



ConsensusDOCS[®]

ConsensusDOCS Guidebook

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by

ConsensusDOCS LLC

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Introduction to the ConsensusDOCS Guidebook

ConsensusDOCS is the product of leading construction associations, dedicated to identifying and utilizing best practices in the construction industry for standard construction contracts. The 35 participating associations represent Design Professionals, Owners, Constructors, Subcontractors, and Sureties that literally spell the DOCS in ConsensusDOCS. ConsensusDOCS contracts and forms attempt to fairly and appropriately allocate risks to the Party in the position to manage and control the risk. The practices articulated in the documents are forward-thinking, and may not always represent the status quo, but rather a better path forward to achieve project results. The goal of the multi-disciplined drafters was to create documents that best place the Parties to a construction contract in a position to complete a project on time and on budget with the highest possibility of avoiding claims.

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

In this Guidebook you will find comments by individual associations regarding particular contract documents. These comments are organized by numeric sequence of the ConsensusDOCS contract documents. The overview sections highlight issues and innovative features of the documents generally. Association comments are expressions by an association to its association membership. These comments highlight provisions or alert their membership to consider possible project-specific modifications to a consensus standard Agreement or form. ConsensusDOCS contracts covered in this release of this Guidebook include the 200; 200.1; 200.2; 205; 220; 221; 235; 240; 260,261,262,263,300; 301; 310;410; 415; 470;471;472;473; 500; 510; 706,70,; 750; 752; and 803.

Users of the original 2007 edition of ConsensusDOCS agreements are encouraged to download a free redline-strikeout version comparing the 2011 to the 2007 edition. However, please note that there has been a significant number of editing changes and section renumbering that give the appearance that more substantive changes were made in the 2011 update than is actually the case. Consequently, a highlight sheet of changes was created to better pinpoint substantive



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changes. The 2011 update highlights sheet can be found here for free on the internet
<http://consensusdocs.org/wp-content/uploads/2011/01/Highlights-7.0.pdf>

In addition to this Guidebook, the notes section embedded into the ConsensusDOCS software system provides instructions to users that often alert users to section renumbering changes.

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



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Comments and Recommendations regarding ConsensusDOCS 200*

Standard Agreement and General Conditions Between Owner and Constructor (Lump Sum Price) (2011 edition)

Overview

Some general characteristics of the ConsensusDOCS 200:

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

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



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

Notification of Cancellation Insurance (ACORD Form Change)

ConsensusDOCS recommends, as of September 2011, the following revision regarding notification of insurance cancellation:

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

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

And Substitute the Following:

“10.2.4 To the extent commercially available to the Constructor from its current insurance company, insurance policies required under subsection 10.2.1 shall contain a provision that the insurance company or its designee must give the Owner written notice transmitted in paper or electronic format: (a) 30 Days before coverage is nonrenewed by the insurance company and (b) within 10 Business Days after cancellation of coverage by the insurance company. Prior to commencing the Work and upon renewal or replacement of the insurance policies, the



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Constructor shall furnish the Owner with certificates of insurance until one year after Substantial Completion or longer if required by the Contract Documents. In addition, if any insurance policy required under subsection 10.2.1 is not to be immediately replaced without lapse in coverage when it expires, exhausts its limits, or is to be cancelled, the Constructor shall give Owner prompt written notice upon actual or constructive knowledge of such condition.”

ConsensusDOCS Guidebook Explanation of Notice of Cancellation Language

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

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

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



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cases such as a lapse in coverage, only the design builder may be aware of the lapse and therefore only the design builders could provide that notice.

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



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Comments from the Associated General Contractors of America (AGC) for ConsensusDOCS 200

Additional comments on this document, including a discussion of pay-if-paid, can be found on AGC's website at www.agc.org/contracts

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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



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

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

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

Documents in Electronic Format (section 4.6.1): Electronic documents are increasingly being used by the industry. This provision requires a protocol to be established relating to the use of such documents. Constructors are strongly encouraged to use the protocol in Consensus DOCS 200.2 to ensure that the risks associated with use of electronic documents are clearly understood by all the Parties to a contract. At a minimum, the 200.2 can allow Constructors to rely upon e-mails and faxes, if the document is completed to indicate such a desire.

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

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

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

Note that this section contains blanks for the Parties to fill in to establish the appropriate dollar amounts (one tied to substantial completion and one tied to final completion) if the Parties elect



to provide for liquidated damages. The amount of the LDs is expressed as a lump sum amount but the Parties may choose to use a per diem amount.

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

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

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

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

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

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



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

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

Cost of the Work (section 8.3.1.3): While the 200 is a Lump Sum Agreement, a more extensive delineation of the Cost of the Work is now included to clarify and help Parties avoid disputes in regard to the cost of the work for changes. This language is derived from existing language in the ConsensusDOCS 500 Construction Management At-Risk agreement with some minor appropriate modifications.

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

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

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

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



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

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

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

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

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

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

Insurance Requirements (section 10.2.1): New language was added to provide a stronger mechanism to ensure the proper procurement of insurance. This approach already existed in the ConsensusDOCS 750 Subcontract section 9.2, and this addition provides a more consistent approach across the ConsensusDOCS families of contracts.

Additional Liability Coverage (section 10.5): An Owner should decide whether to require the Constructor to purchase additional insured coverage for the Owner. If so, the Owner can then



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

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

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

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

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

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

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

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



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

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

Attorney's Fees and Prevailing Party (section 12.5.1): The ConsensusDOCS Drafters made this rather significant revision to help encourage settlement of potential litigation of claims. Users may wish to provide for a definition of prevailing party. The force and effect of such definition may vary based on state law. One possible example is as follows:

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

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

“In the event of any arbitration or litigation involving the parties, the prevailing party shall be awarded its share of the arbitration costs, arbitrator compensation, and its attorneys' fees and expert witness fees. For the purpose of the application of this provision, the prevailing party shall be determined by the arbitrator(s) as follows. The prevailing party shall be that party whose last written settlement position (demand/offer)



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made before the commencement of the arbitration hearing(s) is closest to the final award rendered by the arbitrator(s). In order to be considered for the purpose of this provision, any settlement position (demand/offer) must be in writing and must have been delivered by certified mail to the other party. It is the intent of this provision for the arbitrator(s) to identify the true party prevailing in any arbitration proceeding. To that end, in the event that a settlement position has not been taken by a party seeking relief, i.e. the claimant, the arbitrator(s) shall consider the settlement demand to be the full relief requested in the arbitration demand. In the event that a settlement position has not been taken by the respondent, the arbitrator(s) shall consider the offer to be a complete rejection of the relief requested by the claimant. Where there are mixed claims and counterclaims, the determination of the prevailing party shall be within the discretion of the arbitrator(s) consistent with the intent of this provision.”

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

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

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

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

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



Comments from the Construction Owners Association of America (COAA) for ConsensusDOCS 200:

(Additional comments on this document can be found at COAA's website, www.coaa.org, in the members-only area.)

Design Authority and Responsibilities (Section 2.3): The language of Section 2.3 raises concerns about having to coordinate design work provided under the construction contract with the design provided by the project's Design Professional. Many contracts will require engineering or other design services from the Constructor. Those design expectations should be clearly identified in the pertinent technical specification. Other design services will be a function of the construction means and methods selected by the Constructor (e.g. falsework, shoring, etc.). Owners should be able to expect that the Constructor will perform all Work shown on, or reasonably inferable from, the Contract Documents without having to separately delineate what design services are included in the scope of Work. Owners should modify this section to accurately reflect the Owner's expectations of the scope of Work to be performed by the Constructor .

Ownership of Construction Documents (Paragraph 2.3.1): The design professional's contract may be written to the effect that the Owner owns the final delivered construction documents. If that's the case, section 2.3.1 then should be rewritten so that the Owner, not the Design Professional, is granting a license to the Constructor and its Subcontractors to use the documents. If that's not the case, and the Design Professional owns the final delivered construction documents, the Owner should ensure that appropriate licenses for use have been obtained from the Design Professional for the Constructor and its subs. This section should reflect the appropriate Ownership of the documents.

Worksite Information (Section 4.3): Owners may want to modify this language to specifically disclaim the accuracy of information provided to the Constructor. COAA recommends that local legal counsel be consulted to draft appropriate language modifying section 4.3 in those instances.

Owner's Representative (section 4.7): Few Owners give their representative the complete authority that Section 4.7 requires. COAA recommends revising the language of Section 4.7 to say that the Owner will define, in writing, the authority that has been granted to its representative.

Contingent Assignment of Subcontracts (Subsection 5.5.1.2): Owners should consider deleting the term "and obligations" from this section. COAA recommends that local legal counsel be consulted to eliminate the Owner's exposure to Subcontractors for preexisting claims against the Constructor.



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Limited Mutual Waiver of Consequential Damages (Section 6.6): The ConsensusDOCS mutual waiver of consequential damages provision represents a positive departure from similar provisions found in other contract forms commonly used in the industry. Consequential damages are one of the most important subjects for an owner to be familiar with in the construction context. COAA highly recommends that every owner seek the advice of competent local construction counsel prior to executing this contract containing waivers of consequential damages. Owners should assess the consequential damages risks associated with each project. Potential outcomes of the assessment could include, but are not limited to, a decision that the risks are small and consequential damages can be waived, that the risks can be captured through liquidated damages, or that the risks are such that the Owner is not willing to waive consequential damages.

Claims for Additional Cost or Time (Section 8.4): Owners should consult local legal counsel regarding the exposure of the Owner to potential claims by Subcontractors being passed through by the Constructor. The Owner may want to include the following additional language in section 8.4: "Prior to submitting any claim by a Subcontractor for additional compensation, the Constructor shall have examined any such claim and verified its accuracy and completeness, and the Constructor shall have identified any Claim or portion of the Claim that is not the responsibility of the Owner."

Constructor Acceptance of Final Payment (Section 9.8.7): COAA recommends deleting 9.8.7.

Insurance (sections 10.2–10.5): COAA recommends that its members review with competent local counsel or risk managers especially coverage limits and the additional insured provisions. Failure to carefully contemplate the handling of these exposures could result in significant unanticipated losses.



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Comments from the American Subcontractors Association, Inc. (ASA) for ConsensusDOCS 200:

(Additional comments on ConsensusDOCS can be found on ASA's website at www.asa.org.)

Constructor's Responsibilities (article 3):

The scope of work should be limited to all work actually indicated in the plans and specifications which was the subject of the Constructor's bid.

Constructors should not ordinarily accept responsibility for design. When design services are requested, the delegation should be specific and should include all design and performance criteria. Constructors should be responsible for promptly reporting defects they actually discover, but cannot be responsible for other design defects that it is claimed they "should have" recognized, or for design requirements that violate code standards.

Clear lines of authority to authorize payments and changes should be established in the general conditions.

One-sided terms that deny a Constructor any right to collect damages for delay, often called "no-damage-for-delay" clauses, are unacceptable. Mutual waivers of consequential damages, such as the Constructor's extended home office overhead and the Owner's loss of use or added financing expenses, are beneficial and encouraged. A Constructor may reserve the right to assess a Subcontractor for a share of liquidated damages actually paid to the Owner, but only to the extent such share is proportionate to the fault of the Subcontractor in causing a delay.

A Constructor's warranty should provide that work is free of defects and performed in workmanlike manner, but should exclude defects inherent in the design or specified materials, ordinary wear and tear, improper maintenance, abuse, modifications, and implied warranties. A Constructor's warranty should have a time limit which should run from either substantial completion or issuance of a certificate of occupancy to the Owner, whichever is earlier. A Constructor's warranty should reserve the right of the Constructor to notice and an opportunity to cure any claimed breach of the warranty, by providing for waiver of any warranty claims where the Constructor is not provided an opportunity to cure.

Expenses claimed as backcharges should not be incurred before notice, and reasonable opportunity to cure, are provided to a Constructor. Backcharges should be billed within a reasonable time and not saved until the end of the project.



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Deadlines for claims should be based on actual knowledge of facts giving rise to a claim (rather than constructive knowledge) and should permit a reasonable time for claims; time extensions should be required for all causes reasonably beyond the Constructor's control; price adjustments should include the entire cost of delays not caused by Constructor (including overhead) and should include a reasonable amount of overhead and profit for extra work. A Constructor should have the right to payment for any extra work that is performed at the Owner's direction, provided that the Constructor confirms verbal instructions in writing before starting work.

A Constructor may be required to conduct a site visit, make observations, and report discovered discrepancies, but should not have an affirmative duty to discover problems in the site conditions or design that a person in the Subcontractor's trade would not ascertain by a reasonable, visual inspection. Constructors should be entitled to rely on the accuracy and completeness of the plans and specifications, and on the accuracy of reports of conditions furnished by the Owner.

Approved submittals should bind the Owner in the same manner as the specifications which are "contract documents."

Owner's Responsibilities (article 4): A Constructor should have access to complete project financing information, including change orders, in order to evaluate its risk of nonpayment. Disclosures that demonstrate adequate project financing are a necessary condition to a commencement or continuation of a Constructor's performance.

See ASA comments under article 3 pertaining to Constructor site visits.

See ASA comments under article 3 pertaining to clear lines of authority.

Contract Time (Article 6): See ASA comments under Article 3 pertaining to one-sided terms that deny a Constructor any right to collect damages.

See ASA comments under Article 3 pertaining to deadlines for claims.

Changes (Article 8): See ASA comments under article 3 pertaining to deadlines for claims.

Payment (Article 9): See ASA comments under article 3 pertaining to clear lines of authority.

Owner payments to the Constructor should be held in trust for the Constructor's Subcontractors and suppliers. The Constructor should be provided a firm deadline of not more than seven days by which it should disburse funds it receives from the Owner for payment of Constructor's Subcontractor's and suppliers. The Owner should expressly preserve its authority to pay a Subcontractor directly who is not paid by the Constructor.



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Past due payments should bear interest at a reasonable rate, so long as payment delay is not the fault of the Constructor. A Constructor should reserve an express right to stop work for non-payment whenever non-payment is not the Constructor's fault, upon reasonable notice and opportunity to cure, including costs of shut-down, delay and start-up. A Constructor should be entitled to payment for suitably stored materials.

Language requiring one Party to sign waivers in whatever form is considered suitable by the other Party is generally unacceptable. Any waiver form should be specified before the contract is signed, should be conditional on payment (except for payments already received), should not apply to funds still held as retainage, and should not apply to claims unrelated to the payment security rights of the Constructor.

General conditions should require Constructors to provide copies of any payment bond to Subcontractors on request, and should expressly exempt steps to preserve lien rights from any dispute resolution requirements.

Retainage should be due on substantial completion, less only those amounts sufficient to pay for punch list items. Substantial completion should be objectively defined as the time when the project is sufficiently complete to be occupied or utilized, such as when a certificate of occupancy is issued. Final payment should not constitute a waiver of claims previously asserted in writing and still pending at the time of final payment.

Indemnity, Insurance, Waivers and Bonds (article 10): Hold-harmless terms should be limited to bodily injury and property damage (other than the Work itself). Such terms should also be limited to provide indemnity only to the extent of the Constructor's negligence, and should provide for payment of attorneys' fees rather than including a duty to "defend." Ideally, hold harmless terms flow in both directions and provide mutual obligations to indemnify the other Party to the subcontract against the consequences of the indemnitor's own negligence.

See ASA comments under article 3 pertaining to one-sided terms that deny a Constructor any right to collect damages.

Any requirements to name additional insureds on any of the Constructor's liability insurance policies, and any waivers of subrogation for claims covered by the Constructor's liability insurance policies (particularly workers compensation), are unacceptable. Requirements to provide special notices of policy cancellation or policy non-renewal often cause great difficulties and friction although they have never been shown to provide any benefits to anyone, and are also unacceptable. Requirements for continuation of coverage beyond the policy period, in the absence of a binding commitment from an insurer to provide that coverage, are also



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unacceptable. Separate liability insurance to cover the Owner and the Constructor for liability arising from “general supervision” of the project, such as Owners and Contractors Protective Liability Insurance (“OCP” - CG 00 09) or Project Management Protective Liability Insurance (“PMPL”—CG 31 15), may be required in lieu of any requirements to name additional insureds or to waive subrogation on the Constructor’s liability insurance policies. The Owner or Constructor should be responsible to purchase all-risk property insurance including coverage for the interests of Subcontractors in installed work and in materials delivered, suitably stored or in transit.

Suspension, Notice to Cure and Termination of the Agreement (article 11): See ASA comments under article 3 pertaining to Constructor site visits.

Where termination is not due to the Constructor’s default, then the Constructor should be entitled to its contract damages, i.e., profit and overhead on uncompleted work, plus all expenses related to termination (such as termination of subcontracts and attorneys’ fees), plus payment for work completed and expenses for labor and materials to the date of termination.

The Constructor should be entitled to claim time and price adjustments for any suspension of work which is not the fault of the Constructor. The Constructor should be able to terminate the contract for unreasonably long suspensions measured in the aggregate, and not by consecutive days. Terms restricting recovery where work “would have been” suspended anyway due to Constructor’s fault merely restate common law requirement for causation.

See ASA comments under Article 4 pertaining to Constructor access to project financing information.

Dispute Resolution (article 12): Early mediation of disputes is beneficial and should be a condition precedent to the use of any other dispute resolution procedure. Should mediation not resolve a dispute, arbitration by an industry professional such as an architect, engineer, Constructor or Subcontractor is always preferable to litigation before a judge or jury. Arbitration should always be conducted subject to the terms of the written subcontract, so specific contract terms can assist Constructors to ensure that arbitration will provide a quick and efficient mechanism for resolving disputes. For example, contract terms can expressly provide that “The award shall be made within nine months of the filing of the notice of intention to arbitrate (demand), and the arbitrator(s) shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by Agreement of the Parties or by the arbitrator(s) if necessary.” (Drafting Dispute Resolution Clauses—A Practical Guide, AAA 12/7/2000.) Or, contract terms may require direct participation by the Parties (not merely through their representatives) for



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- selection of the arbitrator (to ensure an industry professional is selected),
- any Agreement or ruling to permit a continuance, and
- Agreement or ruling to permit any discovery (particularly depositions, which add considerable time and expense) beyond the discovery of information contemplated by Rule F-7 of the AAA's Construction Industry Arbitration Rules, Fast Track Procedures in fast track cases (no claim or counterclaim exceeds \$75,000), or Rule R-22 of the AAA's Construction Industry Arbitration Rules, Regular Track Procedures in regular track cases (\$75,001-\$500,000), or Rule L-4 of the AAA's Construction Industry Arbitration Rules, Procedures for Large, Complex Construction Disputes.

See ASA comments under Article 9 pertaining to general conditions requiring Constructors to provide copies of any payment bond to Subcontractors on request.

Miscellaneous Provisions (article 13): Contracts should provide that the appropriate venue for dispute resolution procedures such as litigation or arbitration is the place where the project is located, and also that the law of the place where the project is located shall govern.

Contract Documents (article 14): See ASA comments under Article 3 pertaining to scope of work limitations.



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