and interests of the Parties to the project
 - Project participants making commitments to work and schedule that can be relied upon by others, and that drive out waste in the form of RFIs, changes and rework
 - Focusing on what is best for the project as a whole and not just certain component parts
 - Seeking constant improvement through continuous assessment and implementation of “lessons learned”.
- The project is managed by a management group comprised of senior representatives of the Owner, Designer and Constructor. (article 4).
- To the greatest extent possible, project decisions are made by consensus. When consensus cannot be reached, the Owner retains the ability to make a determination in the best interest of the project. (section 4.6).
- In addition to the collaborative elements of necessary for this approach, ConsensusDocs 300 also contains where appropriate many of the elements found in other ConsensusDocs standard forms.

Unique Considerations:

- Project Target Cost Estimate: There is no lump sum or guaranteed maximum price established for the project that can create competing interests and counterproductive behavior among the Parties. Instead, the Parties establish a Project Target Cost Estimate under article 8 that serves as the benchmark for measuring the project’s overall success, the performance of each Party and to what extent each will participate in any savings or losses.
- Project Risk Allocation: Under section 3.8, the Parties mutually agree upon an approach to risk allocation. The options include:
 - Safe Harbor Decisions: The Parties release each other from any liability resulting from project decisions that are collaboratively made the Management Group.
 - Traditional Risk Allocation: Under this approach each Party remains liable for its own negligence and breaches of contract or warranty, subject to optional specific, agreed-upon (fill in the blank) limitations of liability for the Designer and Constructor.



- Target Value Design: Cost and schedule are design criteria the Designer should consider (section 3.6). For their part, the Constructor and Trade Contractors should support the Designer's efforts by continuously looking for ways to create value through improved quality, constructability, reduced capital or life cycle costs, for example. (section 6.13). This is not traditional constructability review but design fully informed by the efforts of the Constructor and critical Trade Contractors and suppliers.
- Incentives and Risk Sharing: Under article 11, The Management Group develops a financial incentive program to encourage and reward superior performance among the project participants. The criteria are not merely financial, but recognize quality, safety, innovation and teamwork. The Parties should also discuss and agree upon how savings (section 11.4) and losses (section 11.5), measured against the Project Target Cost Estimate, will be shared among them. Under section 11.6, the amount of the Designer's and Constructor's respective fees can serve as a cap on the extent of the losses those Parties will bear.
- Right to Audit: Collaborative project delivery, without a lump sum or GMP, should be based on transparency of decisions and open-book accounting. Article 19 requires the Designer and Constructor to maintain full and detailed accounts subject to inspection and a final accounting.
- Dispute Resolution: Disputes should be resolved collaboratively through the Management Group, but when they are not, the Parties can elect to use a project neutral or dispute review board to mitigate the costs, time and overall impact of disputes. Elimination of or early resolution of disputes are key components of driving out waste in the project.



Comments regarding ConsensusDocs 301* **Building Information Modeling (BIM) Addendum**

Overview:

The Building Information Modeling (BIM) addendum is intended for use on Projects on which the Project Owner and other major Project Participants have made a commitment very early in the Project planning process to utilize BIM or virtual design and construction.

The 301 BIM Addendum should be used where the Owner, lead design professional, lead construction professional, and major subcontractors and suppliers are willing to commit to model the Project design and construction media using three-dimensional design or modeling software with demonstrated interoperability, so as to eliminate the need for conversion of two-dimensional design and construction documents into three-dimensional virtual models.

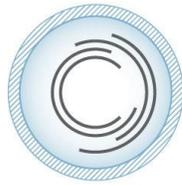
The 301 BIM Addendum should be used when the Parties are prepared to involve all essential participants, including key subcontractors, subconsultants, and suppliers, early in the design, procurement, and construction planning process.

The 301 BIM Addendum is envisioned to be used with traditional project delivery methods, especially where construction is to be priced by means of a negotiated guaranteed maximum price (GMP) with significant preconstruction services. For the 301 BIM Addendum to be of value, it is not necessary for the Parties to agree to mutually shared cost-saving bonus arrangements for all Participants (as anticipated in, for instance, the ConsensusDocs 300 Standard Form of Tri-Party Agreement for Collaborative Project Delivery involving three-Party collaboration).

The 301 BIM Addendum can be used whether or not any Design Model is considered a Contract Document.

The 301 BIM Addendum can be used when the Owner has determined that a three-dimensional, digital building model is to be used as the primary means of communicating specified geometric, quantity, and other metric and representational data required for the design, procurement, and construction processes of a construction project.

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The 301 BIM Addendum can be used when Models and Drawings co-exist on a project (for example, details such as waterproofing a parapet wall may more conveniently be drawn, not modeled, in some circumstances).

The 301 BIM Addendum is intended to incorporate a consensus of what many observers believe to be the current best practices in the use of BIM techniques and technology. Currently, many, if not all, BIM technologies and methodologies rely on a Federated Model. The 301 BIM Addendum assumes that the Project Model and some other models, such as the Full Design Model, will be Federated Models.

Definition of Affiliated Contract (section 2.1): When any given copy of the Addendum (as prepared for a given Project) is appended to and incorporated into a specific contract, the contract to which it is appended is the Governing Contract with respect to that copy of the Addendum. Each contract on a Project to which it is appended is a Governing Contract with respect to that copy of the Addendum and an Affiliated Contract with respect to the other copies of the Addendum that are appended to other contracts on the Project.

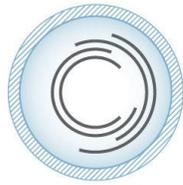
Definition of Contract Documents (section 2.3): This section clarifies that to the extent that any Design Models are included as part of the Contract Documents, Project Participants may rely on the accuracy of the information in those Design Models. This reliance, however, does not extend to the dimensional accuracy of such Models which is controlled by agreement of the parties in the BIM Execution Plan pursuant to section 4.3.11.

Definition of Governing Contract (section 2.10): When any given copy of the Addendum (as prepared for a given Project) is appended to and incorporated into a specific contract, the contract to which it is appended is the Governing Contract with respect to that copy of the Addendum. Each contract on a Project to which it is appended is a Governing Contract with respect to that copy of the Addendum and an Affiliated Contract with respect to the other copies of the Addendum that are appended to other contracts on the Project.

Information Management (section 3.1): The Owner has the option of appointing as the IM one person for the duration of the Project, or changing that appointment as the Project progresses. The Owner also has the option of appointing as the IM someone who is already fulfilling a function on the Project, such as the Architect/Engineer or Contractor. There is no requirement under the BIM Addendum that the Owner hire a third party or a separate consultant for this function.

Record User Role (section 3.2.5 b): This information may be stored with the user registration information, but a user may have different roles, and the role a user is playing when a data entry is made may be important.

Record Contact Information (section 3.2.5 c): This information is typically stored with the registration information, but may be added here as an aid in operations.



Meeting and Conferring on BIM Execution Plan (section 4.1): The BIM Addendum assumes that the Owner, Architect/Engineer, and Contractor may not be able to meet, confer and agree on issues relating to the BIM Execution Plan until after the Owner-Architect/Engineer and the Owner-Contractor agreements are negotiated. Ideally, if possible, the details of the BIM Execution Plan should be resolved prior to execution of the agreements, so that the compensation for such agreements can accurately reflect the scope of services to be provided. As additional Project Participants join the Project, it is necessary to convene another meeting to consider whether the addition of other Project Participants requires any modification of the BIM Execution Plan. Such a meeting could easily occur as part a regular project meeting.

Here is What the BIM Execution Plan Addresses (section 4.3): In addition to the elements provided in the BIM Addendum, additional elements may be added to the BIM Execution Plan for project specific needs.

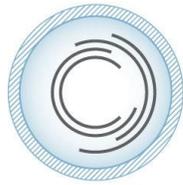
Object Property Data (section 4.3.5 b): An example would be wall fire-rating.

Object Constitution Data (section 4.3.5 c): For example, how are assemblies broken down.

Definition of what Model shall constitute part of the record documents (section 4.3.8): For example, as-builts.

Project Owner's Entitlement to use Full Design Model after completion of the Project (section 6.4): If modifying the 301 BIM Addendum for a Design-Build project, users should change "Architect/Engineer" to "Design-Builder."

Non-exclusive License (section 6.5): A Project Participant's Model may contain Contributions from multiple Project Participants. Should a Project Participant wish to use the Contribution of another Project Participant for marketing and/or educational purposes, such use should be clarified in the Project Participant's Governing Contract. In the absence of any such provision in the Governing Contract, the license is limited to the keeping of an archival copy.



Comments and Recommendations regarding ConsensusDocs 310* Green Building Addendum

Overview:

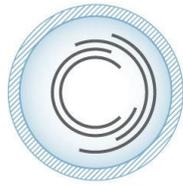
Increased interest in and the demand for green buildings are among the most pronounced developments in the present evolution of the design and construction industry. New challenges and demands are required from multiple participants with varying responsibilities to achieve a single goal – successfully delivering a green building project. Despite a critical need to identify the legal risks presented by designing and constructing green buildings and appropriately allocate those risks, standard contract documents to help guide the performance requirements and address risk allocation have not yet been created.

Consequently, the ConsensusDocs organizations, with the input of additional diverse industry stakeholders, have developed the ConsensusDocs Green Building Addendum (“GBA”) to meet this need and to benefit the industry. The GBA uses contractual best practices to collectively identify the Project Participants, including their respective roles, and the implementation and coordination efforts critical to achieving a successful project using green building elements, particularly those seeking a third-party green building rating recognition.

Evaluation of the various design and construction elements, coupled with coordinating green building elements and requirements, have resulted in the creation of the Green Building Facilitator or GBF, a person or entity charged with the responsibility to identify, coordinate, implement and conclude necessary submittal documentation to achieve the desired green building goals. In the event that there is no separate underlying agreement already in place, it will be necessary to establish the commercial terms to address the scope of work required of the GBF by the terms of the GBA. The GBA will similarly accommodate attachment to a separate underlying agreement between the owner and the person or entity that will be fulfilling the GBF’s role and functions. In either scenario, the GBA is intended to identify the elements of performance required of the GBF on projects incorporating green building elements and/or rating goals.

The GBA is flexible in approach, adapting itself not only to multiple applications of the GBF role in the hands of the architect/engineer, contractor, construction manager or even an third-party advisor/independent consultant, in each instance hired by the owner specifically for the project, as opposed to being an in-house employee or a staff member of the owner, and application in situations where the project team has not been fully assembled. In addition, the GBA adapts itself

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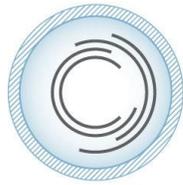
to projects seeking formal third-party agency ratings or high-performance building criteria, as well as a combination of the two. However, for projects on a design-build delivery track, the GBA would require specific modifications to reflect both design and construction responsibilities within a single entity or Project Participant.

The GBA takes into consideration the elevated risks in green building design and construction, design/development strategies potentially impacting that risk, the unique material/equipment/design components associated with these projects, and re-evaluation of traditional design elements consistent with implementation of the green building measures. The GBF provides assistance to the owner in coordinating the design, construction and document submissions that are necessary to accomplish the green building objectives for the project, should an independent third-party rating be desired. To assist the GBF in the performance of its duties and obligations to the owner and the project, there are certain coordination, cooperation and documentation requirements for the various Project Participants are imposed in several areas of the GBA. These requirements enhance the facilitative role of the GBF and also permit the GBF to discharge its other GBA responsibilities to the owner and the project. Coupled with these express elements of coordination, cooperation and documentation, any Project Participant is encouraged to communicate the terms of the GBA to any specialty contractors, subcontractors, material suppliers or other consultants who may be engaged by a Project Participant to assist in achieving the stated green building goals for each project, whether evidenced by a formal third party rating or otherwise.

As a result, the articles that follow in the GBA address the definition of the green scope, the allocation of green building-related responsibility and risk, apportionment of liability, and changes to the design and/or construction of the project to accommodate green building objectives, as well as discuss post-physical completion actions and obligations. It is contemplated that the GBA will be used in conjunction with developing the underlying agreement between the owner and the entity that will become the Green Building Facilitator, which will further address commercial terms such as compensation and insurance requirements. Nevertheless, with this single GBA document ultimately appended to the owner and GBF agreement as well as appended to each of the other Project Participant agreements, all Project Participants should be aware of each other's roles and responsibilities as they relate to the achievement of the project's green objectives.

General Principles (article 1):

The GBA is intended to modify, accompany, and complement pre-existing or contemporaneously prepared design and construction agreements on projects where green building elements, goals, or, more formally, third-party rating recognition is sought. The general definitions, contract terms, and the underlying expectations are contained in the traditional design and construction agreements. While the GBA makes these various documents subject to the GBA's terms, certain provisions in the underlying contract documents are not altered by the GBA. The operative alterations of the agreements to which the GBA is appended will include obligations necessary for the GBF to perform its functions, including coordination of performance and cooperation with the GBF and the other Project Participants that have agreed to the terms of the GBA. Also, while the drafters envisioned that the GBA would coordinate with ConsensusDocs family of construction contract documents, the GBA can be considered for use, upon appropriate review, with other non-standard contract agreements, as well as American Institute of Architect (AIA) or Engineers Joint Contract



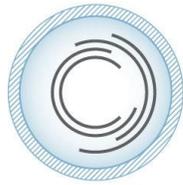
Document Committee (EJCDC) contract documents. Further, in the event the underlying Governing Contract adequately identifies a remodeling as opposed to a new construction scope of work, the GBA could be used to accommodate green building goals and objectives for the remodeling effort.

Definitions (article 2):

Applicable definitions specific to the GBA set the stage for the GBA's accommodation of pre-design planning and analysis to determine which green measures will be selected for the project and ultimately incorporated into the project through design, construction, and, if applicable, third-party rating certification submission. Providing unambiguous and uniform definitions are among the benefits of creating a standard document for the design and construction of green/sustainable buildings. The definitions take into account those elements of the green building project that are physical in nature, requiring specific physical parameters for performance, while also acknowledging that certain green elements require certifications or submissions of documentation of a more procedural nature in order to be recognized under applicable laws, codes, rules, regulations and/or rating system criteria. The GBA also establishes coordination and cooperation obligations that provide the GBF the ability to discharge the roles and responsibilities necessary to accomplish the project's green objectives. Furthermore, the GBA accommodates the specific identification of these green objectives, whether by declaration of a specific level of third-party rating (e.g., LEED[®] Gold), a specific level of building performance, or both.

The definitions article introduces the "Green Building Facilitator" or "GBF." The roles and responsibilities of the GBF are key components in the document. While the Project Participants could function without the GBF, their ability to successfully pursue the desired green elements is enhanced by the GBF's roles set forth in the GBA. On projects of larger scale and complexity, the GBA facilitates (but does not require) the engagement of a third-party as the GBF, separate and apart from the architect/engineer and contractor teams. Again, the structure of the GBA contemplates the GBF is not an in-house employee or a staff member of the owner. Further, following a design-build delivery model would necessitate specific modifications of the GBA.

The definitions of green certification documents and other similar documents otherwise identified in this article reflect the GBA's understanding and accommodation that many green building measures are already document-intensive and will require written substantiation of performance in addition to the actual performance itself. While the GBA does not require additional documentation, it certainly contemplates that the respective collection and supply of documentation verifying the underlying green building performance will be necessary elements of monitoring project progress under many selected green building rating criteria. The procedural green methods will largely be driven by the green measures selected for application in the project. For example, should the elected green measure contemplate submission of documentation supporting the underlying performance that is claimed to be compliant with the particular rating system, then that documentation would be included among the procedural green measures to be performed by the appropriate Project Participant, as also defined in this article.



Green Requirements and Procedures (article 3):

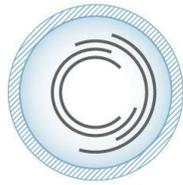
This article emphasizes that the objectives of the green building project at issue may not necessarily require ultimate review and certification by a third-party rating agency or service. In particular, the GBA accommodates scenarios where formal compliance with an established green rating system is preferred, instances where specified energy performance and/or environmentally beneficial criteria are desired, and where both the rating recognition and the actual performance-related options are selected in the GBA, rating achievement at the specified level as well as performance consistent with the identified energy and environmental parameters are sought from the design, materials, equipment, construction, and commissioning supplied and performed on the Project.

Green Building Facilitator (article 4):

In this article, the roles and responsibilities of the Green Building Facilitator are set forth in further detail. The GBA accommodates multiple options for the person or entity filling the role of the GBF. For example, the GBF could be the architect/engineer, a contractor, construction manager or even a third-party advisor/independent consultant, as long as the GBF is not in-house employee or a staff member of the owner. The GBA likewise accommodates and addresses specific situations where particular roles might be in conflict where the GBF is also the architect/engineer. Not only is the GBF relationship with the other Project Participants identified, but also the roles and responsibilities of the GBF are identified in such a fashion that the architect/engineer, the contractor and any other Project Participant will be aware of the GBF's presence and purpose on the project. The article additionally emphasizes that the GBF is not assuming the role of the architect/engineer (except, of course, where the GBF is also the architect/engineer) and that a key function of the GBF's presence on the project is to take the various documentation and reports supplied by the architect/engineer and/or the contractor and assemble that documentation and those reports for submission and processing to obtain the written certification, designation, or denomination of the elected green status. The article concludes by emphasizing that the roles and responsibilities of the architect/engineer and the contractor, consistent with the role of the GBF, are provided for otherwise in the GBA and/or in their respective Governing Contracts. This approach is more consistent with a design-bid-build project delivery model, rather than a design-build project delivery approach.

Green Status (article 5):

In this article, the path from the identification and selection of green measures to the achievement of the elected green status is discussed in more detail. Not only are further elements of the green status indicated, but it is also made clear that the elected green status shall be brought to the attention of the architect/engineer as well as the contractor engaged (or to be engaged) on the green building project. This article, and those that follow, recognize that the contractor may not be engaged as early in the process as the architect/engineer and/or the GBF.

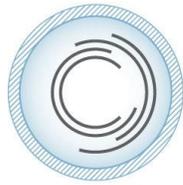


Green Measures (article 6):

This article represents the core of the GBA. In the sections contained in this article, detailed procedures are identified for all Project Participants to be involved in incorporation of the green measures into the plans and specifications for the project and to react if these measures are perceived to be in conflict with the scope of services to be provided under a respective underlying agreement. There are, among other things, procedures for the preparation of reports by the GBF to advise the owner of the green measures to be specifically incorporated into the plans and specifications. This article places the GBF in a role of facilitating the steps to be undertaken in order to achieve the desired elected green measures and places appropriate coordination and cooperation obligations on the Project Participants. Advice to the owner about the differing approaches to achieving the desired green building objectives, coordination with the architect/engineer and contractor, and follow-up measures are clearly identified. While these points could and should be echoed in the underlying Governing Contract between the owner and the GBF, placing it in the GBA defines Project Participants' respective roles with respect to the GBF and, in turn, the GBF's role with respect to the Project Participants' various work scopes so that all Project Participants have knowledge of the GBF's and their own respective responsibilities. Ultimately, this article provides that the architect/engineer remains responsible for the design of the project and the incorporation of the green measures into the necessary documents for execution of the work consistent with those elected green measures. Furthermore, there is a detailed procedure for resolution of objections made by the architect/engineer regarding any of the elected green measures. Again, in its role as a facilitator, the GBF participates in this process and counsels the owner on alternatives to address the architect/engineer's objections. While the GBA accommodates many variables for the person or entity serving in the role of the GBF, special attention should be given to situations where the GBF is also the architect/engineer as well as in situations where the projects or the green measures being incorporated are more complex in nature.

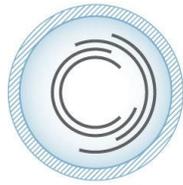
Plans and Specifications (article 7):

In this article, the role of the GBF in preparing and issuing plans and specifications is established. The GBF again acts in its facilitator role to confirm that the elected green measures have been incorporated into the issued plans and specifications and that any necessary revisions are made by the architect/engineer as a part of review procedures set forth within the body of the GBA. Objection procedures are included to allow for resolution of any differences over incorporation of elected green measures into the plans and specifications. The contractor is engaged in communications over the details of the elected green measures incorporated into the plans and specifications and procedures for resolution of differences over or objections to those measures both as a part of the construction of the project and as a part of revising the pertinent Governing Contracts. If changes are needed to the design of the project either as a result of or in order to assimilate elected green measures on the project, procedures are included to accommodate these changes consistent with the elected green measures. Overall, the Project Participants' roles and responsibilities with regard to the elected green measures are set forth in this single GBA document to allow for the maximum opportunity of coordination of these efforts among the various Project Participants, all under the review of the GBF.



Risk Allocation (article 8):

Specific risk allocation principles are identified in this article, including responsibility for the elected green status; reinforcement of existing liability provisions; characterization of certain damages as consequential in order to be addressed more fully in the underlying Governing Contracts; and emphasis that nothing contained in the GBA is intended to impose liability on an architect/engineer or contractor for defects or deficiencies inherent in the elected green measures as they affect their ability to achieve the elected green status. This is not to say that the inherent defect or deficiency in the design or the material would be removed from any other liability equation. Also included in this article is a paragraph dealing with damages which could reasonably be incurred by the owner as a consequence of the project not achieving the Elected Green Measure. These damages are identified as Consequential Damages in the GBA so that they can be addressed further by any applicable waiver of Consequential Damages contained in a Governing Contract. The Governing Contracts prepared by ConsensusDocs adopt the approach of clarifying those damages that will be regarded as consequential damages and providing that consequential damages are generally waived. However, unlike other standard form agreements, ConsensusDocs provides for the parties to a Governing Contract to agree upon exceptions to the waiver of consequential damages. The approach employed in the GBA provides consistency with the Governing Contract and addresses consequential damages under the GBA by accommodating how the parties agree to address that issue in the Governing Contract. The GBA does clarify which damages would be regarded as consequential in nature. Consequently, a waiver of consequential damages, and any exceptions to that waiver, in a Governing Contract, will apply to consequential damages arising under the GBA as well. Whether the parties have agreed to waive or permit the recovery of certain consequential damages between parties to a Governing Contract, the GBA accommodates that agreement by providing for the Governing Contract to control that determination on limitation or waiver of Consequential Damages. Ultimately, as to the liability of the GBF in connection with the achievement of the elected green status, that liability determination should be addressed fully and comprehensively in the underlying Governing Contract between the owner and GBF. Further, any continuing obligations of performance beyond completion of the project and initial achievement of the elected green status would have to be address separately and apart from the GBA.



Comments regarding ConsensusDocs 410*
Agreement and General Conditions Between Owner and Design-Builder
(Cost of the Work Plus Fee with GMP)

Overview:

Design-build delivery project delivery methodology offers some benefits, but you should be design-build Agreements contain different risks from traditional delivery methods. In order for a design-build project to be successful, the design-build Agreement should effectively define and allocate the risks associated with one Party assuming the responsibility for the design and construction of the project.

ConsensusDocs 410 is a balanced document that is reflective of the market. It reflects the collaborative efforts of Owners, Contractors, design-builders, Subcontractors, engineers, and sureties. The Agreement is an improvement from previous standard design-build Agreements and the CD 410 was updated in January of 2011. It addresses risks associated with relatively new construction issues, such as the use and maintenance of electronic data, while clarifying several risk provisions common to most standard form design-build Agreements. For example, this Agreement simplifies claim procedures, identifies excusable compensatory damages, and adopts the limited consequential damages provision that has become popular among Contractors and Owners.

You may access a sample redline of the 2007 and 2011 editions as a sample document of the CD 410 at <http://www.ConsensusDocs.org/catalog/designbuild/>

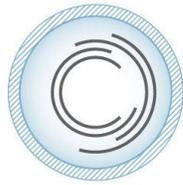
Exhibits (2.4.1.1): The User is expected to create these referenced exhibits as applicable. These exhibits contain information that is largely based on project and company specific information that varies.

The Parties are encouraged to create other exhibits as appropriate and list the exhibits in this subsection.

General Provisions (subsection 2.4.9): The term “Contractor” should be replaced by “Design-Builder.”

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—From the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations



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

Section 3.3.8: One of the options should be checked and the other option deleted.

Emergencies (section 3.6): This section was moved from section 9.7 in the last 2007 edition.

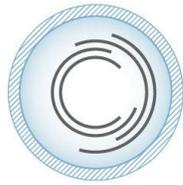
Electronic Documents (section 4.6): The Agreement recognizes the importance of electronic data and documents in the design and construction process. Article 4.6 allows the Parties to develop a project-specific protocol to facilitate the sharing of electronic data. Among other things, the protocol is intended to: define the scope of electronic data and identify the types of electronic documents the Parties expect to use; manage the sharing and coordination of electronic data; identify electronic formats that are acceptable to the Parties; establish security parameters for electronic data; and create mechanisms for storing and retrieving electronic data. Because there are many potential sources of electronic data and programs that manipulate electronic data, the Parties are encouraged to develop a protocol to fit their specific needs.

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

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

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

Cost Items for Construction Phase Services (section 8.2): While the 200 is a Lump Sum Agreement, a more extensive delineation of the Cost of the Work is being provided to provide clarity in regard to the cost of the work for changes. This language is being derived from existing



language from the ConsensusDocs 500 Construction Management At-Risk agreement with some minor appropriate modifications.

Concealed or Unknown Site Conditions (section 9.4): Revisions were made to more closely conform with the terms used in ConsensusDocs 200 3.16.2 related to concealed or unknown site conditions.

Cost of Work Estimate (section 9.5.4): The Cost of the Work estimate is subject to 3.2.8, which provides for audit rights and reasonable skill and judgment in preparing such.

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

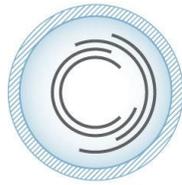
Section 9.7 of the 2007 edition was moved to 3.3.3.1 in the 2011 edition.

Section 10.1.2: Users are advised to check state statutes to determine if there is a shorter period required by state law regard to the time period required for payment.

Notification of Cancellation Insurance, ACORD Form Change (section 10.2.1 and 10.2.4):

ConsensusDocs changed the language regarding notice of cancellation of insurance in 2012 to reflect changes in the ACORD form for certificates of insurance as well as to reflect actual notice that is realistic to receive in today's marketplace and best practices to reflect the substantive notice that parties are actually receiving if there is a cancellation of insurance coverage.

Other standard form contracts and manuscript contract documents are likely to include contract language that no longer reflect current practice. Generally, construction contracts had require that insurance policies include at least 30 days advanced written notice to the owner (or an upstream contractual party) if an insurance policy is canceled or allowed to expire. This has generally been satisfied through certificates of insurance as evidence of compliance. ACORD, the licensing company for insurance forms, has amended their certificate requirements (e.g. ACORD 25). Consequently, contractors and subcontractors may no longer be able to received certificates of insurance language that proclaims that the insurance company or insurance broker, should any policies be canceled before the expiration date thereof, "endeavor to mail 30 days written notice to the certificate holder." Therefore, contractual requirements that 30 days advanced notice be included in insurance policies may not be commercially available and altering ACORD forms to purport to do so may run afoul of state law. Consequently, the current ConsensusDocs language was revised to reflect realities in today's construction marketplace.



Dispute Resolution (article 13): The Agreement offers the Parties a number of dispute resolution procedures in lieu of judicial litigation. First, the Parties are encouraged to conduct direct good faith discussions to resolve the dispute. After direct discussions, the Parties have the option of dispute mitigation with a project neutral/dispute review board or mediation. If the Parties choose dispute mitigation, the project neutral/dispute review board will create a nonbonding finding that the Parties may use in a subsequent binding proceeding.

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

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

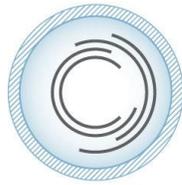
Dispute Mitigation and Resolution, Directed Discussion, Mediation, and Guided Choice Mediation (section 13.3):

Select only one option if a mitigation selection is desired.

See ConsensusDocs Guidebook commentary regarding Guided choice mediation for considerations as a new way to conducted mediations effectively. Since that ConsensusDocs agreements call for the Parties to communicate directly initially to resolve disputes, and section 12.2 addressing direct party discussion may need to be modified to implement Guided Choice mediation as spelled out in more detail in the following article: "Guided Choice: Early Mediated Settlements and/or Customized Arbitrations," *Journal of the American College of Construction Lawyers*, Vol. 7, No 2, Summer 2013 by Paul Lurie.

Guide Choice mediation is used as early as possible in the dispute in which clients drive decisions and customize the mediation process. It does not require major changes to the ConsensusDocs contractual dispute resolution terms, except as noted above. Mediators help the parties customize the dispute resolution process based on their understanding of what impasses must be overcome to reach a settlement. Proper diagnosis is essential to a successful mediation process.

Contract Documents, (c) (section 15.1): List here or attach exhibits to identify the binding contract documents. This is important section to fill out carefully so as to distinguish documents provided for information purposes only versus binding contract documents which can be relied upon.



AGC Comments for ConsensusDocs 410:

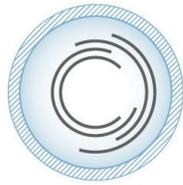
(Additional comments by AGC can be found on AGC's website at members only page of http://www.agc.org/galleries/members-only/AGC-only_ConsensusDocs_Guidebook.pdf for many of the ConsensusDocs documents.)

Standard of Care (section 2.1): A definition of the standard of care applicable to architectural and engineering services performed under this Agreement is not included in this Agreement (previous additions of AGC contracts did include such a definition). The drafters of the new Consensus documents determined that it would be better for the design professionals to be held to a standard imposed on them by their own profession, rather than one defined by this Agreement.

Contractors and Owners should not modify this Agreement by adding language that would hold any design professional to a standard of care that is above that which is customary and normal for design professionals in the same time and location, because that might result in the unintended consequence of voiding errors and omissions coverage available to the respective design professionals.

Relationship of Parties (section 2.1): This section requires the Design-Builder to proceed "on the basis of trust, good faith and fair dealing" and take all actions "reasonably necessary" to perform "in an economical and timely manner." Under article 3, the Design-Builder "shall exercise reasonable skill and judgment in the performance of its services."

Standard of Care (section 2.2): The Agreement removes the architect/engineer's standard of care from the former and no longer published AGC 410 section 2.2. CAUTION: Contractors and Owners should not modify this Agreement by adding language that would hold any design professional to a standard of care that is *above* that which is customary and normal for design professionals in the same time and location, because that might result in the unintended consequence of voiding errors and omissions coverage available to the respective design professionals.



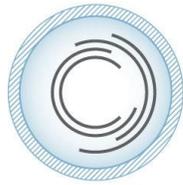
Comments regarding ConsensusDocs 415*
Agreement and General Conditions Between Owner
and Design-Builder (Lump Sum)

Overview:

Please see comments in the ConsensusDocs 410 Guidebook which is illustrative of the 410. The CD 415 was updated in March of 2012 to reflect the updates made to the CD 410. The primary differences between the documents is the form of payment with the 415 offering a lump sum version of the CD 410.

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—From the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations



Comments regarding ConsensusDocs 450* **Agreement Between Design-Builder and Subcontractor**

Overview:

This document is similar to the ConsensusDocs 750 Subcontract and it is recommended that you look at additional commentary associated with this document for completing the 450. The main differences in the 450 reflect the differences in working with the design-build project delivery method.

Conflicts (section 2.5): The “Extent of the Agreement section from what was section 2.5 has been moved to section 13.1 and added to all ConsensusDocs agreements, including short forms.

Section 2.6.1.1, exhibit E: This exhibit should state specific responsibilities of the Subcontractor, and Design-Builder.

Emergencies (section 3.17): Formerly was located in section 7.8.

Permits, Fees, Licenses and Taxes (section 3.18): Section 3.17 Assignment of Subcontract work was moved to the Misc. section in 12.2.

Layout Responsibility and Levels (section 3.21): Section 3.21 Warranties was moved to section 3.13.

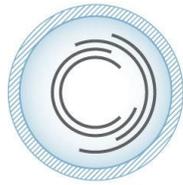
Article 6 (c): If appropriate the following incentives clause is suggested:

To extent awarded in the prime agreement and Design-Builder has received such payment from the Owner, subcontractor shall receive an incentive award based upon early completion, provide Subcontractor adequate notice prior to Substantial Completion.

Time of Payment (section 8.2.5): What constitutes reasonable is a controversial subject that varies from state to state based upon state statues and case law.

Section 8.2.7.2: Insurance coverage implies that there is a positive indication that there is an acceptance of liability for the loss.

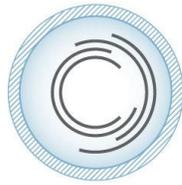
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Minimum Insurance Limits (section 9.2.2): The ConsensusDocs 200 article 11 on insurance spells these requirements out in the contract, but because most Constructors/General Contractors provide these requirements as a standard attachment it is handled differently in this agreement.

AGC Comments for ConsensusDocs 450:

(Additional comments by AGC can be found on AGC's website at members only page of http://www.agc.org/galleries/members-only/AGC-only_ConsensusDocs_Guidebook.pdf for many of the ConsensusDocs documents.)



Comments regarding ConsensusDocs 460*
Agreement Between Design-Builder and Design-Build Subcontractor
(Subcontractor Provides a GMP)

Overview:

This document is similar to the CD 450 Design-build subcontract, however, the payment provisions are different to reflect when a Subcontractor provides an element of design and is paid on the basis of the Cost of the Work with a GMP.

Subcontract Work (section 2.2): Note that section 2.2 of the ConsensusDocs 460 addressing design obligations has now been moved to section 3.8.1.

Conflicts (section 2.5): The “Extent of the Agreement section from what was section 2.5 has been moved to section 13.1 and added to all ConsensusDocs agreements, including short forms.

Section 2.6.1.1, exhibit E: This exhibit should state specific responsibilities of the Subcontractor, and Design-Builder.

Emergencies (section 3.17): Formerly section 7.8.

Permits, Fees, Licenses and Taxes (section 3.18): Section 3.17 Assignment of Subcontract work was moved to the Misc. section 12.2.

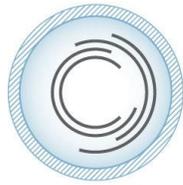
Layout Responsibility and Levels (section 3.21): Section 3.21 Warranties was moved to section 3.13.

Adjustment in the Subcontractor’s Fee (section 6.2.5): If appropriate the following incentives clause is suggested:

To extent awarded in the prime agreement and Design-Builder has received such payment from the Owner, subcontractor shall receive an incentive award based upon early completion, provide Subcontractor adequate notice prior to Substantial Completion.

Section 7.1: New language conforms with CD 200 section 8.1.2.

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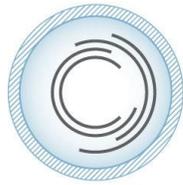
Time of Payment (section 8.2.5): What constitutes reasonable is a controversial subject that varies from state to state based upon state statutes and case law.

Section 8.2.7.2: Insurance coverage implies that there is a positive indication that there is an acceptance of liability for the loss.

Minimum Limits of Insurance (section 9.2.2): The ConsensusDocs 200 article 11 on insurance spells these requirements out in the contract, but because most Constructors/General Contractors provide these requirements as a standard attachment it is handled differently in this agreement.

AGC Comments for ConsensusDocs 460:

(Additional comments by AGC can be found on AGC's website at members only page of http://www.agc.org/galleries/members-only/AGC-only_ConsensusDocs_Guidebook.pdf for many of the ConsensusDocs documents.)



Comments regarding ConsensusDocs 500* **Agreement and General Conditions Between Owner and Construction Manager (Where the CM is At-Risk)**

Exhibits (section 2.3.1.1) Consider, for instance, putting in an exhibit for Labor Relations setting forth any conditions, obligations, or requirements relative to labor relations and their effect on the Project. It is recommended to get legal counsel as appropriate for this issue.”

Cooperation With Work of Owners and Others (section 3.5): This section was moved from 3.4.9 to match the order of subsections used in the ConsensusDocs 200.

Section 3.8.3 of the 2007 edition was deleted as the new section 3.11 now covers this issue. The language used in ConsensusDocs 200 is now more consistent with the CD 500.

Date of Commencement (section 6.1): It is common for the scheduled time period of commencement and the Agreement signing date to be different. Parties need to specify if this is the case for this Project. The default Date of Commencement will be the signing date of the Agreement.

Construction Manager’s Fee (section 7.3): State whether a stipulated sum or other basis. If a stipulated sum, state what portion of the sum shall be payable each month.

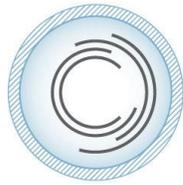
Preconstruction Services (section 7.5): State whether a stipulated sum, actual cost, or other basis. If a stipulated sum, state what portion of the sum shall be payable each month. Preconstruction services are spelled out in article 3, specifically sections 3.2 and 3.3.

No Obligation to Perform (section 9.1.3): This language was taken from section 7.7 of the ConsensusDocs 750, and now appears in other ConsensusDocs agreements.

Cost of the Work Estimate (section 9.2.2): Cost of the Work estimate is subject to 3.6.5, which provides for audit rights and reasonable skill and judgment in preparing such.

Incidental Changes (section 9.6): This language is taken from section 7.9 of the ConsensusDocs 750 Subcontract agreement. This added language provides for greater clarity for the project participants and provides a consistent approach across the ConsensusDocs family of contracts.

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Notification of Cancellation Insurance, ACORD Form Change (section 10.2.1 and 10.2.4)

ConsensusDocs changed the language regarding notice of cancellation of insurance in 2012 to reflect changes in the ACORD form for certificates of insurance as well as to reflect actual notice that is realistic to receive in today's marketplace and best practices to reflect the substantive notice that parties are actually receiving if there is a cancellation of insurance coverage.

Other standard form contracts and manuscript contract documents are likely to include contract language that no longer reflect current practice. Generally, construction contracts had require that insurance policies include at least 30 days advanced written notice to the owner (or an upstream contractual party) if an insurance policy is canceled or allowed to expire. This has generally been satisfied through certificates of insurance as evidence of compliance. ACORD, the licensing company for insurance forms, has amended their certificate requirements (e.g. ACORD 25). Consequently, contractors and subcontractors may no longer be able to received certificates of insurance language that proclaims that the insurance company or insurance broker, should any policies be canceled before the expiration date thereof, "endeavor to mail 30 days written notice to the certificate holder." Therefore, contractual requirements that 30 days advanced notice be included in insurance policies may not be commercially available and altering ACORD forms to purport to do so may run afoul of state law. Consequently, the current ConsensusDocs language was revised to reflect realities in today's construction marketplace.

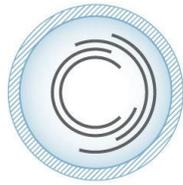
Insurance Coverage Acceptance of Liability (section 10.3.2): Insurance coverage implies that there is a positive indication that there is an acceptance of liability for the loss.

Payment Delay (section 10.5): Note that subsection 10.2.1 defines payment due date.

Dispute Mitigation and Resolution, Direct Discussions, Mediation, and Guided Choice (article 12)

See ConsensusDocs Guidebook commentary regarding Guided choice mediation for considerations as a new way to conducted mediations effectively. Since that ConsensusDocs agreements call for the Parties to communicate directly initially to resolve disputes, and section 12.2 addressing direct party discussion may need to be modified to implement Guided Choice mediation as spelled out in more detail in the following article: "Guided Choice: Early Mediated Settlements and/or Customized Arbitrations," *Journal of the American College of Construction Lawyers*, Vol. 7, No 2, Summer 2013 by Paul Lurie.

Guide Choice mediation is used as early as possible in the dispute in which clients drive decisions and customize the mediation process. It does not require major changes to the ConsensusDocs contractual dispute resolution terms, except as noted above. Mediators help the parties customize the dispute resolution process based on their understanding of what impasses must be overcome to reach a settlement. Proper diagnosis is essential to a successful mediation process.



AGC comments for ConsensusDocs 500:

(Additional comments by AGC can be found on AGC's website at members only page of http://www.agc.org/galleries/members-only/AGC-only_ConsensusDocs_Guidebook.pdf for many of the ConsensusDocs documents.)

Design Authority and Responsibilities (section 2.3 and 3.1.6): Under the *Spearin Doctrine*, the Party responsible for furnishing the completed design impliedly warrants its sufficiency and adequacy. *United States v. Spearin, 248 U.S. 132 (1918)*. Contractors need to carefully consider the effect of specifying any design responsibilities in this fill-in-the-blank section. Also, a Construction Manager should pay particular attention to the ramifications of performance specifications, equipment selections, preparation of shop drawings, and the like in the context of section 2.3. Similarly, post-award actions such as Construction Manager initiated value-engineering changes may alter the Parties' responsibilities for the adequacy of the design of a particular system on the Project. These actions may shift risk for design responsibilities to the Construction Manager. In addition, Construction Managers should be wary of modifications that add disclaimers to shift the risk of design flaws to a Party that was not responsible for the preparation of the design.

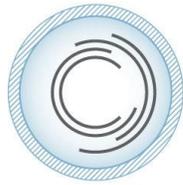
Definition of Overhead (sections 2.4.10 and 3.8.3): The definition of "Overhead" includes cost incurred on any insurance policy and costs related to the correction of defective work. Under many standard industry contract forms, these costs are considered Cost of the Work, subject to the Guaranteed Maximum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

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

Preconstruction Services (sections 3.3.1 and 7.5): The Agreement provides the cost of reconstruction Services is not included in the Guaranteed Maximum Price, but is to be paid as a separate payment. Often, Owners would prefer to have Preconstruction Services included in the Guaranteed Maximum Price and paid when the Project financing closes. The manner in which Preconstruction Services will be paid for should be addressed during the negotiations and the Agreement should be reviewed or modified to confirm that it is consistent with the treatment of payment for Preconstruction Services agreed to between the Parties.

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

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



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

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

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

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

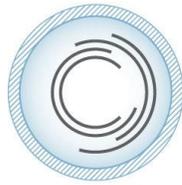
Professional Services (section 3.16): When taking on design responsibility (See section 2.3), the Construction Manager should also consider the provisions of section 3.16 that obligate it to obtain professional services from licensed design professionals and to require the design professionals to stamp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

Digitized Documents (section 4.6.1): Electronic documents are increasingly being used by the industry. If electronic documents are to be the primary source of design documents for the Project, this provision may need to be modified to accurately describe the manner in which Contract Documents are to be provided. This provision requires a protocol to be established relating to the use of electronic documents. Construction Managers are strongly encouraged to use the protocol set forth in ConsensusDocs 200.2 to ensure that the risks associated with the use of electronic documents are clearly understood by all the Parties to a contract. At a minimum, the 200.2 can allow Construction Managers to rely upon e-mails and faxes, if the document is completed to indicate such a desire.

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

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

Liquidated Damages (section 6.6): Section 6.6 is an optional liquidated damages provision, which allows the Parties to elect whether to provide for liquidated damages. Although AGC members generally view liquidated damages negatively, and AGC advises Construction Managers to take extreme caution before electing to provide any liquidated damages in this section, liquidated



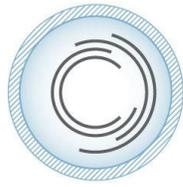
damages are generally a better risk management arrangement than leaving the Construction Manager potentially exposed for actual damages related to delayed completion, which can be highly speculative and excessive. Liquidated damages are intended to compensate the Owner (and serve as a substitute for) the Owner's actual delay damages, such as lost revenues. Thus, a contract that allows the Owner to recover liquidated damages, but otherwise bars both Parties from collecting consequential damages, is not truly mutual. If liquidated damages are elected, the Construction Manager should recognize that the limited mutual waiver of consequential damages provision contained in section 6.7 is not truly mutual. To make the provision truly mutual, it can be modified to also provide for a stipulated payment to the Construction Manager for delays in completion of the Project caused by the Owner. In addition, Construction Managers should not agree to liquidated damages measured from final completion because the Owner generally does not suffer delay damages following Substantial Completion because the Owner has beneficial use of the Project following Substantial Completion.

Note that this section contains blanks for the Parties to fill in to establish the appropriate dollar amounts (one tied to substantial completion and one tied to final completion) to be paid for each day completion is delayed if the Parties elect to provide for liquidated damages. If liquidated damages are included in the Contract, the Construction Manager may want to include a cap to the total amount of liquidated damages that may be assessed, which should be no more than a percentage of the fee to be earned by the Construction Manager.

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

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

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



Retainage (section 10.2.4.1): This provision is important so that Construction Managers may ensure that payment flows in a fair and equitable manner. The Owner is required to release retainage applying to work of early finishing Subcontractors upon acceptance of such work. Once the work is 50% complete, the Owner shall not withhold any additional retainage.

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

Adjustment of Construction Manager's Payment Application (section 9.3.7): This provision allows an Owner to withhold payment if a third party files a claim, unless a Construction Manager furnishes the Owner with adequate security in the form of a Surety bond, letter of credit or other collateral or commitment sufficient to discharge such claims if established. Construction Managers should provide more specificity regarding adequate security. If there is a bond in place, no additional security should be required besides consent to payment by the Surety after acknowledging the existence of the claim. If it is a lien claim, the Construction Manager should be required to bond around the lien in accordance with applicable statutory requirements.

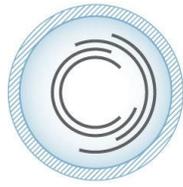
Some Construction Managers report abuse of the right to withhold payment, even after adequate security has been provided.

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

Indemnity (section 11.1): The Parties' indemnity obligation is limited to the extent of the Parties' negligence and covers only insurable risks, i.e., personal injury (including death) and property damage. Either Party is entitled to reimbursement of defense costs paid in excess of that Party's percentage of liability for the underlying claim. Construction Managers should be vigilant during contract negotiations, and should only agree to broaden risks covered (if requested by the Owner) with full knowledge and understanding of the impact of a broader standard on the Construction Manager's anticipated profitability and fee.

Indemnitees also include the Architect/Engineer, and "Others." The term "Others" should be defined or stricken if not defined, from the Construction Manager's standpoint, as it represents a potential broadening of the indemnity obligation to persons or companies who the Parties may not have actually intended to benefit from the indemnity.

Duty to Defend (section 11.1–11.3): Given the reciprocal indemnity obligations in the ConsensusDocs forms, and the pure comparative causation standard, there is not a duty to defend. A Construction Manager who is liable under the indemnity provision is obligated to reimburse the indemnified Party for that Party's legal fees to the extent of the Construction Manager's percentage of liability (which may as a practical matter create a willingness to defend). But as a matter of contract obligation, there is no duty to defend of the Construction Manager vis-à-vis the Owner, or of a Subcontractor vis-à-vis the Construction Manager. For some Construction Managers, the desire to invoke a Subcontractor's duty to defend will outweigh the Construction Manager's desire



not to have to defend the Owner. Construction Managers will need to assess this aspect of the indemnity carefully, and discuss it with their risk managers or brokers, in order to assure themselves that the proper stance is taken on this issue relative to the Construction Manager's insurance program.

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

Additional Liability Coverage (section 11.5): An Owner should decide whether to require the Construction Manager to purchase additional insured coverage for the Owner. If so, the Owner can then decide whether it wants to choose additional insured coverage or Owners' and Contractors' Protective Liability Insurance ("OCP"). If an Owner selects OCP coverage, an Owner may desire additional insured protection for completed operations in addition to OCP coverage. If agreed upon by the Construction Manager, this should be accomplished by striking "operations" in this section and then checking both boxes.

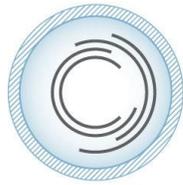
Any additional cost incurred by the Construction Manager for purchasing additional insured or OCP coverage shall be paid by the Owner and should be included in the Guaranteed Maximum Price.

Owner's Termination for Convenience (section 11.4): If an Owner elects to terminate for convenience there is a premium payment. This payment is not a penalty, but rather reflects a Construction Manager's lost business opportunity. This section is carefully crafted to balance Construction Managers' and Owners' interests and risks.

Dispute Mitigation and Resolution (article 13): This article focuses on mitigation of claims by directing direct discussions between the Parties. It then allows the Parties to use either a previously selected Project Neutral or a dispute review board. If the Parties decide not to use a Project Neutral or dispute review board, the issue then goes to mediation followed by a binding dispute resolution process of the Parties' choosing. If the process goes this far, any decision made by the Project Neutral or the dispute review board can be introduced as evidence at a binding adjudication of the matter.

Work Continuance and Payment (section 13.1): The Parties must continue to perform their obligations under the contract, pending resolution of any dispute. Thus the Construction Manager continues to perform its work under the contract and the Owner continues to make payments to the Construction Manager for those amounts not in dispute during the pendency of any dispute resolution proceedings.

Direct Discussions (section 13.2): In the event the Parties cannot reach an Agreement about the matter in dispute, they are obligated to engage in "good faith" negotiations at the next level in a multiple step approach which moves from field representative to those representatives with greater authority in an effort to resolve the dispute. If resolution is not achieved within five business days of the first discussion, it moves to the next level of senior executives, and if resolution fails within 15 days of the first discussion, it moves to mitigation.



Mitigation and Mitigation Procedures (section 13.3): Initially the Parties have the option to select either a Project Neutral or Dispute Review Board for the mitigation procedure. The Project Neutral/Dispute Review Board is subject to a separate retainer Agreement between the Parties and is obligated to issue nonbinding finding(s) within five business days of referral of the dispute. If Parties do not check either of the fill-in-the-blank options, then the procedures provided in this section are not required.

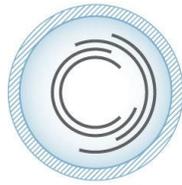
Mediation (section 13.4): If the Parties do not select a mitigation procedure in section 13.3, disputes that are not resolved through the direct discussions called for under section 13.2 shall be submitted to mediation. The Parties have the option of using the Construction Mediation Rules of the American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

Binding Dispute Resolution (section 13.5): In previous AGC contract Agreements, the dispute resolution section was a separate exhibit. The ConsensusDocs includes this section in the contracts and includes fill-in-the box options. If mediation fails to resolve a dispute, the Parties submit the matter to binding dispute resolution using either the current Construction Industry Rules of the American Arbitration Association or litigation in a state or federal court. The Parties, however, are free to select another set of rules. The costs of the binding dispute resolution process are to be borne by the non-prevailing Party as determined by the Neutral.

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

Multi-party Proceedings (section 13.6): Appropriate provisions are to be included in all other contracts relating to the Project to provide for joinder or consolidation of such dispute resolution procedures.

Lien Rights (section 13.7): Nothing contained in the dispute resolution procedures is to limit any lien rights unless expressly waived.



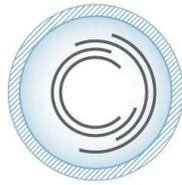
Shared Savings (proposed new section 2.1 for Amendment 1 to ConsensusDocs 500):

2.1 Shared Savings

2.1.1 If the final Contract Sum (Cost of the Work plus Construction Manager's Fee) is less than the Guaranteed Maximum Price (as may be adjusted by Amendment or Change Order), such savings ("Savings"), shall be distributed as follows:

- *On the first ten million dollars (\$10,000,000) of Savings, eighty percent (80%) shall be retained by Owner and twenty percent (20%) shall be paid to Construction Manager as a Shared Savings Bonus;*
- *On the next ten million dollars (\$10,000,000) of Savings (i.e., Savings dollars \$10,000,001 through \$20,000,000), seventy percent (70%) shall be retained by Owner and thirty percent (30%) shall be paid to Construction Manager as an increase of the Shared Savings Bonus;*
- *On the next ten million dollars (\$10,000,000) of Savings (i.e., Savings dollars \$20,000,001 through \$30,000,000), sixty percent (60%) shall be retained by Owner and forty percent (40%) shall be paid to Construction Manager as an increase of the Shared Savings Bonus; and*
- *On any Savings above thirty million (\$30,000,000) (in addition to the Shared Savings Bonus of \$9,000,000 applicable to the \$30,000,000 in Savings (20% of the first \$10,000,000, plus 30% of the second \$10,000,000, plus 40% of the third \$10,000,000), ninety-six percent (96%) shall be retained by Owner and four percent (4%) shall be paid to Construction Manager as an increase of the Shared Savings Bonus (to reimburse Construction Manager for the diminished Construction Manager's Fee as a result of the additional Savings).*

Notwithstanding the foregoing, Construction Manager shall not be entitled to participate in any savings resulting from the actual Cost of the Work for an allowance item being less than the allowance amount for that item or any savings resulting from or associated with scope decreases.



Comments regarding ConsensusDocs 702* **Standard Purchase Order for Commodity Goods**

Overview:

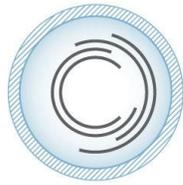
This document along with the 702A General Terms and Conditions document, possess similar terms to the ConsensusDocs 703 Purchase Agreement, however, the terms and structure is simplified for commodity goods as well as some non-applicable terms for commodity purchases have been eliminated. Significantly, the Order form and the General Conditions are separate documents.

Materials or Equipment, Unit Description (article 2): Include plan, specifications and incidental services, as applicable. If significant additional services or detailed specifications are required, consider using "ConsensusDocs 703 - Standard Purchase Agreement for Noncommodity Goods By a Contractor".

Price (article 3): Sales and use taxes have been separated from the overall Agreement price so as to reduce bonding costs, which are based on the overall Agreement price.

If applicable, the Buyer should send copies of documented tax exemption certificates for Seller's files prior to executing the Purchase Order to confirm whether to purchase qualifies as tax-exempt. Otherwise, the Seller should charge applicable taxes.

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Comments and Recommendations regarding ConsensusDocs 702.1* **Terms and Conditions for Purchase Order for Commodity Goods**

Exhibits and Documents (article 1): If a detailed Progress Schedule or other details are required, consider using "*ConsensusDocs 703 - Standard Purchase Agreement for Noncommodity Goods By a Contractor*".

Changes (article 4): The Parties may consider use of "ConsensusDocs Addendum 200.1. Time and Price Impacted Materials and Schedule A to incorporate price-escalation terms if appropriate.

Shipping (article 8): If shipping instructions change they may cause a change pursuant to the Changes article.

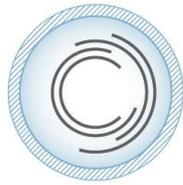
Binding Dispute Resolution (section 19.3): Users may wish to modify this section depending upon the local jurisdiction of the project. Jurisdictions with unique state laws may cause the parties to scrutinize and negotiate which jurisdictional laws should govern this contract.

Section 19.4: Users may wish to provide for a definition of 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 the Party defending against such claim is found to be not liable to pay all or substantially all of the disputed amounts claimed by the other party, then the Party so defending against such claim shall be the prevailing Party. If both Parties prevail with respect to different claims, then the Party who is prevailing with respect to the greater monetary sum shall be deemed the prevailing party."

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—From the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations



Comments and Recommendations regarding ConsensusDocs 703* Purchase Agreement for Noncommodity Goods

Materials and Equipment (article 2): Include plan and specification references with specific sections, and incidental services, as applicable.

Price (article 3): Sales and use taxes have been separated from the overall Agreement price so as to reduce bonding costs, which are based on the overall Agreement price.

Exhibits and Documents (article 4): “Buyers should be aware that the practice of attaching the Seller’s form of standard terms and conditions to a Purchase Order or Purchase Agreement may be deemed ‘assent’ in some jurisdictions. Buyers should consult with legal counsel regarding the effect of attachment of the Seller’s terms and conditions. It is recommended that agreed terms and conditions be set out in an attachment to the Purchase Order by listing agreed Clarifications and Exceptions.”

Shipping (article 11): If shipping instruction change they may cause a change pursuant to the Changes article.

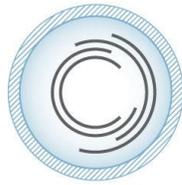
Termination for Convenience (article 15): The reference to cost plus percentage for overhead includes engineering goods that haven’t been delivered and are fabricated for a specific project. A routine product that can be restocked or potentially recover some of the value would lead to a lower charge under this provision.

Warranty (article 16): This includes including any implied warranty of merchantability or fitness for a particular purpose.

Payment and Liens (article 17): Recommend that Owner and Buyer attach an acceptable lien waiver form to this Agreement.

Indemnity (article 20): This provision does not address if the product is used for purposes that are not originally intended. Misuse of a product would potentially be determined in litigation and is project specific.

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Compliance with Laws (article 23): Add in Notes section, Indicated in article 1.

Governing Law (article 26): Users may wish to modify this section depending upon the local jurisdiction of the project. Jurisdictions with unique state laws may cause the parties to scrutinize and negotiate which jurisdiction's laws should govern the project.

Binding Dispute Resolution (section 27.4): Users may wish to modify this section depending upon the local jurisdiction of the project. Jurisdictions with unique state laws may cause the parties to scrutinize and negotiate which jurisdictional laws should govern this contract.

Section 27.5: Users may wish to provide for a definition of prevailing party. The force and effect of such definition may vary based on state law. One possible example is as follows:

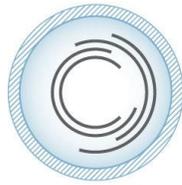
If a party claiming a right to payment of an amount in dispute is awarded all or substantially all of such disputed amount, then such claiming party shall be the prevailing party. If a party defending against such claim is found to be not liable to pay all or substantially all of the disputed amounts 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.

Venue (section 27.6): Users may wish to modify this section depending upon the local jurisdiction of the project. Jurisdictions with unique state laws may cause the parties to scrutinize and negotiate which jurisdictional laws should govern this contract.

Limitation of Liability (article 29): This is a critical provision that User should select carefully. Endorsing organizations have to provide additional comments on this point.

AGC Comments for ConsensusDocs 703:

Limitation of Liability (article 29): AGC members indicated that the standard option would be to check the box that does not limit liability, unless the Constructor has the appropriate upstream provision in its prime agreement with the owner. The Constructor is likely to be responsible for direct damages that flow from damages, and therefore limiting the Supplier's liability would create a potential liability gap.



Comments regarding ConsensusDocs 750* **Agreement Between Constructor and Subcontractor**

Extent of Agreement (section 2.5): The “Extent of the Agreement” section from what was section 2.5 has been moved to section 12.1 and added to all ConsensusDocs agreements, including short forms.

Section 2.5.1.1, exhibit E: This exhibit should state specific responsibilities of the Subcontractor, and Constructor.

Emergencies (section 3.17): Formerly section 7.8.

Assignment of Subcontract Work (formerly section 3.17) was moved to the Misc. section in 12.2

Layout Responsibilities and Levels (section 3.21): Warranties was moved to section 3.13.

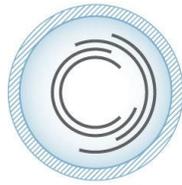
Claims Relating to the Constructor (section 5.3.4): This clarifying sentence was in the original 450 subcontract and was added to appear in the 750.

Subcontract Amount, (c) (article 6): If appropriate, the following incentives clause is suggested. To extent awarded in the prime agreement and Constructor has received such payment from the Owner, Subcontractor shall receive an incentive award based upon early completion; provide Subcontractor adequate notice prior to Substantial Completion.

Time of Payment (section 8.2.5): “What constitutes reasonable is a controversial subject that varies from state to state based upon state statutes and case law.”

Section 8.2.7.2: Insurance coverage implies that there is a positive indication that there is an acceptance of liability for the loss.

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AGC Comments for ConsensusDocs 750:

(Additional comments on this document can be found on AGC's website at members only page of http://www.agc.org/galleries/members-only/AGC-only_ConsensusDocs_Guidebook.pdf)

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

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

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

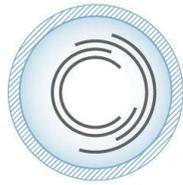
Supremacy of Documents (section 3.1): In order to eliminate potential liability gaps between obligations owed to the Owner and those passed to the Subcontractor which may have direct responsibility for such obligation, strike "this Agreement" in the last sentence and replace with Prime Agreement.

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

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

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

Time and Cost Adjustments (section 5.2): This section now explicitly allows for an increase in the Subcontract Time and Subcontract Cost if Contractor's schedule changes impact the Subcontractor's schedule and costs. The Contractor will want to make sure to include a "no damage



for delay” provision instead of this section in instances where the Agreement Between Owner and Contractor does not allow the Contractor to recover additional costs as a result of delay.

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

Pay-When-Paid / Pay-if-Paid (section 8.2.5): This payment provision provides that the Constructor must pay the Subcontractor within 7 days of Owner’s payment to Contractor upon receiving payment from the Owner. This section mirrors prompt pay laws in the majority of states in that it provides for payment to the Subcontractor within a reasonable time if, through no fault of the Subcontractor, the Owner fails to timely pay the Constructor. The contingent nature of receiving payment from the Owner is commonly referred to a “Pay-When-Paid” clause. What differentiates this from a Pay-if-Paid, is that the Constructor must ultimately pay the Subcontractor for the Subcontractor within a reasonable time. Under a “Pay-if-Paid” clause, owner nonpayment would result in nonpayment to the Subcontractor. The obligation to pay AGC members should check applicable law carefully before modifying this section as a “pay if paid” clause shifting risk of receiving payment to the Subcontractor may not be fully enforceable because of state law.

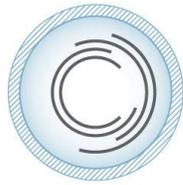
ConsensusDocs only includes a pay-when paid subcontract. However, ConsensusDocs 750 can easily be modified to incorporate a pay-if-paid clause by adding the following to the beginning of section 8.2.5:

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

Some AGC members believe that a “pay-if-paid” clause equitably shares the risk of Owner non-payment, while other specialty members of AGC view such provisions as unreasonably withholding payment that derives from a separate contract with the Subcontractor. AGC of America does not have an affirmative policy position on which approach is fairer or appropriate.

The last edition date of an AGC pay-if-paid subcontract (AGC 604 or AGC 655) was 1998, and AGC of America no longer offers a pay-if-paid provision to new purchasers of documents. If you are being presented an AGC of America paper contract, it may be that the user of the document is making copies of the agreement in violation of the copyright, and you may consider contacting AGC contract documents staff at perlbergb@agc.org).

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



Indemnification (section 9.1): This section has new language providing Subcontractor indemnification to Contractor, Architect/Engineer and Owner for all claims for bodily injury and property damage, other than to the work itself, which mirrors standard commercial general liability insurance coverage language. This section also allows for the Subcontractor to be reimbursed for the percentage of liability in the claim attributable to the negligent acts or omissions of the Owner, Contractor and Architect/Engineer. Such reimbursement was not previously included in the previous and defunct AGC 650 or 655 Subcontracts. The Contractor will want to carefully review insurance obligations in the Agreement Between Owner and Contractor to make sure any special obligations imposed on the Contractor are similarly imposed on the Subcontractor so there is no gap in insurance coverage for these types of losses.

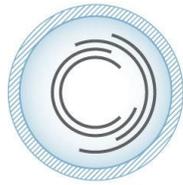
Additional Insured: Several new sections (9.2.11-9.2.11.1) provide “check the box” options creating the Subcontractor’s duty to provide additional liability coverage, the listing of the Contractor as an additional insured on Subcontractor’s CGL policy (which was not addressed at all in the AGC 650) and whether the Subcontractor has a duty to provide Owners’ and

Contractors’ Protective Liability Insurance (“OCP”) (subparagraph 11.5.2.2): If OCP coverage is selected, a Contractor may desire additional insured protection for completed operations in addition to OCP coverage. This can be accomplished by striking “operations” in this section and then checking both boxes. Note: any additional cost incurred by the Subcontractor for purchasing such coverage shall be paid by the Contract, which should be reimbursable by the Owner if a consistent option is chosen in the ConsensusDocs 200 Owner-Contract Agreement.

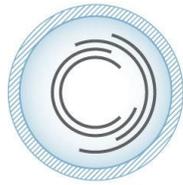
Time and Price Adjustments (section 10.3): This section now explicitly provides for Subcontractor to receive an adjustment to its Time and Price via Change Order to the extent the Agreement Between Owner and Contractor permits the Contractor to receive such adjustments. Thus, the Subcontractor may seek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

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

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



contract should be on guard when negotiating this section and should modify it accordingly to provide for the recovery of attorneys' fees, if desired.



Comments regarding ConsensusDocs 751* Short Form Agreement Between Contractor and Subcontractor

AGC Comments for ConsensusDocs 751:

Pay-When-Paid / Pay-if-Paid (section 9.4): This payment provision provides that the Constructor must pay the Subcontractor within 7 days of Owner's payment to Contractor upon receiving payment from the Owner. This section mirrors prompt pay laws in the majority of states in that it provides for payment to the Subcontractor within a reasonable time if, through no fault of the Subcontractor, the Owner fails to timely pay the Constructor. The contingent nature of receiving payment from the Owner is commonly referred to a "Pay-When-Paid" clause. What differentiates this from a Pay-if-Paid, is that the Constructor must ultimately pay the Subcontractor for the Subcontractor within a reasonable time. Under a "Pay-if-Paid" clause, owner nonpayment would result in nonpayment to the Subcontractor. The obligation to pay AGC members should check applicable law carefully before modifying this section as a "pay if paid" clause shifting risk of receiving payment to the Subcontractor may not be fully enforceable because of state law.

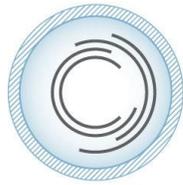
ConsensusDocs only includes a pay-when paid subcontract. However, ConsensusDocs 750 can easily be modified to incorporate a pay-if-paid clause by adding the following to the beginning of section 9.4:

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

Some AGC members believe that a "pay-if-paid" clause equitably shares the risk of Owner non-payment, while other specialty members of AGC view such provisions as unreasonably withholding payment that derives from a separate contract with the Subcontractor. AGC of America does not have an affirmative policy position on which approach is fairer or appropriate.

The last edition date of an AGC pay-if-paid subcontract (AGC 604 or 655) is 1998, and AGC no longer offers a pay-if-paid provision to new purchasers of documents. If you are being presented an AGC of America paper contract, it may be that the user of the document is making copies of the agreement in violation of the copyright, and you may consider contacting AGC contract documents staff perlbergb@agc.org).

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Comments and Recommendations regarding ConsensusDocs 752* **Standard Subcontract Agreement for Use on** **Federal Government Construction Projects**

Other FAR Provisions and Documents (section 12.14): One of the most important things to include in a subcontract for federal work or federally financially assisted work is flowing down the proper federal acquisition regulation (FAR) clauses down to the subcontract level in a consistent manner as the Prime Contract. Users should consider FAR Provisions exhibit included in the ConsensusDocs contracts software as a separate document in producing the exhibit referenced in section 12.14.

AGC Comments for ConsensusDocs 752:

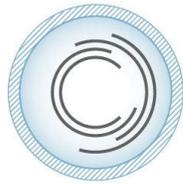
Section 3.1: A potential liability gap might result if the Constructor/General Contractor is responsible to the federal Owner but not be able to pass that equal responsibility to the Subcontractor in the Subcontract Agreement. Therefore, AGC members should consider the following modification:

Revise the last sentence of ~~Article~~ section 3.1 to read as follows: "In the event of an inconsistency among the documents, the specific terms of ~~this Agreement~~ THE PRIME AGREEMENT shall govern.

One example of how the above the revision might come into play is the requirements in section 3.4 of the Subcontractor to conduct a visual inspection of the Worksite, where it is common of the federal Owner to obligate the Construction/General Contractor to have a higher duty to perform independent subsurface investigations to satisfy its obligations to inspect the Worksite.

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—From the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations



Comments and Recommendations regarding ConsensusDocs 803* Agreement Between Owner and Design Professional

Schedule of Exhibits (article 11): Delete the reference to “Exhibit E: Dispute Resolution Menu.” This reference is being struck due to the fact that this information is already incorporated into the document (see article 8).

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