



ConsensusDOCS™

ConsensusDOCS Guidebook

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by

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Introduction to the ConsensusDOCS Guidebook

ConsensusDOCS is the product of 23 leading construction associations, dedicated to identifying and utilizing best practices in the construction industry for standard construction contracts. The participating associations represent Designers, Owners, Contractors, Subcontractors Specialty Contractors and Sureties that literally spell the DOCS in ConsensusDOCS. If you are looking for documents that are pro-Owner or pro-Contractor, you should not use these documents. Rather, the documents offer a better contractual path forward from the status quo of today's design and construction industry, which is too often contentious, inefficient and litigious. ConsensusDOCS contracts and forms are designed to fairly and appropriately allocate risks to the Party in the best position to manage and control the risk. The drafters' goals are to identify and utilize best practices that place parties in a position to achieve better project results.

By starting with better standard documents that possess unprecedented buy-in, you reduce your transaction time and costs in reaching a final agreement. Many "fill-in-the-blanks" are intended to lead to productive discussions about how particular risks should be allocated on specific projects before a contract is finalized. The ConsensusDOCS catalog includes complete "families" of documents for each project delivery method that provide a coordinated set of agreements and administrative forms. There also are short form agreements that address the Owner-Contractor (205), the Owner-Design Professional (245), and the Contractor-Subcontractor (751) contractual relationships in a more abbreviated manner than do the standard agreements (ConsensusDOCS 200, 240 and 750 respectively).

In these Guidebooks you will find comments by individual associations regarding particular contract documents. These comments are organized by numeric sequence of the ConsensusDOCS contract documents. The overview sections highlight issues and innovative features of the documents generally. Individual association comments are expressions by an association to its association membership. These comments highlight provisions as well as alert their membership to make certain fill-in-the blank selections or consider possible project-specific modifications to a consensus standard agreement or form. ConsensusDOCS contracts covered in this release of this Guidebook (others will be added later) include the 200, 200.1, 200.2, 240, 300, 301, 310, 410, 500, 750 and 752; and the bond forms collectively.



Comments and Recommendations regarding ConsensusDOCS 310*

Green Building Addendum

INTRODUCTION

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

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

* This publication is designed to provide information in regard to the subject matter covered. It is published with the understanding that the publisher, endorsers of ConsensusDOCS and contributors to this Guidebook are not engaged in rendering legal, accounting, or other professional services. If legal advice or other professional advice is required, the services of a competent professional person should be sought.
—From the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations



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

The GBA is flexible in approach, adapting itself not only to multiple applications of the GBF role in the hands of the architect/engineer, contractor, construction manager or even an third-party advisor/independent consultant, in each instance hired by the owner specifically for the project, as opposed to being an in-house employee or a staff member of the owner, and application in situations where the project team has not been fully assembled. In addition, the GBA adapts itself to projects seeking formal third-party agency ratings or high-performance building criteria, as well as a combination of the two. However, for projects on a design-build delivery track, the GBA would require specific modifications to reflect both design and construction responsibilities within a single entity or Project Participant.



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

As a result, the Articles that follow in the GBA address the definition of the green scope, the allocation of green building-related responsibility and risk, apportionment of liability, and changes to the design and/or construction of the project to accommodate green building objectives, as well as discuss post-physical completion actions and obligations. It is contemplated that the GBA will be used in conjunction with developing the underlying



agreement between the owner and the entity that will become the Green Building Facilitator, which will further address commercial terms such as compensation and insurance requirements. Nevertheless, with this single GBA document ultimately appended to the owner and GBF agreement as well as appended to each of the other Project Participant agreements, all Project Participants should be aware of each other's roles and responsibilities as they relate to the achievement of the project's green objectives.

GREEN BUILDING ADDENDUM OVERVIEW

ARTICLE 1 General Principles

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



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

ARTICLE 2

Definitions

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

The definitions Article introduces the "Green Building Facilitator" or "GBF." The roles and responsibilities of the GBF are key components in the document. While the Project



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

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



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ARTICLE 3

Green Requirements and Procedures

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

ARTICLE 4

Green Building Facilitator

In this Article, the roles and responsibilities of the Green Building Facilitator are set forth in further detail. The GBA accommodates multiple options for the person or entity filling the role of the GBF. For example, the GBF could be the architect/engineer, a contractor, construction manager or even a third-party advisor/independent consultant, as long as the GBF is not in-house employee or a staff member of the owner. The GBA likewise accommodates and addresses specific situations where particular roles might be in conflict where the GBF is also the architect/engineer. Not only is the GBF relationship with the other Project Participants identified, but also the roles and responsibilities of the GBF are identified in such a fashion that the architect/engineer, the contractor and any other Project Participant will be aware of the GBF's presence and purpose on the project. The Article additionally emphasizes that the GBF is



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not assuming the role of the architect/engineer (except, of course, where the GBF is also the architect/engineer) and that a key function of the GBF's presence on the project is to take the various documentation and reports supplied by the architect/engineer and/or the contractor and assemble that documentation and those reports for submission and processing to obtain the written certification, designation, or denomination of the elected green status. The Article concludes by emphasizing that the roles and responsibilities of the architect/engineer and the contractor, consistent with the role of the GBF, are provided for otherwise in the GBA and/or in their respective Governing Contracts. This approach is more consistent with a design-bid-build project delivery model, rather than a design-build project delivery approach.

**ARTICLE 5
Green Status**

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

**ARTICLE 6
Green Measures**

This Article represents the core of the GBA. In the sections contained in this Article, detailed procedures are identified for all Project Participants to be involved in incorporation of the green measures into the plans and specifications for the project and to react if these measures



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



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GBF is also the architect/engineer as well as in situations where the projects or the green measures being incorporated are more complex in nature.

**ARTICLE 7
Plans and Specifications**

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

**ARTICLE 8
Risk Allocation**

Specific risk allocation principles are identified in this Article, including responsibility



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



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damages between parties to a Governing Contract, the GBA accommodates that agreement by providing for the Governing Contract to control that determination on limitation or waiver of Consequential Damages. Ultimately, as to the liability of the GBF in connection with the achievement of the elected green status, that liability determination should be addressed fully and comprehensively in the underlying Governing Contract between the owner and GBF. Further, any continuing obligations of performance beyond completion of the project and initial achievement of the elected green status would have to be address separately and apart from the GBA.