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

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AGC Member-Only Comments to the ConsensusDocs 200 Standard Agreement Between Owner and Constructor with General Terms and Conditions*

These comments were created by a working group of the AGC Contract Documents Forum (CDF) and approved by the CDF. This document is intended to provide insights from the General Contractor's perspective on important risk allocation issues and ways General Contractors may want to consider in negotiating their contracts. AGC members may use this document as a resource in negotiating ConsensusDocs standard contracts, other standard construction contract documents, and "bespoke" or "manuscript" contracts. Most construction contracts cover the same construction law and business practice issues. Updates to this document can be found on the members-only section of the AGC Contracts and Law website, https://www.agc.org/industry-priorities/contracts-law. This page also contains information on the AGC Contract Documents Forum (CDF). Questions on how to get involved or about this document may be directed to Brian Perlberg, AGC Senior Counsel for Construction Law, at brian.perlberg@agc.org.

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

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

Design Authority and Responsibilities (§2.3): Under the *Spearin Doctrine*, the Party responsible for furnishing the completed design impliedly warrants its sufficiency and adequacy. *United*

* This publication is designed to provide information regarding the subject matter covered. It is published with the understanding that the publisher, AGC, 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

States v. Spearin, 248 U.S. 132 (1918). Therefore, under *Spearin*, an Owner who provides a design to the Constructor warrants the design, if followed, will be adequate. For design-bid-build delivery, a Constructor who receives Owner-issued design information must carefully consider how – if at all – to assist the design process. For example, §3.15 identifies any scope of work where the contract delegates design to the Constructor. The more involved the Constructor is in the design process, the more like the Constructor erodes the *Spearin Doctrine* and exposes itself to potential design-based liability with different legal risks, timelines, procedures, and insurance needs. Carefully consider the effect of specifying and/or performing any design responsibilities. Also, pay particular attention to any performance specifications (whereby the Constructor promises the Work will function as intended), equipment selections, Owner-dictated vendor usage, and the like in the context of §2.3. Similarly, post-award actions such as Constructor-initiated value-engineering changes may alter the Constructor's design risk. In addition, the Constructor should avoid contract language that disclaims or shifts the risk of design flaws to the Constructor when it played no part in the preparation of the design. If the Constructor wishes to unequivocally state it has no design role, it can add the word "expressly" between "services" and "delegated" in subsection (a) and delete subsection (b).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Submittals (§3.14.1): Construction contracts commonly require the Constructor to perform the Work per approved submittals, yet also strictly follow the Contract Documents. Those two concepts can conflict. Here the Constructor must obtain a change order for any differences between an approved submittal and the Contract Documents. This process can be cumbersome, especially when the submittal process is used to clarify ambiguities or conflicts in the Contract Documents. The Constructor may wish to revise this section, removing the change order requirement for clarifications, and more clearly defining the circumstances when a change order is required if specific approval was given in a submittal response.

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

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

Financial Information (§4.2): For purposes of §4.2, the Parties can use ConsensusDocs 290.1 (Owner Financial Questionnaire). ConsensusDocs 290 (Guidelines for Obtaining Owner Financial Information) provides additional guidance for requesting the owner's financial information. If the Owner argues against such provisions, the Constructor may offer to limit its right to demand financial information after work starts to only those situations when payment is missed, or an event occurs that puts the Owner's ability to make future payments in reasonable

doubt. Further, the Constructor may wish to revise the last sentence to require the Owner to disclose any additional terms, approvals, authority constraints, or limits imposed on it by Project lenders or others.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Another potential issue regarding the use of float may exist concerning schedule gains earned by the Constructor during the Project. Constructors may also wish to consider modifying the language in sections 6.2 or 6.3 to reserve for themselves the right to use the float created by schedule gains created by early completion of critical path activities throughout the Project (i.e., the difference between the contractual completion deadline and the completion of the last critical path activity). Comprehensive language may also have the effect of reserving the Constructor's right to early completion or cutting off the Owner's argument that it has the right to delay prompt determination of the Constructor's delay notices under the theory that, even though an impact occurred, a time extension ultimately may not be necessary because of the float created by the Constructor's schedule gains. To avoid that scenario, the Constructor may wish to clarify that the Constructor controls the use of all of the float on the Project for its benefit.

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

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

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

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

Limited Mutual Waiver of Consequential Damages (sections 6.5 and 6.5.1): The Parties agree to waive Consequential Damages except for Liquidated Damages, damages covered by contract-required insurance, and other mutually agreed items. A consequential damages waiver usually is very beneficial to the Constructor, so any exceptions (even the ones listed above) should be carefully considered. For example, whether to allow Consequential Damages covered by insurance involves such considerations as who is providing insurance, what insurance is required, and how, if at all, responsibility for deductibles is assigned. There is precedent in the construction industry to waive consequential damages without any insurance exception. Those damages often depend upon the Owner's business dealings with non-Constructor Parties – matters over which Constructor has limited or no control. If the Parties elect to use this term for insurance-covered items, the Constructor may wish to limit it to matters "covered **and paid for** by insurance…."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Adjustment of Constructor's Payment Application (§9.3.7): This provision allows an Owner to withhold payment if a third-party files a claim unless a Constructor furnishes the Owner with adequate security in the form of a surety bond, letter of credit, or other collateral or commitment which are sufficient to discharge such claims if established. The Constructor may wish to delete this section to allow for a scenario where it disputes a subcontractor claim. At the least, the Constructor may wish to provide more specificity and clarity here regarding adequate security. For example, if a payment bond is in place, no additional security should be required besides consent to payment by the surety after acknowledging the claim's existence. If it is a lien claim,

the Constructor can bond around the lien in accordance with applicable statutory requirements. This section also should clearly state that if the specified security is provided, the Owner is obligated to make payment.

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

Payment Delay (§9.5): While §9.2.1 defines the payment due date, the Constructor may wish to change "may seek an equitable adjustment" in the second sentence to "shall be entitled to an equitable adjustment.". The rationale for this change is because the Constructor did not cause the delayed payment.

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

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

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

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

retention amount is incurred. In that instance, the Parties may wish to clarify that the obligation to provide defense applies before satisfaction of the retention amount, even if self-funded.

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

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

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

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

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

greater amount sufficient to cover the potential losses. In that case, the Owner compensates the Constructor for the additional premium cost.

Additional General Liability Coverage (§10.4): An Owner should decide whether to require the Constructor to purchase additional insured coverage for the Owner. If so, the Owner can then determine if it wants to choose additional insured coverage or Owners' and Contractors' Protective Liability Insurance ("OCP"). If an Owner selects OCP coverage, an Owner may desire additional insured protection for completed operations in addition to OCP coverage. If the Constructor agrees, this should be accomplished by striking "operations" in this section and then check both boxes.

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

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

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

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

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

Direct Discussions (§12.2): If the Parties cannot reach an agreement about the matter in dispute, they are obligated to engage in "good faith" negotiations at the next level in a step approach that moves from field representative to those representatives with greater authority to resolve the

dispute; then if the resolution is not achieved within five business days of the first discussion, it moves to the next level of senior executives, and if resolution fails within fifteen days of the first discussion, it moves to mitigation.

Mitigation (§12.3): Initially, the Parties can select either a Project Neutral or DRB for the mitigation procedure. The Project Neutral/DRB is subject to a separate retainer agreement between the Parties. It is obligated to issue a nonbinding finding within five business days of referral of the dispute. If Parties do not check either of the fill-in-the-blank options, then the procedures provided in this section are not required.

Binding Dispute Resolution (§12.5): If mediation fails to resolve a dispute, the Parties submit the matter to binding dispute resolution using either the current Construction Industry Rules of the American Arbitration Association or litigation in a state or federal court. The Parties, however, are free to select another set of rules. The costs of the binding dispute resolution process are borne by the non-prevailing Party as determined by the Neutral. If the parties choose litigation, the Constructor should consider whether a mutual jury waiver is in its best interest; this may benefit a Constructor from out of town.

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

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

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

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

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

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

Multiparty Proceeding (§12.6): Appropriate provisions are to be included in all other contracts relating to the Project to provide for joinder or consolidation of such dispute resolution procedures. This will assist the consolidation of related dispute resolution proceedings involving other parties, such as design professionals or Subcontractors.

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

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

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

AGC Member-Only Comments to the ConsensusDocs 750 Standard Agreement Between Constructor and Subcontractor

Preamble: ConsensusDocs contract forms now contain prompts for job number and account code to assist contract organization and tracking.

Avoidance of Conflicts (§ 2.1.1): A warranty is included 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. In many jurisdictions, there is no implied obligation for parties to a contract to act in good faith and deal fairly with each other. While that obligation is included in § 2.1, this section is not intended to create a fiduciary relationship between the Parties. In jurisdictions that tend to interpret such language more broadly (particularly with the term "economical"), the Constructor may wish to add a clause clarifying that no fiduciary obligation exists.

Subcontract Work (§ 2.2): To clarify that the Subcontractor is responsible for its means and methods, the Constructor may wish to add a sentence at the end of this paragraph that states, "Notwithstanding the foregoing, Subcontractor is responsible for its own means and methods in performing the Subcontract Work."

Electronic Communications (§ 2.4.1): This subsection sets out a written protocol for the exchange, storage, and retrieval of electronic documents (which can be used in conjunction with the Consensus Document 200.2, the Electronic Communications Addendum). The Constructor will want to craft a protocol with the Owner tailored to anticipated Project communications and then make sure Subcontractors follow the same protocol during Project performance. If litigation results and e-discovery is an issue, preserving electronic information by all Parties consistent with their agreed-upon protocol can help limit the Constructor's liability. To avoid the potential that a Subcontractor could later claim that the Subcontract Documents were not provided in advance of contract signing, the second sentence should be replaced with the following, "Subcontractor acknowledges that Constructor has provided Subcontractor with access to all existing Subcontract Documents before execution of this Agreement."

Conflicts (§ 2.5): This section states that in the event of a conflict with "other Subcontract Documents," the subcontract governs. However, under § 2.4, the term "Subcontract Documents" also includes the "Prime Agreement," *i.e.*, the Prime Agreement between the Constructor and the Owner. From a Constructor's perspective, providing that a subcontract controls over the Prime Agreement may not be desirable or even possible under the Prime Agreement terms. In this case, § 2.5 should be deleted entirely. If elected, this edit requires modification to § 3.1 and 13.1.5.

Subcontract Work Exhibit (§ 2.5.1.1): This exhibit should state the specific responsibilities of the Subcontractor and the Constructor.

Definitions (§ 2.6): 2.6.1.1: The contracting Parties should take great care when completing this list of exhibits because any exhibit listed is part of the contract. Note that ConsensusDocs are not

jurisdiction specific. Consider adding an exhibit to incorporate any terms required by or necessary in a particular jurisdiction. For example, the Constructor may want to include any required lien release forms required by the Prime Agreement with the Owner.

2.6.8: Consider adding a provision defining the start date for the Subcontract Work. For example, the Constructor could add the following provision: "Subcontractor shall start the Subcontract Work upon receiving a notice to proceed from Constructor."

2.6.10: Add a new definition for Prime Agreement: "Prime Agreement means the agreement between Constructor and Owner for the construction of the Project." If this definition is added, all references to "Prime Contract" must be updated to "Prime Agreement, unless there are any references to the prime between the owner and design professional."

Obligations (§ 3.1): This section intends to flow down mutual obligations in the Prime Agreement, making the relationship between the Constructor and the Subcontractor mirror the relationship between the Owner and the Constructor. However, if the Constructor does not want its obligations to the Subcontractor to mirror the Owner's obligations toward the Constructor, this section should be modified. Delete the first two sentences of this section and, in the third sentence, delete "in an identical way." To eliminate potential conflicts between the Subcontract and Prime Agreement, delete the last sentence and replace it with: "In the event of an inconsistency or conflict among the Subcontract Documents, the greater quantity, better quality, stricter provision, or higher standard governs."

Standard of Care (§ 3.2): Replace "diligent efforts" with "best skill and judgment." Add the following to the end of § 3.2: "Subcontractor represents that it is duly licensed and possesses the sufficient experience to perform fully its obligations under this Agreement."

Increased Costs or Time (§ 3.5): Replace "assert a claim" with "seek a Change Order" in the first sentence.

Coordination (§ 3.9): If the Constructor has an obligation under the Prime Agreement to coordinate work with separate contractors hired by the Owner, such obligation should also be included in this section.

Safety Programs (§ 3.14.4): Modify the last sentence as follows, "Damage or loss to the extent caused by the negligent or intentionally wrongful acts or omissions of Constructor, shall be promptly remedied by Constructor. To the extent a third party causes the damage or loss, Constructor will cooperate in any action brought by Subcontractor against that third party for recovery."

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

Correction of Work (§ 3.21.2.2): This section requires the Subcontractor to correct, upon receipt of a written notice from the Constructor, Subcontract Work that is defective. However, the third sentence of this paragraph provides for a waiver of the obligation to correct defective work if the Constructor fails to provide "prompt written notice." Because some jurisdictions may find that a Constructor's failure to provide "prompt written notice" is a waiver of a right to require correction of defective work, it is recommended that the Constructor delete the third sentence in its entirety.

The Constructor should also verify that the time the Warranty obligations commence in the Prime Agreement is consistent with when the Warranty obligations in the Subcontract commence.

Correction of Work (§ 3.21.2): The Constructor should verify consistency between Prime Agreement and Subcontract as to when the call-back warranty starts and for how long the warranty lasts.

Correction of Work (§ 3.21.3): The Constructor should modify to maintain consistency with the Prime Agreement. For example, whether correction of work pursuant to this section extends the warranty period should track the provisions of the Prime Agreement.

Use of Constructor's Equipment (§ 3.24): Add after the word "indemnify" and before the word "and" in the second sentence the following: ", defend, hold harmless"

Owner's Ability to Pay (§ 4.2.2): The Constructor should consider deleting this paragraph in its entirety.

Owner-Furnished Information (§ 4.4): This section provides that, to the extent, the Owner provides a warranty regarding Owner-furnished information, the Subcontractor may prosecute a claim in the Constructor's name for the use and benefit of the Subcontractor regarding breach of that warranty. To eliminate this potential, delete the last sentence of this section. A Constructor should not agree to allow the Subcontractor to prosecute a claim in the Constructor's name against the Owner. Doing so could result in damaging the Constructor's relationship with the Owner. The Constructor can always allow this to occur, if necessary, per agreement with the Subcontractor.

To avoid a potential argument over whether the Constructor materially breached the Subcontract regarding the timeliness of its communications/obligations, which could potentially excuse the Subcontractor from continuing performance, delete "the" and replace "Subcontractor's" immediately before the term "obligations."

Schedule (§ 5.2): To provide the Constructor with more control over the Project Schedule, delete "In consultation with Subcontractor" from the beginning of the second sentence. Also, delete the last sentence of the paragraph. The Subcontractor has these rights under the Subcontract as it exists.

Owner Caused Delay (§ 5.3.1): To expand the scope of this section to cover other time impacts, insert a comma and add "suspended, disrupted, or accelerated" after the term "delayed." To provide a limitation on the Subcontractor's ability to recover only to the extent the Constructor recovers from the Owner, delete "to the extent caused by Constructor under the Subcontract

Documents" and replace with "but only to the extent, if any, that Constructor obtains an extension or adjustment from Owner on Subcontractor's behalf."

Claims Relating to Owner (§ 5.3.2): Delete the second sentence of this paragraph. A Constructor should not agree to allow the Subcontractor to prosecute a claim in the Constructor's name against the Owner. Doing so could result in damaging the Constructor's relationship with the Owner. The Constructor can always allow this to occur, if necessary, per agreement with the Subcontractor.

Constructor Caused Delay (§ 5.3.3): This section permits the recovery of delay damages from the Constructor. If the jurisdiction which governs the Subcontract enforces "no damage for delay" provisions to prevent the Constructor from having exposure to delay damages. In that case, the existing language should be deleted and replaced as follows: "To the fullest extent permitted by law, Subcontractor waives and agrees that its sole and exclusive remedy for any delays caused by Constructor or any other subcontractor shall be a time extension. Constructor shall not be liable to Subcontractor for any costs, losses, or damages for delay or other schedule-related damages, including for acceleration, loss of inefficiency, loss of productivity, disruption, suspension, except and only to the extent Constructor recovers such costs, losses, or damages on Subcontractor's behalf from Owner or another subcontractor."

Limited Mutual Waiver of Consequential Damages (§ 5.4): Consequential damages (also called special damages) are a remedy for harm done due to another's actions. Consequential damages do not necessarily have to arise from the direct wrongful act of another but result naturally from the act. This section generally provides for a limited mutual waiver of consequential damages subject to listed exceptions for (i) damages that the Owner is entitled to recover under the Prime Agreement; and (ii) losses covered by insurance. The Constructor should review the risk of consequential damages for each project and determine whether additional listed exceptions may be appropriate to cover other potential categories of consequential damages.

Liquidated Damages (§ 5.5): This section provides an explicit flow-down provision related to liquidated damages and other delay damages in the Prime Agreement between the Owner and the Constructor. It also allows the Constructor to assess these damages to the Subcontractor in proportion to the Subcontractor's responsibility. In § 5.5.1, the Constructor should add the following language to the end of the first sentence: "as reasonably determined by Constructor." Additionally, the Constructor should delete the word "actual" in the last sentence so that the Constructor's damages are not otherwise unintentionally limited by this section.

Subcontract Amount (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 before Substantial Completion."

Change Orders (§ 7.1 and § 7.1.1): Consider inserting requirements that the Change Order must meet specific requirements to be effective. By way of example, one such requirement would be that it is signed by an authorized representative of the Constructor who has the authority to enter

Change Orders with the Subcontractor. Another requirement would be that the Change Order must be in a certain form. Section § 7.1 states that a change that "affects the Subcontract Amount or the Subcontract Time shall be formalized in a Subcontract Change Order and processed in accordance with this article." To avoid any confusion on the issue, the required, official form of a change order could be attached to the Subcontract as an exhibit which would provide clarity on the prescribed form of Change Order which is to be used (such as ConsensusDocs 795, a change order form that is available from ConsensusDocs).

Constructors should be aware that including a change order form and requiring its use is not a failsafe solution. Deviations from a contract-prescribed procedure, such as the use of a form change order, could result (depending on your jurisdiction's law) in waiving that prescribed procedure. While § 12.6 contains a provision that is known as an "Anti-Waiver" clause, it is important to note that, in some states, even an anti-waiver provision can be waived. Constructors should consult with a construction attorney regarding the requirements in your jurisdiction.

Lastly, § 7.1 does not address any requirement that the Owner approve the Subcontract Change Order. If the Subcontract Change Order increases the Subcontract Time or the Subcontract Amount, it could potentially increase the Prime Agreement Time and Prime Agreement Amount. The Prime Agreement could potentially require a corresponding change order from the Owner that includes and approves the Subcontract Change Order if the Subcontract Change Order increases the Prime Agreement Amount or Prime Agreement Time. Making the approval and validity of a Subcontractor-requested Subcontract Change Order that alters the Prime Agreement Time or Prime Agreement Amount contingent on the Owner's approval of the Subcontract Change Order prevents the Constructor from placing itself in a situation where the Subcontract Amount or Subcontract Time has changed with no corresponding adjustment to the Prime Agreement or Project schedule.

Interim Directives (§ 7.2): Aside from permitting the Constructor to direct the Subcontractor to perform work without a Change Order, this section allows the Subcontractor to receive at least 50% of its actual costs in performing that work if the cost to perform the work is in dispute. It is recommended to consult with a construction attorney to ensure that this section is not contrary to your state's rules on prompt payment.

The Constructor may also consider adding the following language at the end of the first paragraph in § 7.2: "If a dispute exists between Subcontractor and Constructor other than a dispute about the cost of the work subject to an Interim Directive from Owner or Constructor (such as a dispute regarding workmanship, timeliness, defects, delays, interference with or damage to the work of other trades on the Project, or a similar non-cost related dispute), Constructor may withhold some or all of Subcontractor's costs in accordance with this Subcontract."

Concealed or Unknown Site Conditions (§ 7.3): Consider revising the second sentence in this section as follows: "After the Subcontractor has provided prompt written notice of the condition to Constructor, Subcontractor shall not be required to perform any Work relating to the condition without the written mutual agreement of the Parties or the receipt of an Interim Directive pursuant to §7.2 herein."

These additions protect the Constructor from adverse schedule impacts should a concealed or unknown site condition be encountered.

Substantiation of Adjustment (§ 7.5): This section allows for an increase to the Subcontract Amount to include the cost of overhead and profit based on either a percentage set in § 7.6 or if no percentage is set in § 7.6, as mutually agreed by the Parties. It is recommended that a percentage be listed in § 7.6 and that these items track the limits, if any, included in the Prime Agreement. If an agreement for a change to the Subcontract Amount is in dispute and § 7.5 governs that profit and overhead the Subcontractor will receive, it is typically better to have agreed on the percentage in § 7.6.

Retainage (§ 8.2.2): The Constructor should ensure that retainage is consistent with the provisions of the Prime Agreement.

Time of Payment (§ 8.2.5): What constitutes a "reasonable time" for payment is a controversial subject that varies from state to state based upon state statutes and case law. You may want to specify or further describe a reasonable time if you do not modify the provision as stated below.

Pay-When-Paid (§ 8.2.5): The standard payment provision provides that the Constructor must pay the Subcontractor within seven days of the Constructor's receipt of payment from the Owner. In most states, this term is interpreted as allowing the Constructor a reasonable period to obtain payment from the Owner; the Constructor is still obligated to pay the Subcontractor when it does not ultimately receive payment from the Owner. This section mirrors prompt pay laws in most states in that it provides for payment to the Subcontractor within a reasonable time if, through no fault of the Subcontractor, the Owner fails to timely pay the Constructor. The contingent nature of receiving payment from the Owner is simply a timing mechanism. This type of payment clause is commonly referred to as a "Pay-When-Paid" clause. What differentiates this from a true contingent payment clause, commonly referred to as a Pay-If-Paid, is that the Constructor must ultimately pay the Subcontractor, notwithstanding the Constructor's ability to collect its payment from the Owner. Thus, when the Subcontract contains a Pay-When-Paid clause, all of the risk of the Owner's solvency is allocated to the Constructor.

A true contingent payment clause, where receipt of payment by the Constructor from the Owner is a condition precedent to the Constructor's obligation to pay the Subcontractor, is not a timing mechanism but a risk-sharing strategy. Under "Pay-If-Paid" clauses, Owner nonpayment would result in nonpayment to the Subcontractor. Not all states will enforce Pay-If-Paid Clauses. Constructors should consult with a construction attorney before modifying this section to a "Pay-If-Paid" clause, as shifting the risk of receiving payment to the Subcontractor may not be fully enforceable because of state law.

While the ConsensusDocs 750 includes a Pay-When-Paid clause, not a Pay-If-Paid clause, ConsensusDocs 750 can be modified to incorporate a Pay-If-Paid clause by adding the following language to the beginning of § 8.2.5:

> Receipt of payment by the Constructor from Owner for the Subcontract Work is an absolute condition precedent to payment by Constructor to Subcontractor. Subcontractor hereby acknowledges that it relies on the credit of Owner, not Constructor, for payment of Subcontract Work.

It may be easier to convince Subcontractors to agree to this risk-sharing approach if the Subcontractor's risk is limited as much as possible. The best way to limit the magnitude of the risk to all Parties is to reduce the amount of time the Constructor and, by extension, its Subcontractors must continue to perform work after the time within which they would otherwise have been paid. In order to provide that risk-limiting provision to its Subcontractors, it is strongly suggested that Constructors negotiate two important clauses into the Prime Agreement. First, the Prime Agreement should contain a clause allowing the Constructor to request and receive financial assurances from the Owner, including anytime the Owner is late in making a payment, such as § 4.2 of the ConsensusDocs 200. Second, the Prime Agreement should include a provision allowing the Constructor to stop performing work within a short period after payment is due but unpaid or if the Owner fails to produce sufficient financial assurances, such as § 9.5 of the ConsensusDocs 200.

Finally, a caveat, while a Pay-If-Paid clause has the effect of sharing the risk of the Owner's solvency between the Constructor and its Subcontractors, it generally will not protect the Constructor from the obligation to pay the Subcontractors where the reason for non-payment is due to the Constructor's failure to comply with the terms of the Prime Agreement.

Payment Delay (§ 8.2.6): If the Constructor modifies § 8.2.5 to a Pay-If-Paid clause, the language in this section must be modified by deleting "or, if Constructor has failed to pay Subcontractor within a reasonable time for the Subcontract Work satisfactorily performed." If § 8.2.5 is not modified, Constructors should consider defining the phrase "reasonable time." One option is to define it as a length of time that allows the Constructor a reasonable period to obtain payment from the Owner, such as "the time within which Constructor diligently and continuously prosecutes its rights to recover payment from Owner."

Payment Withheld (§ 8.2.7): Section § 8.2.7 provides for a seven-day period for the Constructor to provide written notice to the Subcontractor of any disapproval or nullification of all or part of the Subcontractor's payment application. If the Constructor desires greater flexibility in delivering notice of disapproving or nullifying a payment application, consider deleting "no later than seven (7) days after receipt of an application for payment."

Add a new § 8.2.7.8, which provides "any grounds permitted for withholding payment pursuant to the Prime Agreement."

Final Payment Delay (§ 8.3.4): If the Constructor modifies § 8.2.5 to make it a Pay-If-Paid clause, § 8.3.4 should be modified similarly. Therefore, to make this section consistent with the Pay-If-Paid Clause § 8.2.5 and to convert § 8.3.4 into a "Pay-If-Paid" clause[1], delete § 8.3.4 and replace

[1] Please see discussion with respect to § 8.2.5 and enforceability of Pay-If-Paid provisions.

it with the following: "Receipt of payment by Constructor from Owner for the Subcontract Work is an absolute condition precedent to final payment by Constructor to Subcontractor. Subcontractor hereby acknowledges that it relies on Owner's credit, and not on Constructor, for final payment for the Subcontract Work."

Waiver of Claims (§ 8.3.5): The Constructor should consider clarifying this section as follows: "Final payment shall constitute a waiver of all claims by Subcontractor relating to the Subcontract Work but shall in no way relieve Subcontractor of liability: (i) for the obligations assumed under § 3.20 and § 3.21; or (ii) for faulty or defective work or services discovered after final payment. Final payment will not relieve Constructor for claims which were submitted before the final payment application, remain unsettled, and which fully comply with the requirements of the Subcontract Documents."

Late Payment Interest (§ 8.4): The interest rate for late payment should be consistent with any such interest rate in the Prime Agreement.

Continuing Obligations (§ 8.5): If the Constructor modifies § 8.2.5 and § 8.3.4 to make them Pay-If-Paid clauses, to maintain consistency, change the "expiration of the reasonable time for payment referenced in §8.2.5" to "payment is due to Subcontractor."

Subcontract Payment Failure (§ 8.9): At the end of the second sentence, add the following after the word "checks": "or issue direct payment to subcontractors or suppliers of the Subcontractor."

Indemnification (§ 9.1): This section has new language providing the Subcontractor indemnification to the Constructor, Design Professional, 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, Constructor, and Design Professional. The Constructor will want to carefully review insurance obligations in the Prime Agreement to make sure any special obligations imposed on the Constructor are similarly imposed on the Subcontractor, so there is no gap in insurance coverage for these types of losses.

Indemnity can be considered in two steps: (1) who is protected; (2) what types of claims they are protected from. Many states have laws that limit the extent of defense and indemnity on construction projects. Like the indemnity provision contained in ConsensusDocs 200, the Parties' indemnity obligation is limited to the extent of the Party's negligence. It covers only insurable risks, i.e., personal injury (including death) and property damage. Therefore, ideally, the protected Parties match the entity/entities the Constructor has agreed to name as Additional Insured under its Commercial General Liability policy.

Given the reciprocal indemnity obligations in the ConsensusDocs forms and the pure comparative causation standard, there is not a duty to defend. The Constructor should consider adding a defense obligation to subcontracts and supply agreements. Ideally, a Party will not want to fund defense out-of-pocket. A best practice is for the Constructor to include an obligation in its subcontracts. The Subcontractor, in turn, can do the same. A Commercial General Liability insurance policy,

once triggered per its terms, typically will provide a defense to named insureds who tender a claim to the insurance carrier. Note that policies with a self-insured retention typically will not provide defense until that retention amount is incurred. In that instance, the Parties may wish to clarify that the obligation to provide defense applies before satisfaction of the retention amount, even if self-funded.

No Limitation on Liability (§ 9.1.2): The Constructor should consult with a construction attorney to determine the enforceability of this section with the local laws.

Professional Liability Insurance (§ 9.2.3.1): Though this section refers back to § 3.8, that section does not specifically require professional liability insurance. Strike "If required by §3.8," and, if required by the scope of work, Subcontractors should have an affirmative obligation to provide Professional Liability insurance and proof of such coverage.

It is also recommended that the "General" be stricken as part of "General Aggregate."

Further, the deductible and self-insured retention wording contained in this section could be more precise. Policies typically have either a deductible or a self-insured retention, but not both. It is recommended that the Constructor simply refer to both the deductible and self-insured retention as "the retention."

Minimum Limits of Liability (§ 9.2.3.2.): Consider replacing "Subcontractor shall require its design professional to furnish to Subcontractor and Constructor" with the following language "Upon Constructor's written request, Subcontractor will provide,"

Number of Policies (§ 9.2.4.): It is acceptable to use umbrella/excess to provide coverage limits. However, AGC members should consider the implications of umbrella/excess liability and horizontal versus vertical exhaustion when doing so. There should also be a requirement that umbrella/excess must follow the terms and conditions of the primary coverage. The Constructor should have either its risk manager, insurance counsel or both review the insurance program required for the Project to ensure that the Constructor is achieving the Project's insurance requirements.

Cancellation, Renewal, and Modification (§ 9.2.5):

- Delete the wording "To extent commercially available to Subcontractor from its current insurance company."
- Certificate of Insurance requirement for one year should be rephrased to state Certificate of Insurance is to be provided in accordance with Exhibit F. For example, some Constructors require Subcontractors to provide a Certificate of Insurance for the entirety of the warranty provisions.
- The Constructor should check with its insurance carrier, risk manager, insurance agent, etc., to confirm insurance requirements and whether carriers will agree to a 30-day advanced notice of any modification to coverage.

Continuation of Coverage (§ 9.2.6): The Constructor should confirm whether one year for continuation of coverage is sufficient. For example, some projects require warranties that extend beyond one year following final payment to the Constructor. Constructors may seek a requirement that completed operations, professional, and pollution coverages are maintained for not less than five years or, alternatively, modify Subcontract Agreements to mirror Owner requirements for the Project, which often require coverage through the expiration of the statute of repose. Completed operations may be better handled through Exhibit F.

Builder's Risk Policy Insurance (§ 9.2.7): The Subcontract Agreement is recommended to specify who is providing Property Insurance/Builder's Risk. The Constructor could also make the following modifications to this section. First, the section heading should be changed to "PROPERTY INSURANCE" to mirror the title as used in Owner-Constructor Agreement. Next, delete the phrase "or any other property or equipment insurance in force for the Project and procured by Owner or Constructor" as the Constructor is unlikely to get a copy of such policies from the Owner. The Constructor may not want to share its equipment policy or other property insurance policies. Also, delete the phrase "Constructor shall advise Subcontractor if a Builder's Risk policy of insurance is not in force" as this places an unnecessary obligation on the Constructor.

Finally, the Constructor should consider having the Subcontract default to holding the Subcontractor responsible for the Builder's Risk Policy deductible unless the deductible will be the Owner's responsibility.

Additional General Liability Coverage (§ 9.2.10): Several subsections provide "check the box" options for creating the Subcontractor's duty to provide additional liability coverage, the listing of the Constructor as an additional insured on the Subcontractor's CGL policy and whether the Subcontractor has a duty to provide Owners' and Constructors' Protective Liability Insurance ("OCP") (§ 9.10.2). The Constructor should have either its risk manager, insurance counsel or both review the insurance provisions to ensure that the Constructor is achieving the Project's insurance requirements. If OCP coverage is selected, a Constructor 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 that any additional cost incurred by the Subcontractor for purchasing such coverage shall be paid by the Constructor, which should be reimbursable by the Owner if a consistent option is chosen in the ConsensusDocs 200 Owner-Constructor Agreement.

It is also recommended that the Constructor revise 9.2.10 to change the title from "Additional General Liability Coverage" to "Additional Coverages."

Additional Insured (§ 9.2.10.1): Constructors will likely require Additional Insured coverage. It is important to check the box requiring such coverage. The Constructor should also consider deleting the requirement to "name" the Constructor as additional insured and simply require additional insured status. "Naming" requires seeking an endorsement to the policy, whereas blanket additional insured endorsements on most Subcontractor policies will serve to provide. The Constructor should also strike "to the extent caused by the negligent acts or omissions of

Subcontractor, or those acting on Subcontractor's behalf" and replace with the word "occurring." The Constructor must ensure compliance with the Prime Agreement. For example, if the Prime Agreement requires additional insured protections for the Owner, Architect/Engineer, and their respective directors, officers, employees, agents, and others as required by the Prime Agreement. In that case, the same should be included in this provision.

There is a reference to Additional Insured status on any required "pollution liability" policy. There is no pollution liability requirement anywhere in § 9.2 unless it is addressed in Exhibit F or incorporated through the Prime Agreement.

The Constructor should also consult with its risk manager, insurance counsel, or both regarding whether this section should require a waiver of subrogation against the additional insureds.

Constructors should also delete the following language as it could permit the Subcontractor to claim costs post bid or post subcontract award for disputes over the extent and sufficiency of the Subcontractor's insurance:

> Any documented additional cost in the form of a surcharge associated with procuring additional general liability coverage in accordance with this subsection shall be paid by Constructor directly, or costs may be reimbursed by Constructor to Subcontractor by increasing the Subcontract Amount to correspond to the actual cost required to purchase and maintain the coverage. Before commencing the Subcontract Work, Subcontractor shall provide either a copy of the OCP policy or a certificate and endorsement evidencing that Constructor has been named as an additional insured, as applicable.

Bonds (§ 9.3): The specific bond form should be specified and attached. A customized ConsensusDocs 706 and 707 is preferable. Many bond forms that Subcontractors and sureties attempt to use are insufficient. For example, having a payment and performance bond for only the "original full Subcontract Amount" may prove insufficient. This is particularly true in multiple GMP situations or when there are large additive change orders. The full contract amount must be included in the penal sum, and increases to the Subcontract Amount should be automatically permitted. Therefore strike "original" before "full Subcontract Amount" and add afterward, "inclusive of any changes to the Subcontract Amount."

Waiver of Subrogation (§ 9.2.8): This section only provides a waiver of subrogation as it relates to property insurance (builder's risk policy). In order to make the waiver of subrogation broader and to waive all subrogation rights, it is suggested that § 9.2.8 be replaced with the following:

> Subcontractor hereby waives and shall require all of its insurance carriers, successors, assignees, sub-subcontractors, suppliers, and vendors, to waive and relinquish all rights against Owner, Design Professional, and their respective officers, directors, members, consultants, subcontractors, sub-subcontractors, agents, and employees for recovery of damages to the extent those damages are covered by Workers' Compensation Insurance, Employer's Liability Insurance,

> Business Automobile Liability, CGL, Professional Liability, property liability, and any excess or umbrella liability policies obtained by Constructor. Subcontractor shall require of Subcontractor's sub-subcontractors, agents, and employees, by appropriate written agreements, similar waivers in favor of the Parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation provided hereunder shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether the person or entity had an insurable interest in the property damaged.

The Constructor may also wish to clarify if a deductible is considered "proceeds" covered by insurance.

Notice to Cure a Default (§ 10.1.1): The Constructor may wish to shorten the timeframe for a Subcontractor to cure the default by removing the second notice requirement and corresponding two (2) Business Day period. Ultimately, the Constructor will want to ensure any cure rights and notice provisions contained in this section are consistent with – or shorter than – any cure periods permitted under the Prime Agreement.

Notice to Cure a Default (§ 10.1.1.1): The Constructor may wish to delete the last sentence of this paragraph which provides the Subcontractor with the rights to a detailed accounting of the costs to finish the Subcontract Work in the event the Constructor supplements, completes, or takes over portions of the Subcontract Work.

Use of Subcontractor's Equipment (§ 10.1.2): The Constructor should be aware that, while this Agreement allows for the Constructor to utilize a Subcontractor's tools and equipment, others may have priority interest in such tools and equipment. The Constructor has an obligation to indemnify the Subcontractor in the event that the Constructor uses the Subcontractor's tools and equipment under this paragraph. As in the indemnification contained in § 9.1, this indemnity should be considered in two steps: (1) who is protected; (2) what types of claims they are protected from. Recall that many states have laws limiting the extent of defense and indemnity on construction projects, and this provision should be considered in the same vein. As such, the Constructor may wish to modify this provision as follows: "If Constructor uses the tools and equipment in accordance with this subsection, Constructor shall indemnify and hold harmless Subcontractor *to the extent caused by* Constructor's use of such tools and equipment." As with all indemnification provisions, Constructors and Subcontractors alike should inform their insurers, risk managers, and/or insurance counsel of all indemnity and insurance obligations. The Constructor should also ensure consistency of this provision with the Prime Agreement.

Automatic Conversion of a Termination for Default: Consider adding a new section that states:

> If Constructor terminates this Agreement for default, and it is later determined that Subcontractor was not in default, or that the default was excusable under the terms of the Subcontract Documents, then, in such event. In that case, the termination

shall be deemed a termination for convenience, and the rights of the Parties shall be as set forth in §10.7.

Note below the addition of new language in § 10.8 to create a termination for convenience option.

Suspension by Owner for Convenience (§ 10.3): This paragraph now explicitly provides for the Subcontractor to receive an adjustment to Subcontract Time and Subcontract Amount via change order to the extent the Prime Agreement permits the Constructor to receive such adjustments. Thus, the Subcontractor may seek to review the Prime Agreement when negotiating this Agreement to confirm when such adjustments may be permitted and if there are any other limitations on recovery, such as a limitation of liability cap. Note that this provision is consistent with ConsensusDocs 200; however, a Constructor may wish to delete the last sentence of this paragraph, allowing a Subcontractor to prosecute a claim in the Constructor's name against the Owner. Allowing such a claim to be pursued without ultimate control by the Constructor could damage the Constructor's relationship with the Owner. The Constructor can always allow this to occur, if necessary, per agreement with the Subcontractor.

Termination by Owner (§ 10.4): A Subcontractor may seek to lengthen the time to allow termination of this Agreement due to an Owner's termination of the Prime Agreement. As with the cure periods in § 10.1.1 above, the Constructor should ensure that any modification to this paragraph is consistent with the Prime Agreement. As with § 10.3, the Constructor may seek to delete the clause of this paragraph's third sentence, allowing a Subcontractor to prosecute a claim in Constructor's name against the Owner. In addition, the Constructor should consider deleting the fourth sentence, which provides the Subcontractor with recovery it might not be otherwise entitled to under governing law.

Suspension by Constructor (§ 10.6): This paragraph, and the notice obligations of the Constructor, should not be modified without confirming that any such modifications are consistent with the Prime Agreement.

Wrongful Exercise (§ 10.7): The Constructor may want to consider deleting the phrase: "together with reasonable overhead and profit on the Subcontract Work not executed, and other reasonable costs incurred by such action, including reasonable attorneys' fees" as this provision opens the Constructor to potential additional claims by the Subcontractor in the event a termination for cause is deemed a termination for convenience.

Termination by Subcontractor (§ 10.8): The Constructor should consider deleting this paragraph in its entirety. By permitting termination where the Subcontractor has not received progress payments, This section conflicts with the "Pay-If-Paid" provisions inserted in § 8.2.5 and § 8.3.4. At a minimum, the Subcontractor's rights to terminate should be limited to the rights (including all notice and cure periods) the Constructor has against the Owner in the Prime Agreement.

The ConsensusDocs 750 does not include a Termination for Convenience provision. If the Constructor wishes to include such a provision, the following may be added:

> Constructor, by written notice, may terminate the Subcontract in whole or in part for Constructor's convenience. In such event, Subcontractor will be compensated for the reasonable cost of all work performed and all materials purchased for the Work before the termination, including a reasonable profit thereon, plus reasonable out-of-pocket costs of terminating the Work, but shall receive no compensation, profit, or overhead for unperformed work or for materials not yet purchased. Regardless of the foregoing, the total sum Subcontractor shall be entitled to be paid in the event of a termination for convenience, including all prior payments to Subcontractor, shall not exceed the Subcontract Amount. Subcontractor shall not be entitled to any other compensation or payment in the event of a termination for convenience other than as specifically provided in this Paragraph.

Dispute Resolution (§ 11): The Dispute Resolution provisions help mitigate claims and encourages early dispute resolution by first requiring direct discussions between the Parties. The Dispute Resolution provisions have undergone several modifications, most notably now explicitly imposing a duty of direct discussions and good faith negotiations on the Parties regarding a dispute. If 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.

Binding Dispute Resolution (§ 11.3.3): If mediation fails to resolve a dispute, the Parties may submit the matter to binding dispute resolution using arbitration under generally accepted arbitration procedures or litigation in federal or state court. The Parties, however, are free to select another set of rules. The costs of the binding dispute resolution process are borne by the non-prevailing Party as determined by the Neutral.

When choosing the form of binding dispute resolution, a vital consideration is whether the Prime Agreement requires arbitration or litigation. Constructors typically favor all disputes being decided in the same manner. This is provided for by § 11.4; however, the Constructor should consider whether to make the dispute resolution provision in subcontracts consistent with the Prime Agreement. Consultation with a construction lawyer is recommended.

If the Parties select arbitration as the binding dispute resolution. In that case, the Constructor should consider what, if any, limitations should be placed on the arbitration proceedings or any other procedural guidelines or limitations in the proposed arbitration rules (e.g., how will discovery be limited, how will the process be streamlined to ensure a prompt resolution, how many arbitrators will serve on the panel, and how will the arbitrators be appointed, etc.). Again, the Constructor should consider whether consistency between the Prime Agreement and the Subcontract Agreement is beneficial. Consultation with a construction lawyer is recommended.

Costs (§ 11.3.4): This provision is included to help encourage the settlement of claims. The Constructor should review the Prime Agreement and other relevant project contracts to see whether they provide for the non-prevailing Party to bear the prevailing Party's costs and may wish to ensure that all relevant agreements include the exact requirement in case multi-party disputes arise.

The Constructor may wish to define the prevailing Party. The force and effect of such definition may vary based on state law. One possible example is as follows:

> If a Party claiming a right to payment of an amount in dispute is awarded all or substantially all of such disputed amount, then such claiming Party shall be the prevailing Party. If a Party defending against such claim is found to be not liable to pay all or substantially all of the disputed amounts claimed by the claiming Party. In that case, the Party defending against such claim shall be the prevailing Party. If both Parties prevail concerning different claims by each of them, then the Party who is prevailing concerning the substantially greater monetary sum shall be deemed the prevailing Party; otherwise, if both Parties prevail concerning 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 attorneys' fees.

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

If the Parties select litigation, the Constructor should consider whether a mutual jury waiver is in its best interest; this may benefit a Constructor from out-of-town.

Venue (§ 11.3.5): Binding dispute resolution is held in the Project's location unless the Parties otherwise agree. This is intended as a compromise to avoid each Party proposing that dispute resolution proceedings take place in the location of its own principal office. Further, the place of the Project should be convenient in that, conceivably, the actual Project site(s), physical evidence, and at least some witnesses are located there or nearby. Finally, some states require that litigation take place at the location of the Project and will disregard venue provisions that attempt to move the case elsewhere.

Lien Rights (§ 11.5): The ConsensusDocs 750 dispute resolution procedures do not intend to limit the Constructor's lien rights unless the Parties agree to add language that expressly waives such rights. Certain jurisdictions do not allow prospective lien waivers as a matter of law.

Extent of Agreement (§ 12.1): This section may need to be modified if the Prime Agreement requires that the Owner be named a third-party beneficiary of subcontract agreements. If this is the case, a new second sentence could be added as follows: "The Owner is, as required by the Prime Agreement, a third-party beneficiary of this Agreement."

Notice (§ 12.5): Consistency of notice provisions in the Subcontract and the Prime Agreement should be verified. Additionally, § 12.5 requires notice by "effective means," which is an undefined term. The Constructor may wish to specify what is effective means of providing notice. For example, how should notices be delivered (i.e., email, letter, certified mail, etc.)? Whether notice was provided and whether that notice complied with the terms of the Parties' Agreement are often disputed issues. Certain states require strict compliance with notice provisions in agreements. In such jurisdictions, providing specificity as to how notices should be provided could offer a legal defense to certain claims.

Order of Precedence (§ 13.1.5): If it is not desired or possible for the subcontract to control the Prime Agreement, this section should be deleted in its entirety and replaced with the following (in addition to making the recommended changes to § 2.5 and § 3.1): "In the event of any inconsistency, conflict, or ambiguity among the Subcontract Documents, subject to §3.1, it is generally intended that the Prime Agreement governs to the extent applicable to the Subcontractor Work, followed by the most recent, fully executed Change Orders to this Agreement, this Agreement, the drawings, and specifications."

AGC Member-Only Comments to the ConsensusDocs 751 Standard Short Form Agreement Between Constructor and Subcontractor

Obligations (§ 1): This section intends to flow down mutual obligations in the prime agreement, making the relationship between the Constructor and the Subcontractor mirror the relationship between the Owner and the Constructor. However, if the Constructor does not want its obligations to the Subcontractor to mirror the Owner's obligations toward the Constructor, this section should be modified. For instance, the Constructor may wish to delete the first sentence of this section and, in the second sentence, delete "in an identical way."

This section provides that in the event of a conflict between the provisions of this Agreement and the prime agreement, the subcontract governs. However, under § 4, the term "Subcontract Documents" also includes the "prime agreement," *i.e.*, the prime agreement between the Constructor and the Owner. From a Constructor's perspective, providing that a subcontract controls over the prime agreement may not be desirable or even possible under the prime agreement terms. In this case, the last sentence of this section should be deleted.

Additionally, to eliminate potential conflicts between the Subcontract and prime agreement, Constructor should insert the following: "In the event of an inconsistency or conflict among the Subcontract Documents, the greater quantity, better quality, stricter provision, or higher standard governs."

Subcontract Work (§ 2): Exhibit A should state the specific responsibilities of the Subcontractor and the Constructor. Also, to clarify that the Subcontractor is responsible for its means and methods, the Constructor may wish to add a sentence at the end of this paragraph that states, "Notwithstanding the foregoing, Subcontractor is responsible for its own means and methods in performing the Subcontract Work."

Exhibits (§ 4): This section sets out the exhibits to the Agreement. The contracting Parties should take great care when completing this list of exhibits because any exhibit listed is part of the contract. Note that ConsensusDocs are not jurisdiction specific. Consider adding an exhibit to incorporate any terms required by or necessary in a particular jurisdiction. For example, the Constructor may want to include any required lien release forms required by the prime agreement. Additionally, with respect to Exhibit B, to avoid the potential that a Subcontractor could later claim that the Subcontract Documents were not provided in advance of contract signing, the Constructor could add the following to the end of the sentence, "Subcontractor acknowledges that Constructor has provided Subcontractor with access to all existing Subcontract Documents before execution of this Agreement."

Warranties (§ 7): This section contains the warranties the Subcontractor is providing with respect to the Subcontract Work and provides that the Subcontractor's warranties commence on the date of Substantial Completion. The Constructor should verify that the time the warranty obligations

commence in the prime agreement is consistent with when the warranty obligations in this Agreement commence.

Time (§ 8.1)[2]: Consider adding a provision defining the start date for the Subcontract Work. For example, the Constructor could add the following provision: "Subcontractor shall start the Subcontract Work upon receiving a notice to proceed from Constructor."

Schedule (§ 8.2): To provide the Constructor with more control over the Project Schedule, delete "In consultation with Subcontractor" from the beginning of the first sentence.

Change Orders (§ 9): Consider inserting requirements that the Change Order must meet specific requirements to be effective. By way of example, one such requirement would be that it is signed by an authorized representative of the Constructor who has the authority to enter Change Orders with the Subcontractor. Another requirement would be that the Change Order must be in a certain form. § 9 states that a Change Order is a "written instrument." To avoid any confusion on the issue, the required, official form of a change order could be attached to the Subcontract as an exhibit which would provide clarity on the prescribed form of Change Order which is to be used (such as ConsensusDocs 795, a change order form that is available from ConsensusDocs).

Constructors should be aware that including a change order form and requiring its use is not a failsafe solution. Deviations from a contract-prescribed procedure, such as the use of a form change order, could result (depending on your jurisdiction's law) in waiving that prescribed procedure.

Lastly, § 9 does not address any requirement that the Owner approve the Subcontract Change Order. If the Subcontract Change Order increases the Subcontract Time or the Subcontract Amount, it could potentially increase the prime agreement time and prime agreement amount. The prime agreement could potentially require a corresponding change order from the Owner that includes and approves the Subcontract Change Order if the Subcontract Change Order increases the prime agreement amount or prime agreement time. Making the approval and validity of a Subcontractor-requested Subcontract Change Order that alters the prime agreement time or prime agreement amount contingent on the Owner's approval of the Subcontract Change Order prevents the Constructor from placing itself in a situation where the Subcontract Amount or Subcontract Time has changed with no corresponding adjustment to the prime agreement or Project schedule.

Interim Directives (§ 9.1): This section permits the Constructor to direct the Subcontractor to perform work without a Change Order. As this section does not address payment for such work, if there is a dispute as to the cost of the Interim Directive, Constructor may wish to add a provision to address this circumstance. Also, the Constructor should consider adding the following language at the end of the paragraph: "If a dispute exists between Subcontractor and Constructor other than

[2] Note that the ConsensusDocs 751 does not include a provision prohibiting Subcontractor from recovering delay damages in the event a delay caused by Constructor. If Constructor would like guidance on inclusion of such a provision, please refer to the AGC Member-Only Comments to ConsensusDocs Guidebook Created by the AGC Contract Documents Forum in connection with the ConsensusDocs 750, Standard Agreement between Constructor and Subcontractor (§5.3.3).

a dispute about the cost of the work subject to an Interim Directive from Owner or Constructor (such as a dispute regarding workmanship, timeliness, defects, delays, interference with or damage to the work of other trades on the Project, or a similar non-cost related dispute), Constructor may withhold some or all of Subcontractor's costs in accordance with this Subcontract."

Pay-When-Paid (§ 10): The standard payment provision provides that the Constructor must pay the Subcontractor within seven days of the Constructor's receipt of payment from the Owner. In most states, this term is interpreted as allowing the Constructor a reasonable period to obtain payment from the Owner; the Constructor is still obligated to pay the Subcontractor when it does not ultimately receive payment from the Owner. This section mirrors prompt pay laws in most states in that it provides for payment to the Subcontractor within a reasonable time if, through no fault of the Subcontractor, the Owner fails to timely pay the Constructor. The contingent nature of receiving payment from the Owner is simply a timing mechanism. This type of payment clause is commonly referred to as a "Pay-When-Paid" clause. What differentiates this from a true contingent payment clause, commonly referred to as a "Pay-If-Paid," is that the Constructor must ultimately pay the Subcontractor, notwithstanding the Constructor's ability to collect its payment from the Owner. Thus, when the Subcontract Agreement contains a "Pay-When-Paid" clause, all of the risk of the Owner's solvency is allocated to the Constructor.

A true contingent payment clause, where receipt of payment by the Constructor from the Owner is a condition precedent to the Constructor's obligation to pay the Subcontractor, is not a timing mechanism but a risk-sharing strategy. Under "Pay-If-Paid" clauses, Owner nonpayment would result in nonpayment to the Subcontractor. Not all states will enforce "Pay-If-Paid" Clauses. Constructors should consult with a construction attorney before modifying this section to a "Pay-If-Paid" clause, as shifting the risk of receiving payment to the Subcontractor may not be fully enforceable because of state law.

While the ConsensusDocs 751 includes a "Pay-When-Paid" clause, not a "Pay-If-Paid" clause, ConsensusDocs 751 can be modified to incorporate a "Pay-If-Paid" clause by adding the following language to the beginning of § 10.2:

> Receipt of payment by the Constructor from Owner for the Subcontract Work is an absolute condition precedent to payment by Constructor to Subcontractor. Subcontractor hereby acknowledges that it relies on the credit of Owner, not Constructor, for payment of Subcontract Work.

It may be easier to convince Subcontractors to agree to this risk-sharing approach if the Subcontractor's risk is limited as much as possible. The best way to limit the magnitude of the risk to all Parties is to reduce the amount of time the Constructor and, by extension, its Subcontractors must continue to perform work after the time within which they would otherwise have been paid. In order to provide that risk-limiting provision to its subcontractors, it is strongly suggested that Constructors negotiate two important clauses into the prime agreement. First, the prime agreement should contain a clause allowing the Constructor to request and receive financial assurances from the Owner, including anytime the Owner is late in making a payment, such as § 4.2 of the ConsensusDocs 200. Second, the prime agreement should include a provision allowing the

Constructor to stop performing work within a short period after payment is due but unpaid or if the Owner fails to produce sufficient financial assurances, such as § 9.5 of the ConsensusDocs 200.

Finally, a caveat, while a "Pay-If-Paid" clause has the effect of sharing the risk of the Owner's solvency between the Constructor and its Subcontractors, it generally will not protect the Constructor from the obligation to pay the Subcontractors where the reason for non-payment is due to the Constructor's failure to comply with the terms of the prime agreement.

Payment Withheld (§ 10.3): This section permits the Constructor to reject a payment application or nullify a previously approved payment application for the stated grounds. Constructor may wish to add an additional ground, which would be added as (e) and would state "any grounds permitted for withholding payment pursuant to the prime agreement."

Payment Delay (§ 10.4): If the Constructor modifies § 10.2 to a "Pay-If-Paid" clause, the language in this section must be modified by deleting "or, if Constructor has failed to pay Subcontractor within a reasonable time for the Subcontract Work satisfactorily performed." If § 10.2 is not modified, Constructors should consider defining the phrase "reasonable time." One option is to define it as a length of time that allows the Constructor a reasonable period to obtain payment from the Owner, such as "the time within which Constructor diligently and continuously prosecutes its rights to recover payment from Owner."

Waiver of Claims (§ 10.5): The Constructor should consider clarifying this section as follows: "Final payment shall constitute a waiver of all claims by Subcontractor relating to the Subcontract Work but shall in no way relieve Subcontractor of liability: (i) for the obligations assumed under § 7; or (ii) for faulty or defective work or services discovered after final payment. Final payment will not relieve release claims which were submitted before the final payment application, remain unsettled, and which fully comply with the requirements of the Subcontract Documents."

Owner's Ability to Pay and Lien Information (§ 10.6): The Constructor should consider deleting the first two sentences of this paragraph. While the Subcontractor may request information, this agreement does not give the Subcontractor an independent contractual right to receive the information from the Owner, and the Owner may not appreciate receiving such requests. However, there may be a state law addressing a Subcontractor's right to receive certain information from an Owner to perfect a lien. If this change is made, the heading should be changed to delete "Owners Ability to Pay" and 10.6.2 should be modified to delete "of Owner's lender".

Indemnity (§ 11): This section has new language providing the Subcontractor indemnification to the Constructor, Design Professional, 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 defense cost paid above the percentage of liability for the claim attributable to the negligent acts or omissions of the Owner, Constructor, and Design Professional. The Constructor will want to carefully review insurance obligations in the prime agreement to make sure any special obligations imposed on the Constructor are similarly imposed on the Subcontractor, so there is no gap in insurance coverage for these types of losses.

Indemnity can be considered in two steps: (1) who is protected; (2) what types of claims they are protected from. Many states have laws that limit the extent of defense and indemnity on construction projects. Like the indemnity provision contained in ConsensusDocs 200, the Parties' indemnity obligation is limited to the extent of the Party's negligence. It covers only insurable risks, i.e., personal injury (including death) and property damage. Therefore, ideally, the protected Parties match the entity/entities the Constructor has agreed to name as Additional Insured under its Commercial General Liability policy.

Given the reciprocal indemnity obligations in the ConsensusDocs forms and the pure comparative causation standard, there is not a duty to defend. The Constructor should consider adding a defense obligation to subcontracts and supply agreements. Ideally, a Party will not want to fund defense out-of-pocket. A best practice is for the Constructor to include an obligation in its subcontracts. The Subcontractor, in turn, can do the same. A Commercial General Liability insurance policy, once triggered per its terms, typically will provide a defense to named insureds who tender a claim to the insurance carrier. Note that policies with a self-insured retention typically will not provide defense until that retention amount is incurred. In that instance, the Parties may wish to clarify that the obligation to provide defense applies before satisfaction of the retention amount, even if self-funded.

Number of Policies (§ 12.3): It is acceptable to use umbrella/excess to provide coverage limits. However, AGC members should consider the implications of umbrella/excess liability and horizontal versus vertical exhaustion when doing so. There should also be a requirement that umbrella/excess must follow the terms and conditions of the primary coverage. The Constructor should have either its risk manager, insurance counsel or both review the insurance program required for the Project to ensure that the Constructor is achieving the Project's insurance requirements.

Cancellation, Renewal, and Modification (§ 12.4):

- Delete the wording "To extent commercially available to Subcontractor from its current insurance company."
- Certificate of Insurance requirement for one year should be rephrased to state Certificate of Insurance is to be provided in accordance with Exhibit F. For example, some Constructors require Subcontractors to provide a Certificate of Insurance for the entirety of the warranty provisions.
- The Constructor should check with its insurance carrier, risk manager, insurance agent, etc., to confirm insurance requirements and whether carriers will agree to a 30-day advanced notice of any modification to coverage.

Continuation of Coverage (§ 12.5): The Constructor should confirm whether one year for continuation of coverage is sufficient. For example, some projects require warranties that extend beyond one year following final payment to the Constructor. Constructors may seek a requirement that completed operations, professional, and pollution coverages are maintained for not less than five years or, alternatively, modify Subcontract Agreements to mirror Owner requirements for the

Project, which often require coverage through the expiration of the statute of repose. Completed operations may be better handled through Exhibit F.

Builder's Risk Policy Insurance (§ 12.6): The Subcontract Agreement is recommended to specify who is providing Property Insurance/Builder's Risk. The Constructor could also make the following modifications to this section. First, the section heading should be changed to "PROPERTY INSURANCE" to mirror the title as used in Owner-Constructor Agreement. Next, delete the phrase "or any other property or equipment insurance in force for the Project and procured by Owner or Constructor" as the Constructor is unlikely to get a copy of such policies from the Owner. The Constructor may not want to share its equipment policy or other property insurance policies. Also, delete the phrase "Constructor shall advise Subcontractor if a Builder's Risk policy of insurance is not in force" as this places an unnecessary obligation on the Constructor.

Finally, the Constructor should consider having the Subcontract default to holding the Subcontractor responsible for the Builder's Risk Policy deductible unless the deductible will be the Owner's responsibility.

Waiver of Subrogation (§ 12.7): This section only provides a waiver of subrogation as it relates to property insurance (builder's risk policy). In order to make the waiver of subrogation broader and to waive all subrogation rights, it is suggested that § 12.7 be replaced with the following:

> Subcontractor hereby waives and shall require all of its insurance carriers, successors, assignees, sub-subcontractors, suppliers, and vendors, to waive and relinquish all rights against Owner, Design Professional, and their respective officers, directors, members, consultants, subcontractors, sub-subcontractors, agents, and employees for recovery of damages to the extent those damages are covered by Workers' Compensation Insurance, Employer's Liability Insurance, Business Automobile Liability, CGL, Professional Liability, property liability, and any excess or umbrella liability policies obtained by Constructor. Subcontractor shall require of Subcontractor's sub-subcontractors, agents, and employees, by appropriate written agreements, similar waivers in favor of the Parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation provided hereunder shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether the person or entity had an insurable interest in the property damaged.

The Constructor may also wish to clarify if a deductible is considered "proceeds" covered by insurance.

Additional Liability Coverage (§ 12.8): Several subsections provide "check the box" options for creating the Subcontractor's duty to provide additional liability coverage, the listing of the Constructor as an additional insured on the Subcontractor's CGL policy and whether the Subcontractor has a duty to provide Owners' and Constructors' Protective Liability Insurance

("OCP") (§ 12.8.2). The Constructor should have either its risk manager, insurance counsel or both review the insurance provisions to ensure that the Constructor is achieving the Project's insurance requirements. If OCP coverage is selected, a Constructor 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 that any additional cost incurred by the Subcontractor for purchasing such coverage shall be paid by the Constructor, which should be reimbursable by the Owner if a consistent option is chosen in the ConsensusDocs 200 Owner-Constructor Agreement.

It is also recommended that the Constructor revise 12.8 to change the title from "Additional General Liability Coverage" to "Additional Coverages."

Additional Insured (§ 12.8.1): Constructors will likely require Additional Insured coverage. It is important to check the box requiring such coverage. The Constructor should also consider deleting the requirement to "name" the Constructor as additional insured and simply require additional insured status. "Naming" requires seeking an endorsement to the policy, whereas blanket additional insured endorsements on most Subcontractor policies will serve to provide. The Constructor should also strike "to the extent caused by the negligent acts or omissions of Subcontractor, or those acting on Subcontractor's behalf" and replace with the word "occurring." The Constructor must ensure compliance with the prime agreement. For example, suppose the prime contract requires additional insured protections for the Owner, Architect/Engineer, and their respective directors, officers, employees, agents, and others as required by the prime agreement. In that case, the same should be included in this provision.

There is a reference to Additional Insured status on any required "pollution liability" policy. There is no pollution liability requirement unless it is addressed in Exhibit F or incorporated through the prime agreement.

The Constructor should also consult with its risk manager, insurance counsel, or both regarding whether this section should require a waiver of subrogation against the additional insureds.

Constructors should also delete the following language as it could permit the Subcontractor to claim costs post bid or post subcontract award for disputes over the extent and sufficiency of the Subcontractor's insurance:

> Any documented additional cost in the form of a surcharge associated with procuring additional general liability coverage in accordance with this subsection shall be paid by Constructor directly, or costs may be reimbursed by Constructor to Subcontractor by increasing the Subcontract Amount to correspond to the actual cost required to purchase and maintain the coverage. Before commencing the Subcontract Work, Subcontractor shall provide either a copy of the OCP policy or a certificate and endorsement evidencing that Constructor has been named as an additional insured, as applicable.

Bonds (§ 13): The specific performance and payment bond forms should be specified and attached. A customized ConsensusDocs 706 and 707 is preferable. Many bond forms that Subcontractors and sureties attempt to use are insufficient. For example, having a payment and performance bond for only the "original full Subcontract Amount" may prove insufficient. This is particularly true in multiple GMP situations or when there are large additive change orders. The full contract amount must be included in the penal sum and increases to the Subcontract Amount should be automatically permitted. Therefore strike "original" before "full Subcontract Amount" and add afterward, "inclusive of any changes to the Subcontract Amount."

Limited Mutual Waiver of Consequential Damages (§ 14): Consequential damages (also called special damages) are a remedy for harm done due to another's actions. Consequential damages do not necessarily have to arise from the direct wrongful act of another but result naturally from the act. This section generally provides for a limited mutual waiver of consequential damages subject to listed exceptions for (i) damages that the Owner is entitled to recover under the prime agreement; and (ii) losses covered by insurance. The Constructor should review the risk of consequential damages for each project and determine whether additional listed exceptions may be appropriate to cover other potential categories of consequential damages.

Failure of Performance (§ 16.1): Ultimately, the Constructor will want to ensure any cure rights and notice provisions contained in this section are consistent with – or shorter than – any cure periods permitted under the prime agreement.

Termination by Owner (§ 16.2): The Constructor may seek to delete the clause of this paragraph's third sentence, allowing a Subcontractor to prosecute a claim in Constructor's name against the Owner. In addition, the Constructor should consider deleting the fourth sentence, which provides the Subcontractor with recovery it might not be otherwise entitled to under governing law.

Termination by Constructor (§ 16.3) The Constructor may wish to shorten the timeframe for a Subcontractor prior to termination by removing the second notice requirement [following the Cure Notice requirement in (§ 16.1)] and corresponding two (2) Business Day period. Constructor may also want to delete the last sentence of this section which provides the Subcontractor with the rights to a detailed accounting of the costs to finish the Subcontract Work.

The ConsensusDocs 751 does not include a Termination for Convenience provision. If the Constructor wishes to include such a provision, the following may be added:

> Constructor, by written notice, may terminate the Subcontract in whole or in part for Constructor's convenience. In such event, Subcontractor will be compensated for the reasonable cost of all work performed and all materials purchased for the Work before the termination, including a reasonable profit thereon, plus reasonable out-of-pocket costs of terminating the Work, but shall receive no compensation, profit, or overhead for unperformed work or for materials not yet purchased. Regardless of the foregoing, the total sum Subcontractor shall be entitled to be paid in the event of a termination for convenience, including all prior payments to Subcontractor, shall not exceed the Subcontract Amount. Subcontractor shall not

> be entitled to any other compensation or payment in the event of a termination for convenience other than as specifically provided in this Paragraph.

Automatic Conversion of a Termination for Default: Consider adding a new section that states:

> If Constructor terminates this Agreement for default, and it is later determined that Subcontractor was not in default, or that the default was excusable under the terms of the Subcontract Documents, then, in such event the termination shall be deemed a termination for convenience, and the Subcontractor shall be entitled to recover from Constructor its reasonable costs arising from the termination of this Agreement, including reasonable overhead and profit on Work not performed.

Termination by Subcontractor (§ 16.4): The Constructor should consider deleting this paragraph in its entirety. By permitting termination where the Subcontractor has not received progress payments, this section conflicts with the "Pay-If-Paid" provisions inserted in § 10.2 and § 10.4. At a minimum, the Subcontractor's rights to terminate should be limited to the rights (including all notice and cure periods) the Constructor has against the Owner in the prime agreement.

Dispute Resolution (§ 17): The Dispute Resolution provisions help mitigate claims and encourages early dispute resolution by first requiring direct discussions between the Parties. The Dispute Resolution provisions have undergone several modifications, most notably now explicitly imposing a duty of direct discussions and good faith negotiations on the Parties regarding a dispute. If 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.

Binding Dispute Resolution (§ 17.8): If mediation fails to resolve a dispute, the Parties may submit the matter to binding dispute resolution using arbitration under generally accepted arbitration procedures or litigation in federal or state court. The Parties, however, are free to select another set of rules. The costs of the binding dispute resolution process are borne by the non-prevailing Party as determined by the Neutral.

When choosing the form of binding dispute resolution, a vital consideration is whether the prime agreement requires arbitration or litigation. Constructors typically favor all disputes being decided in the same manner. This is provided for by § 17.4; however, the Constructor should consider whether to make the dispute resolution provision in subcontracts consistent with the prime agreement. Consultation with a construction lawyer is recommended.

If the Parties select arbitration as the binding dispute resolution, the Constructor should consider what, if any, limitations should be placed on the arbitration proceedings or any other procedural guidelines or limitations in the proposed arbitration rules (e.g., how will discovery be limited, how will the process be streamlined to ensure a prompt resolution, how many arbitrators will serve on the panel, and how will the arbitrators be appointed, etc.). Again, the Constructor should consider whether consistency between the prime agreement and the Subcontract Agreement is beneficial. Consultation with a construction lawyer is recommended.

If the Parties select litigation, the Constructor should consider whether a mutual jury waiver is in its best interest; this may benefit a Constructor from out-of-town.

Costs (§ 17.8.1): This provision is included to help encourage the settlement of claims. The Constructor should review the prime agreement and other relevant project contracts to see whether they provide for the non-prevailing Party to bear the prevailing Party's costs and may wish to ensure that all relevant agreements include the exact requirement in case multi-party disputes arise.[3]

Venue (§ 17.8.2): Binding dispute resolution is held in the Project's location unless the Parties otherwise agree. This is intended as a compromise to avoid each Party proposing that dispute resolution proceedings take place in the location of its own principal office. Further, the place of the Project should be convenient in that, conceivably, the actual Project site(s), physical evidence, and at least some witnesses are located there or nearby. Finally, some states require that litigation take place at the location of the Project and will disregard venue provisions that attempt to move the case elsewhere.

Extent of Agreement (§ 18.1): This section may need to be modified if the prime agreement requires that the Owner be named a third-party beneficiary of subcontract agreements. If this is the case, a new second sentence could be added as follows: "The Owner is, as required by the prime agreement, a third-party beneficiary of this Agreement."

Notice (§ 18.3): Consistency of notice provisions in the Subcontract and the prime agreement should be verified. Additionally, § 18.3 requires notice by "effective means," which is an undefined term. The Constructor may wish to specify what is effective means of providing notice. For example, how should notices be delivered (i.e., email, letter, certified mail, etc.)? Whether notice was provided and whether that notice complied with the terms of the Parties' Agreement are often disputed issues. Certain states require strict compliance with notice provisions in agreements. In such jurisdictions, providing specificity as to how notices should be provided could offer a legal defense to certain claims.

[3] Note that the ConsensusDocs 751 does not include a definition for prevailing party. If Constructor would like to define prevailing party, which the force and effect of such definition may vary based on state law, proposed definitions are included in the AGC Member-Only Comments to ConsensusDocs for the ConsensusDocs 750, Standard Agreement between Constructor and Subcontractor (§11.3.4).