Changes to ConsensusDocs Construction Contracts: What Lawyers Need to Know

Default for Builder's Risk, Indemnification, Notice, Payment, Dispute Mitigation and Resolution, and Bond Penal Sum

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Workshop 501A
Leverage New Standard Contracts to Keep Your Clients’ Interests Ahead of the Curve

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I. Introduction

Standard construction contracts written by trade associations play a critical role, perhaps a fundamental role in the construction industry. You literally cannot write the word “General Contractor” or “Subcontractor” without including the word “contract.” A construction contract sets the foundation for a construction project’s success. Traditionally, a trade association representing a single segment, *i.e.* architects, engineers, writes and publishes a standard contract from the perspective of that individual segment of the industry.

Consequently, industry standard contracts are typically perceived as favoring one segment of the industry. ConsensusDocs formed a diverse coalition of construction industry organizations, who came together to create best practice contracts that are fair to all parties in an effort to get better project results. The coalition aims to get better project results, in part, by lowering transactional costs, such as litigation, and breaking down contractual silos and imbalanced risk allocation in traditional contracts that have greatly diminished the quality and productivity in construction. Industry studies estimate project increase in price in the range of three to 20 percent based upon inefficient use of contract terms. The construction industry appears to be the one industry in the United States that has become less efficient in delivering project results over the last 50 years.

II. Contract Form Updates

Case law, technology, processes, delivery methods, and insurance have changed dramatically over the past decade. In December 2016, ConsensusDocs, a coalition of now 40 construction organizations, published comprehensive updates to its most used standard agreements. First the design-bid-build prime agreements (200 series) and subcontracts (700 series).
series) were published. Then in March of 2017, the design-build (400 series) and construction management at-risk documents (500 series) followed suit with revisions.

ConsensusDocs has adopted a policy to update its contracts every 5 years, while giving a great deal of flexibility to update contracts sooner should the need arise. An example of an off-cycle update to address a discrete issue was when the ACORD forms changed and impacted certificates of insurance. Free samples as well as a redline comparison between the old and new standards are available on the ConsensusDocs website.

Comprehensive revisions were made to the general terms and conditions integrated in the ConsensusDocs 200 Owner/Constructor long form agreement and the ConsensusDocs 205 short form agreement. See generally ConsensusDocs Form 200, Agreement and General Conditions Between Owner and Constructor (Lump Sum); ConsensusDocs Form 205, Short Form Agreement Between Owner and Constructor (Lump Sum). These changes drove revisions in the design-build and CM At-Risk series. Where appropriate, these revisions were then flowed down to other agreements.

A. Insurance Updates: Changing the Default for Builder’s Risk

One of the more significant changes in the 2016/17 comprehensive updates pertained to insurance. ConsensusDocs risk allocation principles is premised upon allocating risk to the party who is in the best position to mitigate and manage the risk. Insurance plays a critical role in allocating risks as many construction risks do not neatly fall into the category of just one party bearing responsibility for a loss. The cost of determining the percentage of fault for when a risk is actualized as a loss, is potentially more expensive than the actual loss. Therefore, covering risk
with insurance is used whenever appropriate, and those proceeds are subrogated to avoid additional litigation and transaction costs.

Another important aspect of insurance coverage is that it should be readily available in the marketplace. Contracting parties should not be in violation of their contract on the day of signing because contractually required insurance coverages cannot be procured in the market where a project is located. Moreover, obtaining insurance coverage for a risk that is also excluded in that same policy issuance is also unhelpful.

With that in mind, ConsensusDocs insurance changes were made to provide for realistic insurance coverage as reflected in today’s market. The most significant changes were made to the builder’s risk insurance requirements in Article 12 of the ConsensusDocs 200.11

Purchasing Builder’s Risk property insurance now defaults to the Constructor, rather than the Owner. See id. at article 10, paragraph 10.3.1. ConsensusDocs also contains added language which allows an Owner to opt out and procure the policy themselves. Requiring an Owner to purchase the policy was the previous default approach and still is in other standard form contracts.12 However, in ConsensusDocs contracts, if the Constructor is concerned that the owner purchased insufficient coverage, then the Constructor may submit a change order for the additional cost in procuring such policy. While aiming for fairness, this approach potentially made for awkward conversations during the honeymoon of the initial contract signing period.

Based on industry feedback, the most common and cost effective method for purchasing builder’s risk insurance is to have the builder purchase the policy. One of the in-house general counsel participating in one of the drafting sessions speculated that up to a 50% savings is
realized when the builder negotiates the builder’s risk policy, since the builder normally has a better relationship and has procured more of this type of insurance than the owner of a project.

The new language also requires that the policy cover renovation work. It will be important for builders to include their cost in a lump sum price or modify language to seek a change order to reflect the price based upon the actual cost of procuring builder’s risk insurance. In addition, risk of loss for work completed before substantial completion will rest with the entity responsible for procuring the builder’s risk policy, which again, will now default to the builder. In the subcontract agreement, the risk of loss has been changed to reside with the Constructor.

A check-the-box for pollution liability insurance has also been added when the project site or the nature of the work raises this type of concern. A provision allowing Owner’s self-insurance is eliminated from the standard contract.

Additional language has been added to the Additional Insured section at subsection 10.4.1. This addition addresses issues raised by case law developments in Illinois and New York regarding vertical and horizontal exhaustion that made additional insured coverage less effective while also significantly raising policy limits and costs. The new language states, “the insurance, (both primary and excess) of the Constructor and Subcontractor shall be primary and non-contributory to any insurance available to the Additional Insured.

B. Design Delegation

Historically, standard construction contracts have not adequately addressed the complexity and subtleties inherent in delegated design. The rise in the use of building information modeling (BIM), the decreased appetite for Owners to pay for fully furnished documents, and the increasing capability and sophistication of builders to perform, assist and
review and design services has led to a dramatic increase in delegated design.\textsuperscript{17} This level of delegation goes far beyond a “means and methods” design that is not apparent in design documents.

ConsensusDocs has been ahead of the curve in recognizing that the responsibility to perform a delegated design is not completed by one general contractor.\textsuperscript{18} Rather the delegated design is likely going to be the resulting work from multiple subcontractors and their design professionals, whom may be outside or inside the subcontractor or constructor’s organization.\textsuperscript{19}.

Sometimes, delegated design is hidden in the plans and specifications by mixing performance specifications that are mostly prescriptive.\textsuperscript{20}

The delegation of design should be clear and transparent. Previously, ConsensusDocs required the delegated design criteria to be articulated at contract signing in the contract or in an exhibit to accomplish this goal at section 2.3. The new language also explicitly recognizes “means and methods” design.\textsuperscript{21} It is still preferable to articulate such delegation at contract signing, however, the newly revised approach allows more flexibility and simply requires the delegation of “a particular system or component” be articulated in the contract documents. This more flexible approach better reflects that the scope of delegation is not fixed or determined at the time of the contract’s execution in today’s construction process.

Professional liability insurance coverage for design delegation now requires prior acts coverage, as well as a delineation of a combined total deductible and self-retention maximum. This change helps provide greater transparency in the types of coverage provided by builders for professional liability as well as provides owners an opportunity to control the amount of risk the builder accepts for self-coverage.
C. **Termination for Convenience**

Beginning in the 2011 edition of ConsensusDocs, an improper termination for cause was automatically converted to a termination for convenience. The remedies for a termination for convenience would depend upon what the parties specifically agreed to in addition to reimbursement for work completed and demobilization costs. ConsensusDocs no longer automatically converts an improper termination for cause to a termination for convenience. Consequently, an improper termination for cause may have larger damages, such as lost profits on work not yet performed as defined under common law. Currently, the ConsensusDocs subcontracts do not allow for termination for convenience, unless triggered by the Owner. Termination for convenience is now addressed in the AGC members-only Guidebook comments. It is important to note, each association involved with the coalition can publish ConsensusDocs Guidebook comments to highlight especially important issues for possible education and modification.

D. **Termination for Cause**

The period for a Constructor to correct defective work has been shortened. The Constructor now has an initial notice of 7 days, and then a period of 3 days. Termination for cause can occur upon the expiration of the second period. Previously, the timing for an Owner to effectuate termination on the second period was much longer. Another important change is new language requiring written permission to use a terminated Constructor’s tools and equipment left on the worksite, and indemnification for the use of such tools and equipment.

E. **Indemnification**
There is no insurance for self-sabotage. Indemnification does not cover intentional acts. Therefore, you cannot get insurance for intentional acts that destroy a construction project by a rogue employee or rogue subcontractor. In general, insurance coverage should match your indemnity obligations. However, from a fairness perspective, it does not make sense to contractually protect a party from harm due to negligent acts or omissions, but leave that same party blowing in the wind if the harm was caused purposefully.

Consequently, indemnification now explicitly covers intentional wrongful acts in addition to negligence. While insurance coverage will not cover intentional acts, protecting a party from the harm resulting from such acts is not only reasonable to allocate to the offending party, but compelling to do so.

F. No Fiduciary Relationship Language

Over the years, some design professionals and insurance stakeholders have complained about the possibility of unintentionally creating a fiduciary relationship in the ConsensusDocs 240 Owner and Design Professional Standard Agreement. In 2011, language referencing a covenant was stricken. Now in 2016, language stating that the “Design Professional accepts a relationship of trust and confidence;” and will “further the interests of the Owner” has been removed. With this revision, there should be little concern that a fiduciary relationship is being created by contract language. Creating a fiduciary relationship would require a design professional to place the owner’s interest above its own, and potentially create extra liability exposure beyond insurance coverage.

It should be noted that a contrary argument was raised, that due to the nature of the relationship between an architect as a learned professional and an owner, there is an implied
fiduciary duty that may not be waived implicitly or explicitly. This argument radically changes the nature of contract and contract negotiations in design professional agreements.

This approach contrasts to other standard contract documents. The 2014 American Institute of Architects (AIA) A141(2014), Design-Build Amendment Exhibit A, states at section 5.6, “The Design-Builder accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to exercise the Design-Builder’s skill and judgment in furthering the interests of the Owner….)

G. Mediation and Arbitration: More Options, Faster Administration

ConsensusDocs contract aims to avoid and mitigate claims and litigation. This is a trademark feature in ConsensusDocs. ConsensusDocs has no reported cases after 10 years of active use. In order to minimize the time and cost involved in arbitration, revised arbitration provisions provide for AAA Fast Track procedures for claims under $250,000. Fast Track procedures generally provide for only a single day of hearing and the entire process to be completed within 45 days. ConsensusDocs is the first to address expedited arbitration procedures in a standard contract, and has chosen to expand the presumption of expedited procedures for total claims under $250,000.

Also added is a check-the-box option for choosing the rules and administration of mediation providers. JAMS and the AAA are listed with the AAA being the default choice.

Another significant clarification regarding arbitration is in response to recent case law out of New Jersey as well as other jurisdictions that appear to be hostile to enforcing arbitration provision even when the parties choose arbitration for resolving disputes. Recently, in another New Jersey case, the arbitration provision in the AIA A201 was nullified, even though
arbitration selection was clearly checked, because it was a “post construction” claim. Consequently, updated language is in bold text and uppercase to clearly affirm that the parties understand their selection of arbitration for all claims.

**H. Bonds and Penal Sum**

Based upon feedback from the surety industry, ConsensusDocs eliminated language in the standard terminology that included the term a “floating bond penal sum.” Previously, standard language automatically increasing the penal sum occurred when the contract price increased or decreased by more than 10%. It is still true that when prices are increased on construction projects, additional bond premiums are automatically collected. However, the surety community made a strong case at the ConsensusDocs drafting table that doing so without additional communication and underwriting, is not fair to the surety. Projects known as “runaway projects” such as some of the reported VA hospital projects that more than doubled from the initial contract price are strong examples of this inherent unfairness.

As an additional resource, there is language in the ConsensusDocs Guidebook to help users navigate this issue should they desire to further refine this issue in their agreements. This language builds from the previous ConsensusDocs language, but requires additional communication and an opportunity for a surety to conduct a renewed underwriting of the project. The goal is to balance additional protection to an owner through use of bonds without requiring a surety to write a blank check for a penal sum for which they may lose control with increasing contract prices.

**I. Changes**
The term “Interim Directed Change” for owner-directed changes was shortened to “Interim Directive” and the definitional scope expanded to include written instructions that do not necessarily cause changes in price or time. In AIA standard contract forms, a directed change is called construction change directive (CCD). It is thought that the term better reflects an Owner’s perspective that its ordered direction is not necessarily a change.

One of the more innovative contract provisions in ConsensusDocs agreements deals with changes. Timely payment flow is the lifeblood of a general contractor. Some say that general contractors go out of business not because they run out of money but run out of time (to collect money owed to them). Paradoxically, builders are more likely to go out of business in improving economic conditions when they take on more work too fast, because their expenditures are not collected in time.

When an owner uses an interim directive, a builder potentially transforms into a banker. If there is a dispute as to whether it changed the scope of the work a builder may be forced to fund all the materials and labor for what it considers a change in the work. This can be devastating, especially for small builders. The mere threat of taking such action is powerful leverage.

ConsensusDocs takes a different and balanced approached to payment flow regarding directed changes. A Constructor is entitled to 50% payment to disputed changed work. The Owner is ultimately not liable for this 50% if it is later determined that the directive was not a change in the work. These funds would “true-up” later. Under the “true-up” model, monthly payment applications administered on a percentage basis are later reconciled pursuant to an audit to determine the actual cost of the work. ConsensusDocs contract forms also include an explicit
requirement that as interim changes become agreed to by the owner and Constructor, they must be processed formally as a change order.

Previously, the 50% payment for an interim change was determined by the Constructor’s estimated cost of the changed work. This calculation left some owners skeptical and suggested that a disingenuous Constructor could estimate the disputed work at 200%, and therefore receive 100% of the change work in advance. Consequently, payment of interim changes is now determined by actual invoiced cost, and not an estimate. Additionally, if it is later determined that the interim change work performed does not merit additional Constructor payment, the 50% payment must be “trued-up,” perhaps taken out of the release of retainage if such a determination has been made by substantial completion.

A timeframe of 7 days has been added to memorialize change orders in writing that are generated and agreed upon through the submittal process. Additionally, a Constructor’s obligation to follow field instructions that are now covered by the definition of Interim Directives, means that such instructions must be in writing to trigger a Constructor’s obligation to perform^{34}.

J. Differing Site Conditions

Differing site conditions is an important risk allocation, especially for projects involving underground utilities or underground work in general. In standard contracts and the federal acquisition regulations, differing site condition risk falls to the owner since the owner is in the best position to know the condition of the property. However, when an unknown condition arises, this is not a risk that is any parties fault. Manuscript or non-standard contract forms increasingly attempt to contractually shift the risk of differing site conditions to builders.
Standard contracts have not gone in this direction yet, although AIA recently reduced the acceptable notice period by one-third.

ConsensusDocs made a minor change to its differing site conditions section. The Constructor was always required to give notice, but it wasn’t always clear what steps an owner was supposed to take upon receiving such notice to resume the project’s progress. Now, once the Constructor gives prompt notice of a changed condition, an owner is to respond with an Interim Directive. The expanded definition of an Interim Directive includes written instructions by an owner. An owner will instruct the Constructor how to proceed provided the Owner agrees the changed or unknown condition exists. If an owner did not accept that the differing site condition existed, the Interim Directive is to specify the owner’s understanding.

K. Schedule

The basic elements of critical path method (CPM) scheduling are now contractually required in ConsensusDocs §6.3. This is the first standard construction contract to incorporate language addressing CPM scheduling, even though doing so is common industry practice. The definition of CPM is generic and basic, and does not require issuance of a scheduling specification.

L. Payment

It is hard to overestimate the importance for a builder to get paid timely for work performed. Many subcontractors accept egregiously unfair contracts if the parties involved in the project have a good reputation for timely payment.

During the revision process, there was a comprehensive attempt to harmonize contract language amongst the different families of documents that are organized by project delivery
method, unless such differences are appropriate because of the different project delivery method. Consequently, in the traditional design-bid-build documents, payment is now required within 15 days from Constructor’s submitting a complete and accurate application. Previously, this requirement was 20 days in the ConsensusDocs 200 and this change aligns the time requirements in other documents. Perhaps more significantly, the Design Professional’s certification for payment is no longer required to process an application of payment. An Owner may certainly defer to or solicit a Design Professional’s judgment for such determinations, and the contract provides an option of including the Design Professional in transmission of payment applications.

Previously, ConsensusDocs required an architect’s or engineer’s approval of payment applications. The original thought was that an outside voice in the payment process could provide some objectivity and help harmonize potential payment disputes. However, experience in requiring this extra step by contract did not reach this objective. Consistent industry complaints that involvement of another party who isn’t necessarily liable for delays slows down the process. Thus, ConsensusDocs has removed this requirement.

M. Clarifications

The 2016/2017 ConsensusDocs contract revisions collectively accomplished hundreds of minor changes in the new ConsensusDocs contract editions. However, the majority of changes are editorial in nature for greater clarity, brevity, and consistency. Within the ConsensusDocs library of 100 contract documents, there were some minor differences between language contained in two different documents. Great care was given to choose the clearest and most efficient terms and then ensure that those same terms appear consistently across all appropriate contract forms. In some instances, sections or provisions were moved to achieve consistent placement across contract document families (project delivery method).
III. Track Record for ConsensusDocs

In 2017, ConsensusDocs reached a ten-year milestone with some definitive accomplishments. The ConsensusDocs coalition has doubled in size to 40 organizations. Collectively, the organizations participating in ConsensusDocs amount to well over 300,000 individual and company member members. The original goal was, and continues to be, to improve the A/E/C industry by forging a better path with fair contracts that incorporate best practice contracts.

ConsensusDocs has established itself as one of the two most used industry standard documents, with over 2,500 subscribers across the United States. The catalog of standard contract documents offered has grown from 70 to over 100. Over the past 10 years, ConsensusDocs contract forms have been used on billions of dollars of construction projects. Consequently, there have been no reported cases involving ConsensusDocs documents and a disproportionately low share of projects that wind up in formal claims. The Iowa Department of Administrative Services has used ConsensusDocs documents on more than $400 million in construction without experiencing a formal claim. Victor O. Schinnerer, the largest underwriter in the U.S. who regularly reviews contracts, reports that the ConsensusDocs design-build agreements are the most commonly used design-build contracts that are shared with that underwriting company. As the industry moves toward increasing collaboration and early involvement of construction professional in the design process, ConsensusDocs are well positioned to serve today’s industry.

IV. Distinctive Substantive Features of ConsensusDocs
The fundamental differences of ConsensusDocs standard contracts as compared to other contracts traditionally used in the A/E/C industry are:

1) Risk allocation is determined by the best party who can manage or mitigate risk, and insurance is used whenever possible to cover risks that do not originate from negligent acts or omissions. In integrated lean project delivery, risk allocation is allocated to the macro level -- to the project as a whole.

2) Owners are more active decision-makers in the design and construction process, and not just passive check-payers;

3) Design Professionals are not the fulcrum of all decision-making and take commensurate responsibility with their authority\(^4\);

4) The documents are written in a plain English style and avoid legalese;

5) Contractually created silos are avoided with positive party communications. Communication is encouraged to help collaboration and dispute mitigation procedures are given more emphasis;

6) Contractors are professional builders who can add value throughout the process, rather than a fungible commodity that should only be differentiated by lowest price alone;

7) General terms and conditions are integrated with the agreements in one document;
8) The documents are updated more frequently to keep up to date with current trends and case law. The ConsensusDocs coalition has an established track record of creating industry first standard contract documents that address emerging issues such as integrated project delivery, (“IPD”) and building information modeling, (“BIM”).

9) The documents provide flexibility to be tailored for project specific needs by prompting and requiring parties to discuss construction’s most difficult issues before contract signing, including using fill-in the blanks. A ConsensusDocs Guidebook is posted to help users navigate the issues from the eyes of the coalition as well as the individual perspectives of each participating organization.

10) Rather than contractually dictate everything that a party should not do, ConsensusDocs attempts to use incentives as well to optimize performance and align parties’ interests towards overall project success.

11) ConsensusDocs are published on a proprietary cloud-based technology platform that allows users to work offline for contract negotiations.

V. Usage and Impact

Usage of the contracts has been significant to date and is accelerating as more construction attorneys and practitioners become familiar with the documents and have witnessed their positive results. According to the Smart Market Report: Key Trends in the European and U.S. Construction Marketing Place, 75% of owners believe that ConsensusDocs adds value to their business.

AGC, an active organization endorsing ConsensusDocs believes that “ConsensusDocs has brought one of the most significant improvements to the industry in 20 years.” However, change in the construction as well as legal contract field is slow moving. Some utilize industry
standard contract documents to negotiate certain problematic provisions in contract negotiations and point to them as a well written national standard. In ten years, ConsensusDocs has become a viable contractual option in the design and construction industry with a track record of success. During the next 10 years, ConsensusDocs aims to become the default standard for construction contracts in order to further the productivity of the industry, and thereby help one of the most important industries in the United States.

VI. ConsensusDocs’ Technology Platform

In 2012, ConsensusDocs launched a New Technology Platform and rebranded its logo and color scheme. Previously, the documents were delivered in a downloadable software called DocuBuilder. The new cloud-based technology platform helps assist in the contract negotiation process by offering:

- **MS Word®** compatibility and automatic section renumbering.
- **Collaboration**—Collaborate with others for free and you control their editing rights.
- **Comparisons**—Quickly see changes between document versions at each step of the negotiation or track from the standard agreement language.
- **24/7 Access**—Access contracts anytime, anywhere via a secure cloud-based system.
- **Automatic Renumbering**—Section and article numbers referenced in the document are automatically updated.
- **Guidance**—Embedded instructions to fill in project specific information.

The intent of the new system is to allow parties to effectively communicate and collaborate on contract negotiations in an efficient matter. This collaborative approach to the delivery and use of the documents more closely matches the substantive contents in the contract documents.

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ConsensusDocs was originally conceived as a stand-alone entity. Currently, the legal structure places the copyright in an LLC but that AGC takes the lead role in management of the coalition efforts. The ConsensusDocs procedures ensures that each group has an equal voice in the document production and approval process.

See Powers, Supra.


https://www.consensusdocs.org/procedures.

www.consensusdocs.org. Samples are free but require a registration.


See ConsensusDocs 200, Article 12.


See ConsensusDocs 200, Paragraph 10.3.1 (“…Constructor shall obtain and maintain a Builder’s Risk Policy upon the entire Project for the full cost of replacement… including existing structures.”).

See Id.

See ConsensusDocs 200, Article §10.4.2 (2011).

See Dennis J. Powers, Traditional Shop Drawing Liability and Liability That Arises From Shared or Delegated Design, Shared Design (Jan. 18, 2018, 6:18PM), http://news.wolterskluwerlb.com/media/ChapterSHAREDDESIGN.pdf.
During the recent great recession, the biggest source of employment of newly graduated architects were builders.

See Id.

See Stuyvesant Dredging Co. v. United States, 834 F.2d 1576 (Fed. Cir. 1987) (Dredging contractor brought claim for equitable adjustment to dredging contract based on differing site conditions with respect to nature of material to be dredged. United States Court of Appeals, Federal Circuit, held in pertinent part that the technical provision in question was merely a performance specification, and not a design (or prescriptive) specification.)

See ConsensusDocs 200 at 2.3 (b) stating, “services within the construction means, methods, techniques, sequences, and procedures employed by Constructor, its Subcontractors and Subsubcontractors in connection with their construction operations.”

See ConsensusDocs 200, Article 11.


See ConsensusDocs 200, Paragraph 11.2.1.


See ConsensusDocs, ConsensusDocs: No Need For Case Law, YouTube (Jan. 3, 2018), https://www.youtube.com/watch?v=n1V7cEEnnA.


See Melissa Blasius and Brandon Rittiman, Colorado VA hospital $1 billion over budget, USA Today, March 18, 2015.

ConsensusDocs 200 200 § 8.2 (2016).


ConsensusDocs 200 § 8.1.3 (2016).

Id § at 6.3.

See ConsensusDocs 200, Article 9 (2011).

See projects listed by ConsensusDocs at https://www.consensusdocs.org/FooterSection_Resources/projecthistories.


ConsensusDocs 240 Owner and Design Professional Agreement requires the Design Professional must provide design documents that are sufficient to bid and build the Work. Also, the lead design professional, in matters of delegated design, retains some responsibility for design coordination.

The ConsensusDocs procedures call for a five-year update cycle. However, the coalition may update the documents more frequently and have already done so. Comprehensive revisions were made in 2011, and 2016. However, discrete revisions were made in response in 2012 and 2014 to address case law and other construction industry changes.

The ConsensusDocs Guidebook is published at http://www.consensusdocs.org/Resource_/FileManager/All_Associations_Guidebook.pdf.

At p. 44-45. Another 19% of owners though the ConsensusDocs maybe would add value. This means that an impressive 94% of surveyed owners thought ConsensusDocs would or might add value to their business.

Steve Sandherr, CEO of AGC quoted in a September 27, 2007, Press Release “INDUSTRY GROUPS SET TO RELEASE CONSENSUSDOCS.”


AIA OR CONSENSUS DOCS CONTRACTS: WHICH STANDARD CONSTRUCTION CONTRACTS ARE BEST FOR YOUR PROJECT?

Success on a construction project can rise or fall on the contract you choose. Remember, financial solvency often depends on it. If just one contract out of 10 goes bad, this might lead to a general contractor shutting its doors. I’m often asked why should I choose ConsensusDocs over American Institute of Architects (AIA) standard construction contract documents? While many express dissatisfaction with AIA contracts to me, they often say it’s the devil they know (and make extensive changes). This article points out the fundamental differences between ConsensusDocs versus AIA contracts and how making a few word changes might not address the fundamental differences.

Mission

The American Institute of Architect’s (AIA’s) mission includes “to organize and unite” and “promote” the architectural profession. The AIA’s contracts show a bias towards architects. AIA contracts give architects a disproportionate share of decision-making authority without the same level of responsibility.

ConsensusDocs’ goal is to write fair contacts that advance better project results. Fairness stems from neutralizing bias by giving all the stakeholders to the A/E/C industry an equal voice to the drafting table.

Communications

Historically, AIA contract documents funnel all communications through the architect. The AIA A201 General Conditions is for a contract between an owner and contractor, and yet the most prevalent word is architect. When coupled with an AIA agreement, the word architect appears 400 times. Historically, the owner and contractor were NOT supposed to communicate directly with one another, but ONLY through the architect. Thankfully this obstacle has finally been removed in 2017, but the basic structure remains.

ConsensusDocs emphasizes positive and direct party communications. Parties are encouraged to speak directly to one another, early and often in the project to facilitate a positive relationship. Electronic communications are recognized as an effective means of communication in notice provisions as well as for use in project administration though documents such as the ConsensusDocs Electronic Communications Protocol.

Role of the Owner, Passive Check-Payer or Decider
AIA documents demote the owner into a passive project role. An owner’s main function is to do one thing – write checks. Beyond that, the message in the AIA B101 Owner/Architect agreement and AIA A201 General Conditions Document, is the architect knows best. And owners need protection from the contractor, who should be kept at arms-length.

ConsensusDocs gives Owners an active role. After all, an Owner has the most to gain or lose in the success of the construction project, which ultimately is the Owner’s capital asset. An Owner may delegate its authority to an outside architect, such as approving change orders, but decision-making authority defaults to the owner. All decision making doesn’t default to the architect. Keep in mind that an owner might have an internal construction manager or hire a construction manager externally, which would certainly change the equation.

**Project Financial Information and Sharing Information**

ConsensusDocs allows a builder to request and receive project financial information before and during construction. ConsensusDocs provide the industry’s only standard questionnaire and guidelines to help ask reasonable questions about project financing.

AIA restricts access to receive financial information once the project commences. Under AIA, the default for commencement of the project is the date of contract signing, which is before dirt is even moved. Thereafter, a contractor must show a reason (as determined by the architect) to receive financial information. The consequences for not receiving reasonably requested information is not clear because new AIA language in this section is vague.

**Writing Style**

The ConsensusDocs are written from the perspective that good legal writing is simply good writing. Contract language with a clear and concise language helps the parties understand, administer, and interpret the contract. A distinguishing feature in ConsensusDocs is the integration of the general terms and conditions and the agreement into one document. This avoids the two documents from conflicting and avoids confusion. Provisions are written so that the responsibilities and obligations, such as indemnification, are reciprocal on both parties in a consistent fashion. What is good for the goose should be good for the gander.

Over ConsensusDocs’ 10-year history a great deal of effort has been made to refine the language and make sure it is consistent in style and even placement throughout the family of 100+ contract documents. ConsensusDocs comprehensively revises its documents once every 5 years but also allow the flexibility for discrete revisions typically based on changes to caselaw or the insurance market. Timely updates keep users from being out of date and exposed.

AIA contract documents are updated once every ten years. Given their long history, AIA’s substance and language style is slower to change. The substantive terms are not always consistent when comparing an architect’s responsibilities and a contractor’s. An architect’s services are at times aspirational or silent in regard to clear consequences for not performing
completely or in a timely fashion. Conversely, obligations falling on the contractor come with hard deadlines and broad consequences, especially when such obligations coordinate with an architect’s responsibility. One example is a contractor’s obligations to provide a submittal schedule, and unclear consequences for not processing submittals in a timely fashion.

Case Law and Litigation

AIA has published contract documents since 1888. AIA documents, old and new revisions, generate a great deal of caselaw and decisions interpreting the language in the documents. There are entire caselaw books devoted to the cases generated by litigated projects using the AIA contract documents. AIA touts the breadth of caselaw associated with AIA contract documents.

ConsensusDocs has been around for over 10 years. Billions of dollars have been put in place using the documents. Not one reported case has been generated using ConsensusDocs. ConsensusDocs touts the infrequency of projects that fall into litigation using their documents.

Dispute Mitigation vs Dispute Escalation

AIA’s first line of disputes is through an initial decision maker (IDM), which defaults to the architect. Architects are not trained to serve in a quasi-judicial role, but the AIA contracts thrust an architect in the role of judge, jury, and executioner, even if they are not interested in many small decisions monitoring contract administration. According to the AIA, the architect serves as the IDM on almost all projects. And even if the architect isn’t the IDM, architects retain authority to make certain decisions regarding design intent. Moreover, the IDM process is complex with technical timing requirements to finalize IDM decisions that have important consequences that might get easily overlooked by some parties.

ConsensusDocs utilizes an innovative tier approach that requires the parties to talk with each other at the project and senior project level to mitigate claims before they are escalated to a formal claim. ConsensusDocs also employs innovative dispute mitigation techniques in calling out options for a project neutral or a dispute review board (DRB) which have proven to be effective on projects that can afford to carry the cost. ConsensusDocs even publishes two standard DRB agreements to implement DRBs.

Design Documents

The AIA B101 Owner/Architect Agreement strongly protects architects’ interests in their intellectual property in design documents. If there are any disputes or potential disputes between the architect and the owner, the architect can stop the project in its tracks from advancing, unless and until full payment for services are rendered and a blanket waiver favoring the architect is given. Protecting an architect’s IP rights takes precedence over advancing a project forward. AIA forbids an owner from using design documents on a future project, even renovations, unless the architect is involved.
An architect is “entitled to rely on, and not be responsible for the accuracy, completeness, and timeliness of services and information furnished by Owner.” The owner may not rely upon the design professionals provided information in a reciprocal manner. An owner’s protection rests upon the architect’s standard of care, which is a different and lower standard. Commenters have cautioned owners from basing their Owner/Architect agreement on an AIA document because AIA’s mission is to protect and promote the architectural professional. The view that AIA documents are owner-friendly is considered a myth.

ConsensusDocs 240 Owner/Design Professional Agreement takes a balanced approach regarding a design professional’s IP rights and an owner’s need to build or renovate a project. An owner is allowed to continue a project if there is a dispute between the owner and architect provided payment for services performed have been paid. An architect retains their claim rights. Additionally, there is an option (although it is not the default) for an Owner and architect to mutually agree for an Owner to use the design documents for future projects along with a waiver of claims to the architect, if the architect is not involved in that future work.

The ConsensusDocs architect agreements provide the owner with construction phase design documents that are sufficient “to bid and build the work.” Reciprocally, the design professional may rely upon the design services provided by others. Unbuildable design documents are the equivalent of pretty pictures. ConsensusDocs provides owners a balanced architectural agreement that isn’t written by an architectural association.

**Conclusion**

Now with a 10-year track record, ConsensusDocs provides an industry-wide developed choice for standard design and construction contracts. ConsensusDocs takes a plain English and fair to all parties’ approach. ConsensusDocs encourages direct party communications to build positive collaboration. Owners gain more control and an active say in their projects. Constructors are viewed as problem solvers rather than problem makers. In comparison AIA provides a more traditional approach that gives architects more control. Architects make most decisions and protect owners from potential contractors’ abuses. AIA contracts’ long history and usage is well known with a history of litigation and case law.

**BRIAN PERLBERG, EXECUTIVE DIRECTOR & SENIOR COUNSEL OF CONSENSUS DOCS.**
The Key to More Efficient Construction Projects is Collaborative Contracts

According to the United States Bureau of Labor Statistics, the architecture, engineering and construction (AEC) industry is the only industry that has become less efficient and productive since 1964.

Albert Einstein said that doing the same thing repeatedly and expecting different results is the very definition of insanity. The way we traditionally contract, design and interact in the AEC industry fits this definition.

The AEC industry is one of the most important drivers of current and future success of the U.S. economy. It’s a homegrown industry and probably still the best way for someone to start their own business. Construction jobs have a great home field advantage to create the infrastructure foundation we need for future success. But, if we don't get out of the old ways of doing things we will lose a golden opportunity.

Creating change

The AEC industry is fragmented and slow moving. The legal industry, which drives the structural relationships in construction contracts, is even slower to change. The combination has us stuck in the morass of contractual silos that create confrontation. Some wear this as a badge of honor. They follow a similar pathway that has been around for over a hundred years and have a mountain of case law dissecting the corpses of dead projects gone wrong interpreting this approach. A siloed approach is done in the
Future of Business and Tech

The Key to More Efficient Construction Projects is Collaborative Contracts - Future of Business and Tech

Better foundation to build requires three things: trust, collaboration and innovation.

Fueled by a combination of frustration with current results, a desire to improve and a technological revolution, the industry is trying new things. The most expensive and complicated construction per square foot, the hospital market, has been a market leader for change. The change comes from searching for a better way of doing things. And that better way is through collaborating... really collaborating.

Improving the foundation

A better foundation to build requires three things: trust, collaboration and innovation. If you don't have trust, you don't have anything. To build trust you need to be understood and act in accordance to what you've agreed to in letter and spirit. You can't say “general contractor” without saying “contract.” The words that bind you matter, so use them wisely. Good legal writing is simply good writing. Don't try to address all contingencies up front, you are more likely to muddy the water. Vague and broad responsibilities that place all the risk on parties that are not able to control or mitigate the risk is the antithesis to trust. Ambiguities will naturally arise. Don't hide in your turtle shell when they do. Communicate constructively and avoid the blame game.

The common thread of failed projects is a lack of communication. Parties in a construction project often meet as strangers and leave as enemies. That's not a recipe for repeat business. Traditionally, contract structures funnel all information and most decisions to the architect. A better approach is to encourage parties to communicate directly and positively. Empowering people in-field who are most familiar with the information can be transformational. Creating a communication structure in which parties must talk to one another about timely issues before claims become intractable leads to less litigation. Early involvement by builders incorporates a practical constructability analysis that enhances overall project value. A race to the bottom to slash an impractical budget that becomes bloated with what might be labeling value-engineering (but is anything but) should be avoided.

The key is innovation

Innovation is what is really driving a great opportunity to change. There has never been a time when there was a greater incentive to build more efficiently. Execution is so much better, safer and more valuable to the end-user when you maximize the impact of technology. To deploy these technology tools, it is necessary to build better teams early. Treat a project as an opportunity to learn and gain efficiency each step of the way, rather than to simply avoid the blame game. Then, and only then, can you yield the most out of the today's wave of incredibly powerful and time-saving construction technology devices.

Today, the technology has arrived, is proven and is very powerful.

To build a better way, you must try something new. Structure your next project to truly collaborate by building trust, encourage the flow of timely information and embracing the maximum power of technology. Don't just pull out the same contract from the drawer and sign it without thought. Use the contract as opportunity to memorialize a business relationship that gets better results.

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http://www.futureofbusinessandtech.com/business-solutions/the-key-to-more-efficient-construction-projects-is-collaborative-contracts
The Key to More Efficient Construction Projects is Collaborative Contracts - Future of Business and Tech
CONSENSUSDOCS STANDARD CONSTRUCTION CONTRACTS: CONTRACTS AIMED TO BUILD PROJECTS, NOT CLAIMS¹

Brian Perlberg

I. OVERVIEW

While success in construction relies upon teamwork, cooperation, and coordination more than any other industry in the United States, it is unfortunately this reliance which leads to the industry being among the most adversarial and litigious. According to the U.S. Department of Labor Bureau of Labor Statistics, the construction industry is the only industry in the United States to be less efficient since 1964.² Resources expended for transactional costs to arbitrate, litigate, or even mitigate potential claims are inefficient waste in the eyes of construction productivity because they do not direct contribute to putting construction work in place.

Standard construction contracts written by various trade associations play a critical role, perhaps a fundamental role, in driving the construction industry down the adversarial and inefficient path.³ You literally cannot write the word “General Contractor” or “Subcontractor” without including the word “contract.” A construction contract sets the foundation for the parties’ relationship and a construction project’s overall success. Traditionally, a trade association representing a single segment, i.e. architects, engineers, writes and publishes a standard contract from the perspective of that individual segment of the industry. Consequently, industry standard contracts are typically perceived as unfairly favoring one segment of the industry over another.⁴ This perception leads to the non-favored party feeling slighted, often

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justifiably, which leads to a poor relationship between the parties and affects many aspects of the project holistically.

In no small measure, unfair construction contracts contribute to unacceptable project consequences and results. Recognizing this fracture in the industry, ConsensusDocs formed an unprecedented coalition of 20 endorsing organizations upon its initial formation.\(^5\) Significantly, the original drafting and endorsing organizations included the three most influential owner organizations which included, the National Association of State Facilities Administrators (NASFA), Construction Users Roundtable (CURT), and Construction Owners Association of America (COAA). Prior to ConsensusDocs, generally the “Owner’s perspective in the formation of industry-wide documents has traditionally been ignored.”\(^6\)

Industry studies estimate inefficient use of contract terms on a project can increase that projects costs in the range of 3 to 20 percent.\(^7\) The coalition aims to get better project results, in part, by lowering transactional costs, such as litigation, and breaking down contractual silos and imbalanced risk allocation in traditional contracts that have greatly diminished the quality and productivity in construction projects.

\(^5\) National Association of State Facilities Administrators (NASFA); Construction Users Roundtable (CURT); Construction Owners Association of America (COAA); Associated General Contractors of America (AGC); Associated Specialty Contractors (ASC); Construction Industry Round Table (CIRT); American Subcontractors Association (ASA); Associated Builders and Contractors (ABC); Lean Construction Institute (LCI); Finishing Contractors Association (FCA); Mechanical Contractors Association of America (MCAA); National Electrical Contractors Association (NECA); National Insulation Association (NIA); National Roofing Contractors Association (NRCA); Painting and Decorating Contractors of America (PDCA); Plumbing Heating Cooling Contractors Association (PHCC); National Subcontractors Alliance (NSA); Sheet Metal and Air Conditioning Contractors’ National Association (SMACNA); National Association of Surety Bond Producers (NASBP); The Surety & Fidelity Association of America (SFAA); and Association of the Wall and Ceiling Industry (AWCI).


Initial publication of the ConsensusDocs® contracts in September 2007 marked the first time in the United States that a diverse coalition of the construction industry’s leading organizations came together and collaboratively drafted standard construction contract documents. This was the culmination of a three year effort in which Associated General Contractors of America lead the original invitation for innovation, but also included many other organizations that joined in and endorsed the efforts to build a better tomorrow through better contracts today. All organizations participating carry an equal voice in approving the content, making this a truly collaborative effort that had not been seen before. The achievement made the cover and was the lead editorial in the pages of Engineering News Record (ENR). The effort was lauded 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”.

As ConsensusDocs has passed its ten-year milestone, the ConsensusDocs coalition has doubled in size to currently comprise 40 organizations. Collectively, the organizations participating in ConsensusDocs amount to well over 300,000 individual and company member members. The goal has, and will continue to be, to improve the A/E/C industry by forging a better path with fair contracts that incorporate best practices that build positive relationships. Contracts that fairly allocate risk to the party or teams to manage and mitigate that risk help foster a better contractual foundation and relationship to successfully complete projects. Better contracts optimize better project results with less wasteful transactional costs, such as claims, contingencies, litigation, and contentious contract negotiations.

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8 ConsensusDocs is a trademark of ConsensusDocs LLC. ConsensusDocs contracts and forms are copyrighted by ConsensusDocs LLC.
9 See. Kevin E. Davis, The Role of Nonprofits in the Production of Boilerplate, Michigan Law Rev., Vol. 104, No. 5, March 2006. This well written article provides an excellent discussion on the value of standard construction contracts, and comments on the need for the U.S. to create standard documents written by the entire industry in a manner like other countries.
11 Id. at 148.
12 Architecture/Engineering/Construction
ConsensusDocs has established itself as one of the most used of the industry standard documents, with presently over 3,000 subscribers across the country. The catalog of standard contract documents offered has grown from 70 to over 100. Over the past eleven years, they have been used on construction projects totaling more than a billion dollars. While other standard contract documents seem to tout the large volume of reported caselaw associated with interpreting their documents that resulted from litigation, including having entire casebooks devoted to interpreting the language in their documents, ConsensusDocs touts the inverse, namely the infrequency at which projects fall into litigation using their standard documents. The Department of Administrative Services of Iowa has reported using the documents on more than $400 million in construction without experiencing a formal claim. There have been no reported courts cases to date citing ConsensusDocs, and very few arbitration claims referred to the largest administrator of arbitration claims, the American Arbitration Association (AAA). Victor O. Schinnerer, the largest underwriter in the U.S. who regularly reviews contracts, reports that the ConsensusDocs design-build agreements are the most commonly used design-build contracts that are shared with that underwriting company. As the industry moves toward increasing collaboration and early involvement of construction professional in the design process, ConsensusDocs are well positioned to serve today’s industry.

A. Distinct Features of Consensusdocs

The fundamental differentiators of ConsensusDocs contracts are:

1) Owners are more active decision-makers in the design and construction process, and not just passive check-payers;

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13 See projects listed by ConsensusDocs at https://www.consensusdocs.org/Footer Section_Resources/projecthistories
15 The author sits on the steering committee for the National Construction Dispute Resolution Committee (NCDRC), which analyzes AAA arbitration case loads and trends.
2) Design Professionals are not the fulcrum of all decision-making and take responsibility commensurate with their authority;\textsuperscript{17}

3) The documents are written in a plain English style and avoid legalese;

4) General terms and conditions are integrated with the agreements themselves in one document;

5) Contractually created silos are avoided with positive party communications. Communication is encouraged to promote collaboration and dispute mitigation procedures are given more emphasis;

6) Contractors are seen as professional builders who add value throughout the process, rather than a fungible commodity that should only be differentiated by lowest price alone;

7) The documents are updated more frequently to keep pace with current trends and case law, and the coalition tends to be first in addressing emerging issues such as IPD and BIM;\textsuperscript{18}

8) The documents provide flexibility to be tailored for project specific needs by prompting and requiring parties to discuss construction’s most difficult issues before contract signing with fill-in the blanks. A ConsensusDocs Guidebook is posted to help guide users on navigating these issues from the eyes of the coalition as well as the individual perspectives of each participating organization;\textsuperscript{19}

9) Rather than contractually dictate everything that a party should not do, ConsensusDocs attempts positively to incentive parties as well to optimize performance and align parties’ interests towards overall project success; and

\textsuperscript{17} ConsensusDocs 240, the Owner and Design Professional Agreement requires that the Design Professional must provide design documents that are sufficient to bid and build the Work. Also, the lead design professional, in matters of delegated design, retains some responsibility for design coordination.

\textsuperscript{18} The ConsensusDocs procedures call for a five-year update cycle. However, the coalition may update the documents more frequently and have already done so. Comprehensive revisions were made in 2011, and 2016. However, discrete revisions were made in 2012 and 2014 in response to, and to address, case law and other construction industry changes.

\textsuperscript{19} The ConsensusDocs Guidebook is published at http://www.consensusdocs.org/Resource/_FileManager/All_Associations_Guidebook.pdf.
10) ConsensusDocs are published on a proprietary cloud-based technology platform that allows users to work offline for contract negotiations.

B. Why Consensus Was, and Is, Needed

Standard contracts published by one association are perceived as ultimately favoring that association’s membership. An alphabet soup of construction associations has published standard form contracts\(^{20}\) and this effort accelerated and expanded near the time of the controversial publication of the 1997 edition of the AIA A-201\(^{TM}\).\(^{21}\) This has led a fragmented construction industry to fragment further in its usage of standard and non-standard contracts. Estimates report that approximately two-thirds of projects use non-standard contract documents.\(^{22}\) Truly national contractual standards have been elusive. Some construction markets, such as in Houston, report the use of 54 separate “standard” documents, which causes there to be no true standard documents that would provide predictability. The lack of national standards may be a reason why state legislatures have passed a wide assortment of laws that interfere with parties’ individual abilities to contract in the private sphere in various areas of construction law.

Even when using standard documents, they are often so heavily modified, typically with risk-shifting killer clauses, that the “standard” documents hardly resemble the original text. Sometimes the “modifications” exceed the original “standard” text. This nullifies the predictability and balancing of risk that is provided in standard documents. All too often parties and their attorney-advisors try to push risk away instead of allocating it to the party who is in the best position to manage and mitigate that risk. “Pricing out” risks with unknowable ramifications, causes unproductive behavior, negatively

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\(^{20}\) AIA, AGC, AOD, COAA, CMAA, DBIA, and EJCDC had all produce or produced standard construction contract documents.

\(^{21}\) AGC’s 1997 endorsement of the A-201 was hotly contested and required an unusual on-the-record vote of the 600-member board of directors in which approximately one-third of the membership voted against endorsement. Some AGC Board members within the same family were on different sides of the vote.

\(^{22}\) As reported by the American Arbitration Association’s (AAA) NCDRC Winter 2008 meeting held at the AIA office in Washington, D.C. AAA requests their arbitrators to evaluate if a case derives from a project using standard or nonstandard contract.
impacts Owners through decreased competition, and increases prices unnecessarily.

The construction industry is moving inevitably towards Building Information Modeling (BIM), lean, design-assist, integrated project delivery (IPD), and green buildings (which will be discussed further below). All of these approaches have one central premise needed for successful utilization—collaborative relationships. Collaboration among multiple participants that coordinate complex and interdependent components builds trust and is essential for better project results and lower costs. The consensus towards collaboration begs an important question. Shouldn’t the contracts reflect the collaborative relationship that is needed?

ConsensusDocs solves this Gordian knot by giving all the stakeholders in the construction process an equal seat at the table. The “DOCS” in ConsensusDocs stands for Designers, Owners, Contractors, and Subcontractors/Sureties. Upon reaching consensus, AGC and COAA merged their previous contract documents program into ConsensusDocs, which provided slightly less fragmentation for the industry.

C. Mission and Philosophy

The ConsensusDocs’ goal is to help facilitate better construction project outcomes with less transactional costs through the use of contract documents that incorporate best practices that are fair to all stakeholders in the design and construction industry.23 Upstream parties, starting with owners, who look to protect themselves rather than build a positive relationship through fairness, often issue one-sided contracts. These risks are pushed down the contractual chain and get worse at each level. Often a party who is lowest in the contractual chain and least able to effectively manage a risk, winds up with the most toxic risk. Projects all too often become contentious and more expensive.

Standard construction contracts, which have such a deep tradition in the industry, have become part of the problem. ConsensusDocs standard contracts should help reduce transactional costs by avoiding the need to repeatedly argue one-sided terms in contentious contracts, terms that generally would be argued through negotiations,

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23 https://www.consensusdocs.org/procedures
arbitration, and litigation, all of which hurt the relationship between the parties, cost time and money, and stall projects. Significantly in contrast to contracts that foster a negative relationship, owners using ConsensusDocs invite positive relationships and send a signal that they want to attract the best contractors at their best prices by operating collaboratively and fairly. Fair contracts lead to fair prices that do not require unnecessary risk contingencies.

Collaboration helps develop positive relationships and direct party communications that are critical when addressing difficult project decisions that inevitably arise. The innovation contained in the ConsensusDocs dispute resolution mitigation procedures employ direct party communications to resolve and reduce potential claims before they become intractable. The contracts aspire to promote a positive business relationship, not got to war. Better contracts help significantly reduce litigation costs for all stakeholders. The tiered mitigation approach and other dispute mitigation tactics are discussed further in the dispute mitigation portion of this chapter.

In reading the ConsensusDocs contract documents, you will notice some fundamental differences from what many are accustomed to reading in other standard documents. Principally, the owner is treated as an active participant in the construction process. After all, the owner has the most to gain or lose in a project’s success. ConsensusDocs views the owner’s involvement as not only welcome, but essential. An owner is not seen as just a check-payer to be kept on the sidelines and tolerated. Design professionals may easily be designated to act on the owner’s behalf in contract administration and dispute resolution under ConsensusDocs agreements. However, the owner decides the level of involvement it desires. The contracts do not mandate that a designer play a central role in all decisions.

The documents are written in a straightforward manner to be more easily understood and utilized by all parties. Rather than be shoved into a desk drawer after signing, the contracts are written to be used as tool to help guide performance.

D. Impact and Outlook

Usage of ConsensusDocs contracts has been significant to date and is accelerating as more construction attorneys and practitioners become familiar with the documents and take notice of the positive results that ConsensusDocs exude in promoting collaboration and a
positive relationship on the project, and thus the overall success of the
projects on which they are used. According to the SmartMarket
Report: Key Trends in the European and U.S. Construction Marketing
Place, 75% of owners believe the ConsensusDocs adds value to their
business.24 The organizations endorsing ConsensusDocs believe that
“ConsensusDocs has brought one of the most significant improvements
to the industry in 20 years.”25 However, change in the construction
industry as well as in the legal contract field is often slow moving.
Some utilize discrete provisions originating from industry standard
contract documents to negotiate certain problematic provisions in
contract negotiations as a strategy, because pointing to national
standards raises the level of conversation above the individual parties’
perspective that are negotiating across the table.26 In ten years,
ConsensusDocs has become a viable contractual option in the design
and construction industry with a track record of success. During the
next 10 years, the coalition aims for ConsensusDocs to become the
default standard for construction contracts to further the productivity
of the industry, and thereby help one of the most important industries
in the United States.

ConsensusDocs has adopted a policy to update its contracts every
5 years, while giving a great deal of flexibility to update contracts
sooner should the need arise.27 An example of an off-cycle update to
address a discrete issue occurred when the ACORD forms changed
and impacted certificates of insurance. Free samples as well as redline
comparison between the old and new standards are available on the
ConsensusDocs website.28

Comprehensive revisions were made to the general terms and
conditions integrated in the ConsensusDocs 200 Owner/Constructor
long form agreement and the ConsensusDocs 205 short form
agreement.29 These changes drove changes in the design-build and

24 Id. at p. 44-45. Another 19% of owners though the ConsensusDocs maybe would add
value. This means that an impressive 94% of surveyed owners thought ConsensusDocs
would or might add value to their business.
25 Steve Sandherr, CEO of AGC quoted in a September 27, 2007, Press Release
“INDUSTRY GROUPS SET TO RELEASE CONSENSUSDOCS.”
26 See, ENR, July 28, 2008, Legal Section quoting John Hinckley, Esq. of Hinckley,
Allen & Snyder.
28 www.consensusdocs.org. Samples are free but require a registration.
29 See generally, ConsensusDocs 200, Standard Agreement and General Conditions
Between Owner and Constructor (Lump Sum); ConsensusDocs 205, Short Form
Agreement Between Owner and Constructor (Lump Sum).
CM At-Risk series, although in some cases the drafters made changes in those documents and flowed them to the other agreements including the 200 and 205.

II. CONSENSUSDOCS 200 GENERAL CONDITIONS AND AGREEMENT BETWEEN AN OWNER AND GENERAL CONTRACTOR

[A] Article 1: General Conditions and Agreement

ConsensusDocs contracts take a different approach to other organization’s documents by integrating the Agreement and General Conditions in one document. You might say this is a two for the price of one scenario. This avoids confusion in referencing one document for General Conditions and a separate document for the Agreement. The ConsensusDocs drafters found this approach to be superior in facilitating contract administration and helping to avoid conflicts between two separate documents. Also, this approach avoids a common problem in which general conditions are referenced but not provided, and therefore may not be enforceable. Moreover, a commonly reported abusive practice is heavily modified general conditions that appear only after contract signing. Using an integrated agreement and general conditions reduces this contractual gamesmanship that can leave designers and contractors in a contractual dispute before beginning work.

For example, the ConsensusDocs 205 provides a short form version of the 200 Agreement. The ConsensusDocs short form agreements are comprehensive but abbreviated agreements that provide most, but certainly not all, of the innovative features found in the ConsensusDocs standard agreements.

[B] Relationship of the Parties

The first provision of each ConsensusDocs agreement states that the Parties “agree to proceed with the Project on the basis of mutual trust, good faith and fair dealing.” From the beginning, the documents take the time to set the tone to help foster a better relationship. Importantly, this provision is educational in nature and does not create a fiduciary relationship. It is emblematic of the current state of affairs in the construction industry when stating that acting in good faith, which is inherent in all contracts, raises concerns that a higher standard of care or new duty is being created.
[C] Ethics

At section 2.2, the ConsensusDocs explicitly state that:

“The Parties shall perform with integrity. The Parties shall: (a) avoid conflicts of interest; and (b) promptly disclose to the other Party any conflicts that may arise. Each Party warrants it has not and shall not pay or receive any contingent fees or gratuities to or from the other Party, including its agents, officers, employees, Subcontractors, Subsubcontractors, Suppliers, or Others, to secure preferential treatment.”

[D] Limited Waiver of Consequential Damages and Liquidated Damages

ConsensusDocs seeks to take a balanced approach in leveling the competing interests involved in consequential damages. Rather than give the owner or contractor everything they desire, ConsensusDocs requires the parties to communicate about this issue to come up with a reasoned approach before the project begins. Owners want to ensure timely performance or to receive compensation for the consequences of delay. Some owners see liquidated damages as a means to incentivize contractors to accelerate before it is too late to correct problems. On the other hand, contractors do not want to unknowingly risk extensive losses from indirect damages that could easily force them out of business to no one’s advantage. Contractors already operate under small profit margins on a project and consequential damages by their very nature are often difficult to accurately anticipate.

The ConsensusDocs provide a limited waiver of consequential damages that provides owners an opportunity to specifically delineate liquidated damages and specifically excluded items not waived. This mechanism gets everything out on the table before the work begins. If exclusions are not specified, consequential damages are waived. If an owner makes exclusions or specifies liquidated damages as a definitive amount measuring something that would be considered a consequential damage, contractors may be wise to include reciprocal financial incentives for early or superior work performance. In other words, if there are liquidated damages for

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30 ConsensusDocs 200 sections 6.5 and 6.6.
$10,000 per day to deliver a project late, is it appropriate to receive an
incentive of $10,000 per day for early completion, provided adequate
notice is given for the owner to make beneficial use of the project.

Other standard documents provide a blanket waiver to consequential
damages. However, this is commonly deleted because owners, who
sit upstream in contract negotiations, generally perceive the waiver as
disadvantageous to their interests. The ConsensusDocs provides best
practice tools for the parties to decide and complete the highly
negotiated provisions regarding consequential damages.

Typically, liquidated damages will be measured to Substantial
Completion, but there may be items measured to Final Completion in
section 6.5.2. Moreover, the subcontracts flow down applicable
liquidated damages provisions from the general contractors to the
responsible subcontractors.

[E] Dispute Mitigation and Binding Dispute Resolution

[1] Dispute Mitigation

The common thread of failed projects is a lack of communications.
Parties to a construction project often meet as strangers and leave as
enemies. That’s not a recipe for repeat business. Traditionally,
contract structures have funneled all information and most decisions
to the architect. A better approach is to encourage parties to
communicate directly and positively. Empowering people in the field
who are most familiar with the information can be transformational.
Creating a structure in which the parties must talk to one another
about issues that arise in a timely manner before claims become
intractable helps avoid litigation.

ConsensusDocs provides for innovative dispute mitigation and
resolution procedures that take specific measures designed to resolve
potential claims amicably and productively before they become
intractable and negatively affect the relationships built between the
parties.

A tiered approach requires the Parties to first meet and discuss
issues at the project level within five (5) business days, and if not
successful, the issues are then raised to a senior management level
within five days. If the issue is not mitigated at the primary level, then
the parties may utilize a Project Neutral or Dispute Review Board
(DRB) to issue non-binding findings to help resolve potential claims. The next step in this process is mediation using either the current Construction Industry Mediation Rules of the American Arbitration Association (AAA), JAMS, or another mediation provider of the parties’ choosing.

[2] Positive and Direct Communications

At the heart of ConsensusDocs’ dispute mitigation procedures is a structure of direct communications that encourages the parties to talk to one another proactively to build a positive foundation. Traditionally, contracts funnel all owner-to-constructor communications through the lead architect or engineer. For instance, the AIA A-201 General Conditions, combined with the AIA A-101 agreement, mentions the architect over 400 times in an agreement to which the architect is not actually a party.\(^\text{31}\) One drawback to this traditional hierarchical approach is that it is inefficient, costly, and slow.\(^\text{32}\) In addition to the dispute mitigation procedures, ConsensusDocs requires the two principal parties of the owner/constructor agreement to communicate directly.

Direct communication is illustrated by the owner approving the construction schedule, requested change orders, and payment applications. One recent change to ConsensusDocs standard contracts is the approval process for the constructor’s application for payment. Previously, the lead design-professional, an architect for vertical construction or engineer for industrial projects, was required to approve an application for payment. While the owner may certainly direct an owner to send the application for payments to its design professional the contract does not default every decision to an outside design professional. This contractual structure puts the owner in the driver’s seat of their construction projects. This more active role of the owner is a distinguishing point in ConsensusDocs. In general, owners have the most to gain or lose in the success of their construction project. Setting up the contractual structure to reflect this reality is important.

\(^{31}\) See, AIA A-201-2017 General Conditions of the Contract for Construction and AIA A-101-2017 Standard Form of Agreement Between Owner and Contractor where the basis of payment is Stipulated Sum.

[3] Binding Dispute Resolution

Parties, rather than the default in standard contract clauses, should consciously determine whether to use arbitration or litigation as a binding dispute resolution method. Depending upon the option selected by the parties, claims elevated to binding resolution will be heard through either arbitration or litigation. The default of not making a selection based upon common law is litigation. In AIA documents, the software automatically defaults to check a box for arbitration, however, the paper version of the contract defaults to litigation as the fill-in-the blank boxes are unchecked. Of course, parties can always mutually agree to arbitration when a claim arises, but it is more likely that the method 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 old rules in effect when the contract was signed). This allows parties to utilize revised and improved procedural rules.

Also, of note is the fact that the non-prevailing party as determined by the adjudicator, must pay the costs of the proceedings. While this does not include legal fees, the additional ramifications of paying the costs of arbitration or court proceedings are another incentive for the parties to negotiate an effective settlement.

[F] Order of Precedence

ConsensusDocs provides that the drawings and specifications are considered complimentary. Section 14.2.2, requires the contractor to report to the owner discovered omissions or errors in figures, drawings or specifications. Significantly, an order of precedence clause is provided at section 14.2 under which the most recent documents take precedence over earlier documents, in interpreting conflicting contract documents. Providing an order of precedence clause helps eliminate disputes in interpreting conflicting contract documents because guidelines for which documents have a higher order of precedence is specified. Otherwise the parties might each marshal facts and circumstances of their convenience to argue their individual perspective. Some contracts insert one-side provisions that whatever interpretation of conflicting or unclear documents is most expensive shall govern. An alternative but also one-side approach is to specify that whatever determination made by the architect or the
owner shall govern. The end of result of such one-sided clauses raises prices because a builder must insert a price for the unknowable cost of undiscovered conflicting contract documents.

[G] Indemnification

The indemnification section now explicitly covers intentional wrongful acts in addition to negligence. ConsensusDocs has a very balanced and reciprocal indemnification provision in which the parties are only responsible to the extent of their negligence, and not made to be responsible for the negligence of others. Therefore, if a party’s attorney’s fees incurred through the indemnification provision otherwise exceed the party’s culpability, that party may seek reimbursement for such fees beyond its percentage of responsiblity.

[H] Mediation and Arbitration: More Options, Faster Administration

The ConsensusDocs contract aims to avoid and mitigate claims and litigation. This is a trademark feature in ConsensusDocs. ConsensusDocs has no reported cases after 10 years of active use.\(^{33}\) In order to minimize the time and cost involved in arbitration, revised arbitration provisions provide for AAA Fast Track procedures for claims under $250,000.\(^{34}\) Fast Track procedures generally provide for only a single day of hearing and require the entire process to be completed within 45 days. ConsensusDocs is the first to address expedited arbitration procedures in a standard contract and has chosen to expand the presumption of expedited procedures for total claims under $250,000. Also added is a check-the-box option for choosing a mediation provider and associated rules. JAMS and the AAA are listed with the AAA being the default choice.

Another significant clarification regarding arbitration is in response to recent case law out of New Jersey as well as other jurisdictions that appear to be hostile to enforcing arbitration provision even when the

\(^{33}\) See, ConsensusDocs, ConsensusDocs: No Need for Case Law, YouTube (Jan. 3, 2018), https://www.youtube.com/watch?v=n1V7cEnnAeA.

parties choose arbitration for resolving disputes.\textsuperscript{35} Recently, in a New Jersey case, the arbitration provision in the AIA A-201 was nullified, even though arbitration selection was clearly checked, because it was a “post construction” claim.\textsuperscript{36} Consequently, updated language is in bold text and uppercase to clearly affirm that the parties understand their selection of arbitration for all claims.

In an off-cycle revision made in 2012, ConsensusDocs revised its arbitration provision to clarify that tolling procedures should apply to arbitration. For instance, subsection 12.5.1.1 of the ConsensusDocs 200 Owner/Constructor Agreement was updated to read:

Neither Party may commence arbitration if the claim or cause of action would be barred by the applicable statute of limitations had the claim or cause of action been filed in a state or federal court. Receipt of a demand for arbitration by the person or entity administering the arbitration shall constitute the commencement of legal proceedings for the purposes of determining whether a claim or cause of action is barred by the applicable statute of limitations. If, however, a state or federal court exercising jurisdiction over a timely filed claim or cause of action orders that the claim or cause of action be submitted to arbitration, the arbitration proceeding shall be deemed commenced as of the date the court action was filed, provided that the Party asserting the claim or cause of action files its demand for arbitration with the person or entity administering the arbitration within thirty (30) Days after the entry of such order.

Construction contracts routinely include arbitration clauses (or the ability to elect arbitration as the method for dispute resolution) to ensure that complex and often technical disputes are resolved by an arbitrator(s) who possesses the requisite knowledge and expertise. While one might assume that an arbitration proceeding must be commenced within the applicable statute of limitations period, courts have held that a state statute of limitations does not apply to arbitration.\textsuperscript{37}

\textsuperscript{37} Id.
The result of those cases may be unexpected, but the reasoning is logical. Most statutes of limitations provide that a “civil action” or an “action at law” (or some similar language) must be filed within set time period from the date a claim accrues. Interpreting that language, some courts have held that arbitration is not a “civil action” or an “action at law” and, therefore, the statute of limitations does not apply. In those cases, a party would be forced to arbitrate a dispute even if that same claim would be time-barred if brought as a civil action in court. Because only four states have addressed this issue legislatively (and most states have not addressed the issue at all), it is advisable to preserve the limitations defense through express language in the contract.\textsuperscript{38}

The revised arbitration language makes clear that the parties contractually agree that any applicable statutes of limitation apply to arbitration. Additionally, the subsection now clarifies that the filing of a demand for arbitration stops the clock for purposes of a limitations analysis. Finally, the new provision includes a savings clause to address a potential trap situation where the arbitrability of a dispute is determined by a court after the limitations period has run. In short, the savings clause prevents the need to file a protective demand for arbitration simultaneously with a lawsuit.

All in all, the revisions adopted by the ConsensusDocs are designed to promote the interests of the contracting parties by ensuring that the applicable limitations period applies to civil lawsuits and arbitrations alike. The result is to enforce the likely expectations of the contracting parties and foreclose a technical argument that could expose parties to stale claims. In addition, the revisions expressly provide the parties with more flexibility concerning the applicable rules and administration of an arbitration proceeding.

Since the arbitration section was up for revision, ConsensusDocs also revisited and revised the provisions concerning the applicable rules for arbitration as well as the administration of the arbitration proceedings. Previously, the American Arbitration Association (“AAA”) rules were specified but the administration of the proceedings was left up to the parties to decide. Now the section provides that the parties can choose both the rules and administration of the arbitration, including options for AAA, JAMS, or as otherwise

\textsuperscript{38} Id.
agreed to by the parties in writing. If arbitration is selected but the parties fail to specify the arbitration rules to be utilized, the AAA rules and administration are the default. Lastly, in the short form agreements, only AAA is explicitly listed as a provider. However, as with any standard document, the parties are free to modify the document to make project specific changes should they choose (and the Word-compatible technology platform makes this exceeding easy to accomplish). Some commentators have suggested that providers such as the International Institute for Conflict Prevention and Resolution (CPR) “deserve equal consideration with those of AAA and JAMs and should be listed in the ConsensusDocs standard contracts.”

[1] Attorney’s Fees Are Paid by Non-Prevailing Party

In an effort to incentivize parties to negotiate and settle claims, as well as prevent frivolous claims, the non-prevailing party is now responsible for attorneys’ fees. The original addition of Consensus Docs required the non-prevailing party to pay court costs only. The ConsensusDocs Guidebook has added a more detailed version of an example definition of prevailing party. This revision reflects industry practices that are more common, however, ConsensusDocs is the only standard construction contract to take this approach. This was a well debated point of change in ConsensusDocs’ 2011 revision cycle because some volunteers feared that some participants would illogically hold onto claims in hopes of winning in the end.

40 ConsensusDocs 200 (2016), § 12.5.1
41 ConsensusDocs Guidebook for ConsensusDOCS 703 at §27.5.1, available at: http://consensusdocs.org/downloads/All+Documents commenting:

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.
[J] Liquidated Damages

As with section 6.5, there is an optional liquidated damages provision, which allows the Parties to elect to provide for liquidated damages since consequential damages are waived, except as specified in the blank portions in ConsensusDocs. Liquidated damages should not be punitive and are only legally enforceable if they are reasonably calculated to compensate a party for damages that are difficult to quantify, so an agreed liquidated amount is given at the time of contract. An example where one might take this approach is for lost profit for failure of a project to open on time, and corresponding lost profits for that closure. 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.

[K] Limited Mutual Waiver of Consequential Damages

The Parties agree to waive consequential damages except for items specified in section 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 job-related assigned overhead are now considered a direct project expense and therefore, are not automatically waived in a waiver of consequential damages.

III. DISPUTE REVIEW BOARDS DRBS

[A] ConsensusDocs 200.4 DRB Addendum Specification

ConsensusDocs is the only standard contract document in the United States, that includes the option of having a dispute review board (“DRB”) as part of the dispute resolution process. The ConsensusDocs 200.4 DRB Addendum Specification is structured for compatibility with the ConsensusDocs 200.5 Standard Three-Party Agreement for a Dispute Board. The DRB Addendum Specification is designed to “implement dispute avoidance and mitigation procedures on the Project. This Addendum provides for the establishment and operation of a DRB to assist and facilitate (a) the avoidance of disputes and (b) the timely resolution of disputes.”42

The DRB Addendum articulates best practices in the structure, selection of the DRB panel members, and the operation of a DRB.

[B] What Is a DRB?

The Addendum provides for the establishment and operation of a Dispute Review Board whose function is to “assist in and facilitate (a) the avoidance of disputes and (b) the timely resolution of disputes.” Section 1.1 The Addendum explicitly expresses the role of the DRB in preventing issues that arise during the construction of a project from developing into disputes between the parties.

[C] Who Are the DRB Panel Members?

The DRB consists of one or more individuals, most often three, who possess the requisite qualifications and who are selected by the parties. In addition to relevant construction experience, the DRB Addendum requires the DRB panel members to be familiar with alternate dispute resolution processes and trained in the best practices of DRB operation.43

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42 ConsensusDocs 200.4, section 1.1.
43 Id. at §3.1.
In order to be effective, each of the DRB panel members must be trusted by all of the parties to be fair and impartial and have the appropriate skills and experience. To prevent the appearance of partiality, the DRB Addendum has comprehensive requirements in Article 3 for DRB panel members’ disclosure requirements and spells out relationships which prohibit serving as a DRB member, such as being a current employee or consultant (whereas prior employment is a required disclosure). A DRB panel member’s disclosure obligations expressly continue throughout the entire duration of the project. The DRB Addendum also adopts the ethical principles set out in the 200.5 Three-Party Agreement and establishes a selection process for the DRB panel members. That selection process begins at the start of the agreement between the parties before the actual construction activity is underway.

[D] How Does the DRB Operate?

The DRB is to adopt flexible procedures to govern its operations. The first meeting of the DRB takes place at the project site within 45 days of contract signing. Subsequent meetings of the DRB occur at periodic intervals and will include informal discussions and an inspection of the project site. In between meetings, the DRB panel members are to have access to current project records and correspondence, including progress meeting minutes, requests for information and responses, schedule updates, key submittals, notices of potential contract changes, and requests for additional compensation. The parties involved entities (which include consultants, subcontractors, and tenants), and stakeholders are invited to attend the DRB periodic meetings.

The primary purpose of periodic meetings is “to avoid disputes and to assist the Parties to mitigate impacts of unforeseen events that may arise in connection with the Project.”44 In order to create an environment of candor and trust, the Addendum also provides that statements made in the periodic meetings are deemed to be settlement negotiations, and are not admissible in any subsequent DRB proceeding, or in any subsequent arbitration or litigation.45 Attorneys may only be present with the consent of the other party(ies), and are

44 Id. at Section 5.6.
45 Id. at Section 5.7.
limited to observing the periodic meetings, without actively participating in them.

At the request of both parties, the DRB may also provide a verbal advisory opinion about an issue affecting the work on the project.

[E] What If a Dispute Does Arise?

Either party may refer a matter to a formal dispute hearing before the DRB panel, but not before the parties have discussed that matter at a periodic meeting of the DRB. The DRB Addendum provides rules for the conduct of a formal dispute hearing. The parties each present their position in writing, first to the other party and then to the DRB panel. At the hearing, each party will argue in support of its position, and the DRB panel will question the presenters. The parties are not allowed to question the other party’s presenters. Attorneys are allowed to participate only with the consent of the other party and the DRB chair.

The DRB panel will issue a non-binding written reasoned recommendation regarding the outcome of the disputed matter. This recommendation will be admissible in subsequent arbitration or litigation proceedings. Mediation may follow the issuance of the DRB panel’s written recommendation, and if the parties do not come to an agreement, the binding dispute resolution provisions of the agreement between the parties will be followed.

IV. CONSENSUSDOCS 310 GREEN BUILDING ADDENDUM

One of the most dramatic trends in the design and construction industry is the adoption of green building requirements. Favorable government support, coupled with increasing energy price volatility and affordable green technology, will continue to fuel the demand for greener construction and building operation. In an industry that is reluctant to change, green building construction appears to have achieved a tipping point in adoption.

However, despite a critical need, construction contracts and risk management have simply not kept pace. Indeed, many standard form construction documents fail to account for these dramatic changes, often leaving basic issues regarding terminology, process, and risk

46 Id. at Section 6.1.
47 Id. at Section 6.2.
unaddressed. Accordingly, several commentators predict increased litigation and frustration among project owners seeking to build green. In November 10, 2009, ConsensusDocs published the ConsensusDocs 310 Green Building Addendum (the “Green Addendum”), which is the first standard construction contract document that comprehensively addresses green building construction. It is a tool to proactively manage the risks and processes involved in building green.

Choosing between building green or a traditionally-built project is, from an owner’s perspective, a business decision. Estimates project a typical green building to have increased construction costs of 6% over standard building costs. State and local governments have attempted to mitigate this impact by extending an array of tax incentive programs to offset the impact on “green” projects which achieve and conform to certain performance criteria. By reducing the tax burden by as much as 70 to 80%, these credits can make the difference for owners deciding whether green projects are worth their increased costs. Though some studies show that there is a 10-fold payback on the increased costs, initial results from some projects are starting to raise doubts whether certified green buildings are performing as projected.

The U.S. Green Building Council (USGBC) has released v3, its third version of its rating system, named Leadership in Energy and Environmental Design (LEED®) (“V3”). V3 attempts to address performance accountability by mandating biannual recertification of building performance. Accountability for performance is a good thing for all parties, but a serious side effect is that a new type of uncertainty is thrown into the mix. Tax credit incentives, which potentially were an essential part of financing, presumably would be subject to potential biannual decertification. Consequently, buildings failing to meet projected outcomes often lead to something that is all too common in the construction industry—claims and litigation.

One of the first green building cases in the country occurred in Maryland and could preface the start of increased litigation associated with green buildings. This case, Shaw Development v. Southern Builders,48 highlights that traditional form contracts inadequately address green building construction from both process and risk management perspectives. In that case, a developer built a

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condominium project which encountered certain project delays. The contractor, complaining about a lack of payment, instituted a mechanic’s lien suit. The delays caused the loss of certain tax credits for the project, which were issued on an annual “use it or lose it basis.” Subsequently, the passing of the calendar year resulted in the loss of the tax credits as the delays pushed the project past its completion date. The owner, therefore, filed a counterclaim against the contractor for millions in losses for failure to receive the tax credit.

This scenario highlights how pitfalls can occur when contract negotiations and documents fail to incorporate intervening changes in business practices. It is, therefore, important to understand that building green encompasses new business practices and procedures, not just construction methods and means. This changed reality should be addressed before the contract is signed and work commenced. In other words, update your contractual and business practices upfront so that building green will benefit your bottom line, and the environment.

[A] **Overview of the ConsensusDocs 310 Green Building Addendum**

In addition to other new tools that can help practitioners adapt to new greener building practices, the ConsensusDocs Green Building Addendum was written to advance best practices to manage the processes and team approach needed to successfully design and construct green buildings. The document addresses, among other things:

- Terminology and General Principles: defines key terms and principles so that everyone is on the same page
- Green Status: clarifies the owner’s desired project goals
- Green Measures: establishes the required physical and procedural measures
- Green Building Facilitator: coordinates various participants’ roles and responsibilities to achieve Green Measures and Green Status. Addresses who will oversee document collection and submission, and if necessary, resubmission
- Implementation: describes how the parties incorporate and refine green measures into the plans and specifications, and resolve potential differences
- Risk Allocation: clarifies legal responsibilities.
The Green Addendum, a 10-page contract document which should be appended to each project participant’s contract agreement, clarifies roles, responsibilities and procedures to maximize the successful delivery of green building objectives. In addition to coordinating with the ConsensusDocs family of contract documents, the Addendum works well with AIA and other standard documents, as well as “original” agreements.

[B] Current Practice for Green Contracts Is Not Best Practice

When beginning the process of drafting a new standard document, the drafting working group first researched field-tested contract examples that worked well. Unfortunately, the contract examples were far from best practice. Current practices tended to dictate a final performance result without defining appropriate responsibilities for conducting that work. One example cursorily dictated construction of a LEED silver-rated building. Consequently, much of the Green Addendum focuses on identifying the roles, responsibilities, and processes to identify and close potential gaps. Team collaboration is particularly important for success due to the highly interactive nature of highly performing building systems, as well as the use of newer materials that carry less field testing. Fortunately, the ConsensusDocs coalition was able to draw upon a diverse coalition of design professional, owner, contractor, and surety stakeholders with practical experience in the design and construction of green buildings.

[C] Elected Green Status—Defining a Green Building

What constitutes green building is a fundamental question but not universally answered the same throughout the industry. The USGBC has done an excellent job of creating a system which is widely-recognized as the standard for rating buildings as green. However, some owners seek green building performance, but are not willing to spend the time and expense involved with an official certification. There are also other rating systems in the marketplace such as Green Globes or Energy Star that are now available. Some owners wish to focus on certain building performance aspects such as energy efficiency in selecting their green objectives.

The ConsensusDocs 310 requires the owner to declare project goals as an elected green status, and the specific green measures which will achieve this elected goal. The measures are required to be outlined in
a central report, which also clarifies which requirements are physical or procedural green measures. Physical Green Measures, such as an HVAC system performing at a certain energy rating, would constitute a physical green measure. Procedural Green Measures, such as recycling construction debris or using materials originating within a certain radius of the project site, is not something that would be apparent in the end project and would be considered a procedural green measure. The Procedural Green Measures must “specifically identify the Project Participant(s) that is to implement, perform and satisfy each …” measure.49 Defining what a green building is, can help alleviate the desire or prevent litigation and disputes.

[D] Risk Allocation

ConsensusDocs Article 8’s risk allocation section provides a straightforward approach. The Green Addendum is designed around the principle that the party in the best position to control and mitigate a risk is assigned that risk. The Green Building Facilitatory (“GBF”) is assigned liability for direct damages if an elected green status is not achieved. If, for instance, LEED certification is not achieved, the GBF will be responsible for promptly correcting the document submission in an appeal process. However, if rejection is due to the defective work of another project participant, that project participant is still directly (and solely) responsible under its Governing Contract. This harkens back to defining the fundamental roles of the project participants and retaining the design professional’s core role of being responsible for design and the contractor to be in charge of the means and methods of building. Once the defective work is corrected, the GBF is responsible for the correction of the document submissions in an appeals process or a resubmission.

Significantly, the document clarifies that the failure to attain the Elected Green Status or intended benefits to the environment are consequential damages. Consequential damages related to a green building are described as an “Owner’s loss of income or profit or inability to realize potential reductions in operating, maintenance or other related costs, tax or other similar benefits or credits, marketing opportunities and other similar opportunities or benefits.”50 So, for instance, failure to achieve a tax credit based on a level of LEED

49 ConsensusDocs 310 § 6.5.
50 ConsensusDocs 310 § 8.2.
certification, which was the subject of the Shaw case described above, is a consequential damage. Liability exposure for a consequential damage is explicitly determined by the applicable Governing Contract. The ConsensusDocs family of standard agreements specifically identifies such risks for the parties to communicate and negotiate. Other standard industry documents typically have a consequential damages waiver. However, this provision is often the focus of significant negotiation, further highlighting the need to ensure the parties coordinate their contracting practices to reflect new green goals.

[E] Outlook

Green building design and construction has taken hold in the United States. Well-designed, high-performing buildings may become synonymous with green buildings. Accordingly, building green requires updated standard documents to reflect new business practices, such as the ConsensusDocs 310 Green Building Addendum. Now is the best time to proactively address these issues to avoid going from green to red (claims and litigation).

Free excerpted ConsensusDocs samples and guidebook commentaries on the document are available at www.consensusdocs.org.

V. CONCLUSION

As stated well by the Construction Industry Institute, “It is ironic that the one industry in the country which more than all others depends upon coordination, cooperation and teamwork among multiple participants should be the country’s most adversarial industry.” Many commentators observe that the A/E/C industry is broken and must be fixed. The role of contracts and the efficient use of arbitration are part of the equation for fixing the industry. One, better communications and collaboration which directly relate to the contractual foundation matters greatly. Secondly, how the contract dispute mitigation and resolution procedures are structured is critical to solving the equation. Faster and less costly arbitration or avoiding expensive arbitration altogether will help improve the industry and consequently improve our society as well.