

ConsensusDOCS: Contracts Built by Consensus for the Project's Best Interest

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Introduction

The publication of ConsensusDOCS^{TM1} contract documents marks the first time the entire industry was invited to write truly consensus standard contract documents.² Highlighted as the cover story and editorial in *Engineering News Record (ENR)*, the release was described as “one of those rare times where much of the industry came together and attempted change. If successful, the effort may go a long way to cutting down the mountain of modified standard paperwork that has bogged down many projects and chocked courts, arbitrators, mediators and disputes review boards. This has the potential of being something really big, if given a chance.”³ ConsensusDOCS now include more than 80 contract agreements and forms that address all major project delivery methods, and publish the industry’s first standard integrated project delivery (IPD) agreement and Building Information Modeling (BIM) document. Rather than just memorialize existing standard practices in today’s industry, ConsensusDOCS presents a new contractual path forward that is literally transforming the industry with new consensus standards.

An initial distinguishing point of ConsensusDOCS is the unique collaborative drafting process which has lead to unprecedented buy-in for the documents. Major owner organizations of the National Association of State Facilities Administrators (NASFA), Construction Users Roundtable (CURT), and Construction Owners Association of America (COAA) co-drafted and actively endorse ConsensusDOCS along with a total of twenty-two leading construction organizations.⁴ Another important feature is the drafters’ mandate to represent the best interests of the project, rather than a single party. The resulting contracts employ best practices and fair risk allocation for all parties. A project-centric approach aligns the traditionally fragmented interests to place construction parties in a better position to deliver superior project results. The widespread endorsement of ConsensusDOCS contracts adds value to your construction law practice and your client’s bottom line.⁵

Unlike the American Institute of Architects (AIA) standard documents, which, not coincidentally, make the architect the pivotal party of all construction contracts, the ConsensusDOCS requires direct party communications and emphasize dispute avoidance.

The contracts attempt to build positive relations to resolve problems before they become intractable, rather than force the architect into the middle of the ring as the third-person. In addition, the owner determines if they want to pay a design professional to serve as an “impartial” decision maker and administrative manager. The ConsensusDOCS drafters see an owner not simply as a check-payer, but rather a potentially actively engaged participant, who has the most to gain or lose in the success of a completed project.

One commentator observes that the traditional construction process typically finds people who enter a project as strangers and leave as enemies.⁶

In the ten years since the 1997 edition of the AIA A201TM, the construction industry has changed dramatically and continues to move toward a more collaborative approach. Many incorrectly believe that AGC’s non-endorsement of the 2007 edition of the AIA A201 is related to AGC’s active endorsement of the ConsensusDOCS. AIA claims that AGC’s non-endorsement is the result of the “current competitive environment.”⁷ In reality, AGC membership’s unanimous vote for non-endorsement was based entirely on “deep concerns that the new edition does not fairly balance risk among all parties, but instead significantly shifts risk to general contractors and other parties outside of the design profession.”⁸ Unfortunately, the 2007 edition of the AIA A201 “does not reflect the collaboration that is necessary for a successful project.”⁹ If the AIA A201 merited endorsement, AGC would have gladly endorsed the document. Significantly, AGC had endorsed the A201 when it published AGC documents which were also “competitive” with the AIA A201.

II. Why ConsensusDOCS Standard Contracts?

Currently there are a variety of construction associations that produce standard form contracts. However, contracts published by one association are perceived as ultimately favoring that association’s membership. Also, there is a growing industry frustration that heavily modified standard form documents hardly resemble the original text. Sometimes “modifications” exceed the length of the original standard form. This nullifies the predictability, lower transactional costs, and balancing of risk, which are supposed to be the hallmarks of standardized documents. Risk-shifting contracts lead to increased costs to negotiate contentious provisions, and protect against unknowable risks. Unfair contracts begin a project down a more adversarial path that is more likely to lead to litigation claims down the road.

All stakeholders in a construction project deserve to work under a fair contract—one that they have confidence in because their respective associations had an equal seat at the drafting table. While AGC has committed to manage the administration of the documents program, AGC’s voice in the drafting process is not “more equal” than the other ConsensusDOCS participating organizations. As a result, these contracts focus on yielding better project results with fewer disputes. This unprecedented effort marks one of the most significant industry developments in recent memory.

III. Key Provisions of ConsensusDOCS Contracts

The goal of ConsensusDOCS is to produce best practice contracts that fairly allocate or share risk among all parties. Highlighted below are some, but certainly not all of the innovative provisions in ConsensusDOCS contracts which are designed to meet this goal.

A. Claims Mitigation & Mediation

The ConsensusDOCS drafters established a consistent philosophy in which the parties are encouraged to communicate directly and resolve potential disputes before they become claims. It is important that parties establish positive relations. To further this end, the first provision of each agreement states that parties are to proceed on the basis of mutual trust, good faith and fair dealing. If issues do arise, which seem inevitable on complex construction projects, the parties must attempt to resolve the claims in a constructive rather than destructive fashion. First, parties meet and discuss issues at the project level, and if not successful, the issues are raised to a senior management level. If the issue is not mitigated at the primary level, then parties may utilize a Project Neutral or Dispute Review Board to issue non-binding findings to help resolve potential claims. The next step in this process is mediation using the current Construction Industry Mediation Rules of the American Arbitration Association (AAA).

B. Binding Dispute Resolution

Parties, rather than standard contract clauses, should determine whether to use arbitration or litigation. Depending upon the option selected by the parties, claims elevated to binding resolution will be heard through either arbitration or litigation. Parties can always mutually agree to arbitration when a claim arises, but it is more likely that the method originally chosen at contract signing will remain. The venue of any claim is established as the location of the project. If arbitration is selected, the AAA rules in effect at the time of the proceedings are used (as opposed to outdated procedural rules that were effective at contract signing). This allows parties to utilize the most current and improved procedural rules.

C. Additional Insured Status

Additional insured coverage was the last and probably most difficult issue for the ConsensusDOCS drafters to reach consensus, in part because the construction and insurance industries have failed to develop a satisfactory best-practice solution for this difficult issue. A framework of options are provided for the parties to determine how to best handle for their project. One option is to elect not to require additional insured coverage. If more insurance is required, options are selected among a menu. The menu includes additional insured status for ongoing and completed operations that is limited to the subcontractor's negligence. Alternatively, an Owners and Contractors Protective Liability Insurance Policy can be used for ongoing operations either alone or in combination with additional insured coverage for completed operations. If there are additional costs for the selected coverage, the owner pays (while the general contractor pays in the ConsensusDOCS 750 subcontract).

D. Ownership of the Design Documents

One major point of contention between owners and design professions is the copyright use of design documents. Many owners assert that they have paid good money to use design plans, and they should be able to use what they paid for on other projects, as well as for finishing and remodeling projects. Designer professionals are concerned that their intellectual property is being devalued or used improperly without just compensation. This issue is further complicated when an owner terminates for convenience. Owners do not want to be held hostage over the use of

plans, and designer professionals want fair treatment. The ConsensusDOCS utilizes innovative contract language which first and foremost requires the parties to discuss such issues before a dispute arises. The documents give the parties a straightforward vehicle to use design plans for fair compensation. If an owner truly wants a copyright transfer, the parties must negotiate a fair price for such transfer.¹⁰

E. Limited Waiver of Consequential Damages

In the drafting process, contractors expressed concerns about facing consequential damages that could easily exceed the total contract price, or certainly anticipated profit. On the other hand, owners seek to ensure timely performance or compensation for lost time through the use of liquidated damages provisions. The ConsensusDOCS provides a limited waiver of consequential damages that includes an opportunity to specifically delineate liquidated damages to reflect owner's anticipated actual risks.¹¹ This mechanism puts everything out on the table before the work begins. Moreover, the ConsensusDOCS 750 subcontract flows down applicable liquidated damages provisions.

F. Owner Financial Information

One of the most important reasons for AGC's non-endorsement of the AIA A201 are the new restrictions placed on obtaining owner financial information. The ConsensusDOCS approach provides a clear ability to request and obtain owner financial information both before and after project commencement. In today's tough financial environment, this ability is viewed by many as absolutely critical. The ConsensusDOCS approach is similar in approach to the 1997 edition of the AIA A201 and better reflects the realities of today's industry. Significantly, ConsensusDOCS provides guidelines and an owners' financial questionnaire as easy to use contractual tools to determine the financial viability of projects.

G. Electronic Communications

Can the parties rely on information in email and fax transmissions as contract documents? Under both the AIA and ConsensusDOCS, the default answer is no.¹² While most construction projects typically use and rely upon fax transmissions and emails to communicate, these electronic communications may not be considered binding contract documents. Consequently, the *ConsensusDOCS 200.2 Electronic Communications Protocol Addendum* provides a comprehensive mechanism to identify which methods and technologies may be relied upon and used in a uniform matter. In addition, the 200.2 document identifies an information management team, if appropriate for the project, to delineate management responsibilities for electronic information and communications.

H. Integrated or Tri-Party Project Delivery

In a fashion similar to the ConsensusDOCS drafting process, the ConsensusDOCS 300 Tri-Party Collaborative Agreement brings together three parties—owner, design professional, and constructor—to execute the same contract and create a core team to act on behalf of the project. The 300 is the first standard integrated project delivery (IPD) agreement published in the United States. Tri-party or IPD agreements have been used more commonly in Australia and are also

known as “alliancing” or “relational contracting.” The document allows the project’s core team, which may include key specialty contractors and consultants, to make consensus decisions based upon the best interests of the project. Preliminary results of construction projects, such as the Cardinal Glennon Children’s Hospital in St. Louis, demonstrate that this type of contractual relationship can eliminate waste and inefficiency through closer collaboration.

I. Building Information Modeling (BIM)

In June 2008, the ConsensusDOCS 301 BIM Addendum was published. BIM is poised to revolutionize the design and construction industry because it is an incredibly powerful tool to collaborate and increase efficiency. However, the perceived legal risks of moving from a 2-D to a 3-D industry are a major stumbling block for many companies to move aggressively into BIM. The ConsensusDOCS 301 is the industry’s first standard document to comprehensively navigate the legal and risk allocation issues using BIM. By receiving extensive input from the entire industry, including many prominent design professionals, this new standard document will greatly facilitate the use of BIM and reduce the transactional costs of individual companies addressing the fundamental legal implication of moving toward BIM.

J. Future Efforts

During its first year in existence, ConsensusDOCS has exceeded its aggressive goals. But rather than rest on its laurels, this unique coalition effort continues to move rapidly forward to address emerging and evolving issues. ConsensusDOCS is nearing publication of a new federal subcontract, a sub-subcontract, a construction management short form, and a host of additional complementary administrative documents. One of ConsensusDOCS’ strengths is its ability to solicit, actively listen, and respond to input from stakeholders in the design and construction industry. Formal procedures have recently been approved that establishes a minimum of a five-year revision cycle.¹³ Potential revisions are currently being evaluated by the ConsensusDOCS Content Advisory Council. Information regarding current and future efforts to develop new documents can be found at www.consensusdocs.org. Significantly, all interested associations have an open invitation to participate and improve the industry. Moreover, current efforts will continue the extensive outreach to individual design professionals and attorneys who represent design professions that was accomplished in drafting the ConsensusDOCS 301 BIM Addendum.

IV. Conclusion

ConsensusDOCS include more than 80 contracts and forms, and address all project delivery methods that cover most all construction contracting needs. Written in a straightforward fashion by experienced construction practitioners and attorneys, the contracts provide common sense solutions that could only be achieved by giving an equal voice for genuine input to all stakeholders to the construction process. Consequently, projects will start from a better contractual foundation utilizing ConsensusDOCS contracts.

According to McGraw Hill’s 2008 Trends, 75% of surveyed owners believe that the ConsensusDOCS will provide value to their business.¹⁴ Construction attorneys and construction professionals should be fluent in the new language in construction contracts and consider using ConsensusDOCS in their next project.

Notes

¹ ConsensusDOCS is a trademark of ConsensusDOCS LLC. ConsensusDOCS contract documents are copyrighted by ConsensusDOCS LLC.

² See Kevin E. Davis, *The Role of Nonprofits in the Production of Boilerplate*, 104 Mich. L. Rev 1075 (2006).

³ Editorial, "New Consensus Standard Contracts Should be Exciting," ENR, Sept. 24, 2007, p. 148.

⁴ The American Institute of Architects (AIA) was invited to participate in the ConsensusDOCS drafting process, but after attending the first exploratory meeting politely declined further invitation. The invitation remains an open one. The Engineers Joint Contract Documents Committee (EJCDC) did participate in the ConsensusDOCS drafting process and provided valuable input and perspective. However, after considering endorsing several individual documents, EJCDC voted to table endorsement consideration due to a lack of agreement on a business agreement.

⁵ See http://www.consensusdocs.org/about_member-organizations.html. In addition, the Construction Management Association of America (CMAA) has indicated their recent endorsement of the ConsensusDOCS 301 Building Information Modeling (BIM) Addendum, which was published on June 30, 2008.

⁶ Quoting Will Lichtig in "Keep your construction projects healthy by going 'lean.'", St. Louis Daily Record & St. Louis Countian, Jul 29, 2005, http://findarticles.com/p/articles/mi_qn4185/is_/ai_n14830883.

⁷ <http://www.ipd-ca.net/PDFs/IPD%20Docs%20FAQ.pdf>.

⁸ Quoting Sandherr, AGC Press Release, "AGC Members Unanimously Vote Against A201 Endorsement, General Terms and Conditions Document Fails to Provide Balance," Oct. 12, 2007.

⁹ *Ibid.*

¹⁰ ConsensusDOCS 240, § 10.1.

¹¹ ConsensusDOCS 200, §§ 6.5 and 6.6.

¹² ConsensusDOCS 200, § 4.6; AIA A201-2007, § 1.6.

¹³ http://www.consensusdocs.org/about_procedures.html.

¹⁴ Smart Market Report. Key Trends in the European and U.S. Construction Marketing Place. P44-45. In addition to the 75% of owners that believe that the ConsensusDOCS would add value, another 19% of owners thought the ConsensusDOCS might add value. This means that an impressive 94% of surveyed owners thought ConsensusDOCS would or might add value to their business.