The 2011 Comprehensive Update to ConsensusDOCS

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For too long, the construction industry has been driven by conflict that begins when the owner puts one-sided contract documents out for bid, and the general contractor creates subcontracts that are one-sided in its favor, and so forth, all the way down the "construction food chain." As a result, for years owners, general contractors, and subcontractors have found little room to agree on contract documents. Drafting an unfair risk-shifting contract is much easier than drafting a fair contract that aligns the entire construction team to produce a successful construction project. While success in construction relies upon teamwork, cooperation, and coordination more than any other industry, it is unfortunately the most adversarial and litigious.[1] In no small measure, unfair construction contracts contribute to the problem, and the results are unacceptable.[2]

The year 2007 was the year of the construction contract. ConsensusDOCS was published for the first time,[3] and the American Institute of Architects (AIA) and the Engineers Joint Contract Documents Committee (EJCDC) produced revisions to their standard contracts. In January 2011, recognizing that the industry is changing constantly, ConsensusDOCS revised its library of contract documents for the first time.

This article provides an overview of the newly revised ConsensusDOCS from the perspective of three authors who were active in the drafting process, each representing different stakeholders in the process. After a brief overview of ConsensusDOCS, the January 2011 revisions to the general terms and conditions are analyzed. Next, the modifications to specific contract documents are discussed. Finally, two new ConsensusDOCS contracts are introduced, and future efforts by the ConsensusDOCS coalition are previewed.

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What Are ConsensusDOCS Contracts?

ConsensusDOCS publishes a library of more than 90 standard construction contract documents that address all project delivery methods. The documents are structured in numerical series by project delivery method as follows:

- 200-series is for traditional contracting or design-bid-build
- 300-series is for integrated project delivery
- 400-series is for design-build
- 500-series is for construction management (at-risk)
- 700-series is for subcontracting
- 800-series is for program management and construction management (agency)

Between and among each series there is some interrelation. For example, the administrative forms in the 200-series can be used for the 500 and 800 series. New documents that have been added since the original release to address emerging needs include the 301 BIM Addendum, 310 Green Building Addendum, the 725 Subsubcontract, and the 752 Federal Subcontract (and FAR Exhibit).

New Documents Cover Emerging Industry Trends

The construction industry is changing, with an increasing emphasis on efficiency and emerging technologies. Design-build, integrated project delivery (IPD), and building information modeling (BIM) are increasingly utilized, and green building is growing rapidly throughout the country. Despite these developments, the traditional industry associations have been slow to publish forms addressing the different risk and scope concerns raised by each approach.

ConsensusDOCS 300: Integrated Project Delivery

IPD projects and contracts are referred to as *relational* projects and contracts because they focus on not only what is going to be built, but also how the parties are

going to build. On IPD projects, the primary members of the construction team sign a single contract document and pledge to work together in the best interests of the project. The idea is to retain and engage key design consultants and trade contractors early in the preconstruction services phase to form a collaborative project team.[4]

The IPD model aims to incentivize participants through project savings and improvements to achieve superior performance and work cooperatively to resolve differences rather than to point fingers at others for faulty work, design, or delays. ConsensusDOCS 300 summarizes its purpose as follows:

> The Parties agree that the project objectives can be best achieved through a relational contract that promotes and facilitates strategic planning, design, construction and commissioning of the project, through the principles of collaboration and lean project delivery.[5]

IPD projects are governed by a collaborative project team (CPT) that consists of representatives of the owner, design-professional, and contractor. Other design consultants and subcontractors may be added to the initial CPT by signing "joining agreements."[6] The CPT is supposed to act in the best interest of the project as a whole, as opposed to each member's self-interests. Essential components of this approach are mutual trust, open communications, and transparency.

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The ConsensusDOCS 300 form has no lump sum or guaranteed maximum price established up front. Instead, the owner establishes a project budget early on, and the design-professional and contractor attempt to design a scope of work based upon that budget, rather than to create a budget based on a scope of work. Eventually a project target cost estimate is jointly established. That estimate then serves as a benchmark for measuring the project's overall success.

Under the ConsensusDOCS 300 IPD model, the design-professional and contractor have two opportunities to profit: first, if they meet project goals outlined by the group; and second, if actual cost is less than the estimated target cost.

ConsensusDOCS 310: Green Building Addendum

The construction industry has traditionally emphasized efficiency rather than overall environmental considerations. However, the trend toward "green building" and an emphasis on sustainability is sweeping the country and dramatically changing this mind-set. Government support is accelerating the trend. Whether green building is being encouraged for altruistic reasons or simply as a "politically correct" marketing technique, one thing is certain: green building is here to stay, especially given the number of states and municipalities that have mandated some form of green building in their jurisdictions.

As with any exciting and rapidly growing opportunity,[7] there are legal risks to building green.[8] While the construction industry has had decades to develop and refine contract documents for normal construction, building to green standards is relatively new and different. As a result, green construction projects have some very different roles and requirements from "normal" construction, and the industry is still struggling with how to address these differences.

Examples of risks owners typically fail to address adequately in their green contract documents are the risk of delays that can occur from a lack of product availability and the damages that accrue if a project does not attain an intended green requirement (such as energy efficiency) or green certification. For example, a green project where the owner is seeking "LEED" certification (from the U.S. Green Building Council's "Leadership in Energy and Environmental Design") may require a product (e.g., drywall) from a sustainable source within a certain radius of the project site (e.g., within 200 miles of the project site). What happens if delivery is delayed or the only supplier goes out of business? In these situations, the construction team is faced with either (a) losing valuable construction time (and money) if it waits for the source product to become available or (b) losing valuable points toward LEED certification if the owner chooses to go with a more readily available product.

Similarly, if LEED certification cannot be obtained, or if certain energy efficiency or similar green "performance" criteria are not met, in the absence of a clear contract, the question of who is responsible for those damages can be uncertain. As tax credits and lease rates may be negatively affected if a certain green criterion is not reached, the extent and level of damages an owner may suffer on a green project could be much more extensive than the types of damages that may result on more traditional construction projects.

Until ConsensusDOCS stepped into the vacuum in November 2009 with the 10-page *ConsensusDOCS 310: Green Building Addendum*, no standard form green building document addressed the unique issues, risks, and relationships that arise in green projects.[9] The Green Building Addendum is intended to modify existing design or construction documents whenever an owner desires green goals and/or third-party rating recognition (e.g., LEED certification) for the project. ConsensusDOCS states that

the purpose of this new document is to provide:

> contractual best practices to collectively identify the Project Participants, including their respective roles, and the implementation and coordination efforts critical to achieving a successful project using green building elements, particularly those seeking a third party green building rating recognition.[10]

By comparison, the AIA has a green form—the AIA B214-2007—that can be used when the owner seeks LEED *certification*. The B214 is primarily a scope addendum that does not address risk allocation or cooperation among the members of the design and construction teams to achieve green certification. The ConsensusDOCS Green Building Addendum is broader and goes into much greater detail than the AIA addendum about the various parties' respective rights and responsibilities. As a result, the ConsensusDOCS form can be used to establish contractual guidelines whether the project is to be LEED certified or is one that simply includes certain sustainability goals or other green criteria or certification. Additionally, where the AIA document can only be used as an addendum to an owner/design-professional agreement, the ConsensusDOCS form can be used with *all* primary construction agreements such as owner-contractor, owner-construction manager, and contractor-subcontractor agreements.

The ConsensusDOCS Green Building Addendum is designed to cover the various rights, roles, and liabilities of the green project participants. In this regard, the ConsensusDOCS 310:

- identifies the role and responsibilities of the various participants;
- is compatible with the other ConsensusDOCS forms;
- creates a green building facilitator (GBF) responsible for compiling and/or coordinating the submittal documentation needed to achieve the green certification or other goals; and
- defines the green scope, allocates green building responsibilities and risks, apportions liability, and calls out changes to the design and construction to accommodate green-building goals.

The ConsensusDOCS Addendum specifically clarifies who is responsible for the more significant legal risks associated with green projects.[11] The ConsensusDOCS Green Building Addendum is clear that only the GBF has the contractual responsibility to facilitate the owner's desired green status consistent with a separate contract between the GBF and owner.[12] The GBF can be an existing project participant (such as the architect or contractor) or a separate party. While the GBF is to advise the owner on the cost and time implications of any green measure and to coordinate and facilitate the process of obtaining the elected green status, under the addendum, the owner has final responsibility to decide the green measures for the project.[13] Moreover, unless expressly provided otherwise in the governing contract, the GBF is solely responsible if the elected green measures fail to achieve either the elected green status or intended environmental benefits the owner is seeking.[14]

With regard to recoverable damages, the addendum provides that any limitations of liability in the governing contract will apply.[15] It also defines as "consequential damages" the following losses or damage that may result if the project fails to attain the elected green status or intended environmental benefits:

- the loss of income or profit;
- the failure to realize potential reductions in operating, maintenance, or other related costs (e.g., energy efficiency);
- the loss of tax or similar benefits or credits;
- lost marketing opportunities (e.g., "Green Building"); and
- the loss of "other similar [marketing or tax] opportunities or benefits."[16]

Because consequential damages are often waived in contracts, the addendum's definition of consequential damages will, in many situations, effectively shield the GBF from open-ended liability if a certain green status was not achieved. In short, the ConsensusDOCS 310 Green Building Addendum is probably the most comprehensive attempt to date to create a fair document that addresses and allocates the unique contractual and legal risks and responsibilities that may arise as owners increasingly look to "build green."

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ConsensusDOCS 301: Building Information Modeling (BIM) Addendum

The ConsensusDOCS 301 BIM Addendum, published in 2008, addresses contractual risk allocation issues as well as implementation issues in using BIM. The document is well suited for all projects using BIM that include early involvement of contractors. In other words, you do not necessarily need to be working on a groundbreaking IPD project to utilize BIM. Many projects see the benefit in cost savings and risk reduction aspects of BIM without being fully integrated contractually. Consequently, the addendum is to be attached to agreements of all project

participants. The document is not intended to restructure contractual relationships and explicitly clarifies that BIM does not change fundamental roles—namely that the design professional is still responsible for the design and that the contractor is responsible for means and methods.

Although there may be the perception that BIM blurs the lines between parties' roles and responsibilities, the addendum clarifies that issues are addressed in the parties' existing contract (defined as a "governing contract") or in related parties' contracts (defined as "affiliated contracts"). Defining how contractual relationships interact is especially important when using BIM because its use is highly collaborative, and the information in "the model" is actually the culmination of several individuals' work product that flash together into a model that is created and maintained by different practitioners. Particularly unique to the BIM Addendum is that it recognizes individual creators' intellectual property contributions.[17]

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The BIM Addendum creates a framework to help guide users. Principally, the addendum assigns one entity to serve as the information manager. Importantly, the parties are required to execute a detailed execution plan. A checklist of the execution plan is given to determine the roles, requirements, and processes the parties are going to choose and provide more details for a project-specific basis. Significantly, the document gives "check-the-box" options for the level of detail for which the model can be relied upon. Initially, there are expectations that parties will attempt to limit the amount of reliance of others by saying that a BIM model is only given for informational purposes, but as the owner's demands and expectations grow, it is likely that they will want to rely on the model. That being said, the document, which was created with extensive input from cutting-edge BIM experts, recognizes that no model will ever be perfect in the sense that not all aspects of the project will be modeled.

Contracts Being Updated

The prime agreements for design-bid-build (200, 205, 240, 245), design-build (410), and CM at-risk (500) as well as the subcontracting agreements (420, 750, 751) have all been revised. In addition, revisions to prequalification statements for contractors (221) and subcontractors (721) are being released. ConsensusDOCS 300 has been renamed to use the accepted industry term *Integrated Project Delivery* rather than *Tri-Party* or *Collaborative*.

Reasons to Update Contracts

The 2011 update was driven by a desire to incorporate emerging best practice trends, legal developments, and industry feedback. Additionally, subcontract documents were made more independent, and the terms and conditions across the entire family of documents were made more consistent. The updates were intended to advance the coalition's core philosophy: to write plain English contracts that produce better project results through more active owner input, positive communication pathways, and a fair allocation of risks and responsibilities.

Industry Trends. The revised documents better incorporate references to issues such as BIM and green building into the main family of documents. Use of digital communications was incorporated into the 2007 edition by referencing the need for a separate electronic communications protocol and providing such a protocol for use.[18] Now, specific references are made in the main agreements to better incorporate references for those projects that are planning to use BIM or build green.

Design-Professional Feedback. While ConsensusDOCS has received some criticism for not obtaining enough design professional input, ConsensusDOCS has always sought such input. For this round of reviews, EJCDC directed its outside counsel to provide comments on the owner/design professional agreements. The Design Build Institute of America (DBIA) has provided some general comments, and the Construction Specifications Institute (CSI) joined as a full participant during this revision. To date, the AIA has turned down invitations to provide commentary.

New Endorsing Organizations. The number of industry organizations endorsing ConsensusDOCS has increased to 34. New endorsing organizations brought new ideas and experience. For instance, the National Association of Electrical Distributors (NAED) and the Water and Wastewater Equipment Manufacturers Association (WWEMA) proposed the 703 Standard Purchase Agreement and were active in the document's development.

Forum Feedback. The Forum, specifically Division 3 and Division 12, provided comments that were seriously considered in the 2011 revision cycle and were the catalyst for a number of changes. Moreover, commentary in industry publications, including *The Construction Lawyer*, was also used in deliberations.

2011 Comprehensive Update—Global Revisions

Below are highlights of substantive changes that were made globally to the terms and conditions throughout the ConsensusDOCS library.

"Constructors" and "Design Professionals"

All of the documents now use *Constructors* rather than

Contractors and *Design Professional* rather than *Architect/Engineer*. These are the terms that have been used since 2007 in the IPD agreement and reflect not just where the industry is going, but where the industry needs to go to get better overall project outcomes. Anyone can sign a contract to be a contractor, but successful construction requires a *constructor* to apply their building skills.

"Cost of Work" Definition for Lump-Sum Agreements

The previous lump-sum agreements did not specifically identify compensable costs of the work to be paid for cost-based change orders or construction change directives.[19] Consequently, ConsensusDOCS added a "cost of the work" definition.[20] This provides greater clarity and detail for price adjustments with the goal of avoiding disputes. The Cost of the Work section is basically taken from the ConsensusDOCS 500 Cost of the Work Agreement for a Construction Manager At Risk.[21] However, the scope has been somewhat narrowed and includes other changes to the cost-of-the-work definition added in the revision cycle. For instance, the following are no longer included in "cost of the work": (a) defense costs (CD 500, § 8.2.11), (b) demobilization costs from suspension of the work, and (c) costs as a result of changes in law.[22] In addition, the document now provides the owner a right to audit cost records.[23]

Attorneys' Fees Are Paid by Nonprevailing Party

In an effort to incentivize parties to negotiate and settle claims, the nonprevailing party is now responsible for attorneys' fees.[24] The original addition required the nonprevailing party to pay court costs only. The *ConsensusDOCS Guidebook* has added an example definition of prevailing party.[25] This revision is considered one of the more significant revisions during this cycle and is a point of distinction from other standard agreements.

Definition of Contract Documents

Contract documents is an important term to define with specificity. In any scope or price dispute, the first reference point should be the agreement itself—what did the parties agree on for the price provided? The revisions added greater precision to the contract document definitions and the corresponding order of precedence. Because of the different nature of the agreements, the term *contract documents* is defined differently in the design-professional, prime contract, and design-build agreements.

In the 2007 version of ConsensusDOCS 200, *contract documents* is defined as the documents listed specifically in section 14.1. Section 14.1 now provides a template for the parties to specifically identify the contract documents, including specifically identifying any "Owner Provided Information" that is to be included as a contract document (as opposed to owner-provided information being for "information only").[26] By contrast, the previous version included all "owner provided information" in the contract document. In addition, "approved submittals" were deleted from the definition.[27] These changes, in combination with the existing order of precedence clause, provide a clear definition of the parties' agreement and how to resolve any conflicts among the contract components. By comparison, the AIA contract documents do not include an order of precedence clause.

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The contract document definition in the owner-design professional agreement only included the minor changes of adding exhibits to identify schedules for services to be included in both basic and additional services.[28]

The design-build agreements were modified to identify the individual contract documents, including expressly designating design documents as contract documents, after they are approved by the owner at the schematic design, design development, and construction document phases respectively.[29] In addition, an edit was made to identify "the Agreement" as the 410 form itself to distinguish it from the other contract components such as exhibits.[30] In addition, information provided by the owner is only a contract document if it is specifically identified as such.[31] Each of the identified documents is also included within the order of precedence clause.[32]

Finally, in the subcontract agreements, "alternates" have been eliminated from the definition of contract documents.[33]

Owner's Responsibilities

Language requiring the owner to provide its approvals and information "so as not to delay the Work" was replaced with language specifying a requirement that the owner act "with reasonable detail and in a timely manner."[34] While timely responses from the owner are still required, this edit was intended to eliminate a potential claim that an owner "delayed the Work" if it still acted in a timely manner. The focus is intended to be on the reasonableness of the owner's conduct.

Overhead Costs

Another global change was to eliminate insurance deductibles paid from "Overhead."[35] The cost of correcting defective work also has been eliminated from the overhead definition. The narrowing of the definition of overhead is

beneficial to owners. The AIA documents do not specifically define overhead, and this can lead to disputes.

Incentives Clause

Current construction contracts practices include many sticks but few carrots, which may contribute to parties too often winding up as adversaries. Consequently, the committee debated extensively whether to include an "incentive clause" as a counterpart to the existing "liquidated damages clause." The group determined that incentives clauses are not appropriate for a broad enough segment of projects to be included within the standard contract language. Specifically, owners were concerned that frequently they do not receive an incremental benefit from receiving a project early. For example, a college dorm room would have little benefit for an owner if it was finished before school started or a retail store finished before its publicized opening or receipt of necessary furniture, fixtures, and equipment. Nonetheless, the committee drafted sample "incentive clause" language to incorporate into the *ConsensusDOCS Guidebook* to make it available to parties on demand.[36] This should be another tool in the parties' contractual toolbox to use to get better project results.

The AIA documents do not specifically define overhead, and this can lead to disputes.

Supplementation and Termination

In the owner-contractor documents, the default section was revised to clarify that in the event of contractor default, the owner may either terminate or supplement the work, at its discretion.[37] This provides more options to meet an owner's particular project needs in a situation where the constructor is not performing properly.

Submittals

Submittals must now be sent to both the design professional and the owner.[38] Previously, it was optional for the owner to direct submittals to go to the design professional. This revision provides better project communications with design professionals.

ConsensusDOCS 240: Design Professional Agreement

Standard of Care

An objective standard of care was added to the owner/design professional agreement requiring the design professional to perform services in compliance with the standard required for a project of "similar size, scope, and complexity during the time in which the services are provided."[39] The language is consistent with most states' common law. Because locality is not specifically mentioned, it is likely to be seen as a slightly higher standard than included in the AIA A201-2007.

Sustainable Building

The document was modified to reflect the growing demand and requirements for green and sustainable buildings. Specifically, green building design is included in basic services if sustainable project goals are included in the owner's program.[40] In addition to recognizing the additional participants that may be required on a green or LEED project, the agreement specifically includes line items in the additional services sections if the design professional is selected to act as green building facilitator or to prepare and submit LEED certification documentation.[41]

Building Information Modeling

The standard owner–design professional document now recognizes the growing use of BIM and electronic project documents. Similar to the green building requirements, use of BIM and other electronic documents is included as a basic service requirement if included in the owner's program.[42]

Time Is of the Essence

An explicit provision stating that "time is of the essence" has been added to the document.[43] The clause was previously included in constructor agreements, but not in the design professional agreement.

Design Coordination\|Delegation

To address concerns regarding responsibility for design elements included in the work product of consultants that are not retained by the design professional (and are retained by the constructor, the owner, or others), the agreement now expressly states that a design professional does not have an affirmative obligation to detect errors, omissions, or inconsistencies in the work product of any design consultant retained by others.[44]

Insurance Requirements

A new provision specifies that the owner may not unreasonably withhold approval of insurance provided by the design professional and its consultants.[45] This provision addresses concerns that smaller design consultants are not able to provide large limits frequently specified in some owner's standard insurance requirements.

Opportunity to Cure

The previous version did not give either the owner or the design professional an opportunity to cure or correct a breach of the agreement prior to termination for default.[46] Now, the agreement requires the nonbreaching party to give the breaching party notice and an opportunity to cure any default prior to the right of the nonbreaching

party to terminate the agreement for default.[47] This language is similar to the corresponding provision already existing in the construction agreements. The absence of such a provision in the initial document appears to have simply been an oversight.

Copyright of Transmitted Material

In direct response to a comment included in a *Construction Lawyer* article,[48] a new provision specifies that transmission of copyrighted information from one party to the other is deemed an express representation that such transmission is with permission.[49]

ConsensusDOCS 750 Subcontract Revisions

The 2011 ConsensusDOCS 750 Subcontract maintains the key elements of the original version[50] while incorporating the following substantive changes:

Consequential Damages

The mutual waiver of consequential damages in the ConsensusDOCS 750 (2007) exempted from this waiver two broad categories of consequential damages: (1) liquidated damages that the owner assessed against the contractor, and (2) losses covered by insurance required by the subcontract documents. The 2011 revisions expand the damages that are *not* covered by the waiver. The effect of this is that the contractor (called the *constructor* in the 2011 documents) has the potential to "pass through" or assess against the subcontractor not only liquidated damages but also any "consequential or other damages" that the owner assesses against the constructor. The new ConsensusDOCS 750 form defines some of the waived damages as including "damages for loss of business, loss of financing . . . , loss of profits not related to the Project, loss of bonding capacity, loss of reputation, or insolvency."[51]

Owner Information Must Be Shared

The constructor must now automatically share with its subcontractors any information it becomes aware of that reflects a "material variation in Owner's financial ability to pay."[52] This change should be particularly helpful to subcontractors in these uncertain financial times.

Release of Retention

When the owner reduces the retainage held from the constructor, the constructor must similarly reduce it for the subcontractor—allowing early-finishing trades to receive their retention more timely.[53]

Constructor's Review of Design Documents

Under the ConsensusDOCS 200 (2007) agreement (Standard Agreement and General Conditions Between the Owner and Contractor), the contractor's general responsibilities were to provide labor, materials, equipment, and services "in full accord with and reasonably inferable from the Contract Documents as being *necessary to produce the indicated results*."[54] Although the 2011 version of the ConsensusDOCS 200 form retains the requirement that the constructor provide all labor, equipment, and so forth that is "reasonably inferable" from the contract documents, the new version eliminates the unnecessarily vague requirement that the constructor provide labor, materials, equipment, and services "necessary to produce the indicated results."[55]

Subcontractor's Review of Contract Documents

Under the ConsensusDOCS 750 (2007), the subcontractor was required to make a "careful analysis and comparison" of the drawings, specifications, and owner-furnished information relative to the "Subcontract Work." The 2011 revisions tweak this obligation to conform more closely to the ConsensusDOCS 200 (2011) requirements. As a result, the subcontractor's obligation is only to "examine and compare"[56] the owner-furnished information relative to the subcontract work. As before, this review is "solely for the purpose of facilitating the Subcontract Work, and *not* for the discovery of errors, inconsistencies, or omissions in the Subcontract Documents."[57] The 2011 changes further clarify that the subcontractor will *not* be liable for errors, omissions, or inconsistencies in the documents unless it "knowingly fails to report a recognized problem" to the constructor.[58] There is also a new provision that provides that the subcontractor "may be entitled to additional costs or time because of clarifications or instructions" that arise out of section 3.3.[59]

A new provision specifies that the owner may not unreasonably withhold approval of insurance provided by the design professional and its consultants.

Termination for Convenience

Neither the 2007 nor the 2011 version of ConsensusDOCS 750 includes a provision allowing the contractor to terminate the subcontract for convenience. In contrast, the ConsensusDOCS 200 agreement between the owner and constructor gives the owner the right to terminate for convenience, recognizing that sometimes a project or contract must be canceled when financing dries up or the owner's needs change. Although the ConsensusDOCS 750 subcontract is silent on the matter of termination for convenience by the constructor, it does provide (in both the 2007 and 2011 versions) that if the prime contract is terminated by the owner, then (1) the subcontractor is required to follow the constructor's directions regarding how to proceed[60] and (2) this may include allowing the owner

to take a contingent assignment of the subcontract.[61]

The ConsensusDOCS 750 thus attempts to balance the subcontractor's interest in and right to perform and profit from its subcontract with (a) the owner's right to terminate for convenience (within the confines of the covenant of good faith and fair dealing)[62] and (b) the constructor's interests in not being liable to its subcontractors for a broader range of recoverable damages than it might recover from the owner after a termination for convenience.

These termination provisions in the ConsensusDOCS 750 may appear at odds with the owner's right to terminate for convenience and a new provision in the general conditions of the ConsensusDOCS 200 (2011), which now provide that if the owner wrongfully terminates the constructor for default, the wrongful termination will be automatically "deemed" a termination for convenience.[63] Opponents of further modification of the subcontract termination clause argued that bad faith or improper terminations should not be rewarded with a "no harm" conversion to a termination for convenience.[64]

The language regarding the time in which a design-builder must notify the owner of a differing site condition was changed.

Termination for Default Requires a Second Notice

Under the original ConsensusDOCS 750, the contractor could terminate for default if the subcontractor materially breached the subcontract and then failed to commence and continue satisfactory correction of the default within three business days after the contractor gave it notice of default.[65] The 2011 revisions add a requirement that the constructor may only terminate for cause if, in addition to the first default notice, the constructor also gives the subcontractor a second notice, giving the subcontractor two additional days to cure defective work if it has failed to commence a cure within the initial three-business-day period.[66] This change brings the subcontract termination requirements in line with the owner's obligations (and constructor's corresponding right to cure) under the ConsensusDOCS 200, where the owner must give the constructor a second notice to correct before the owner can terminate the prime contract for default.[67]

ConsensusDOCS 410: Design-Build Agreement Revisions

Changes to the ConsensusDOCS 410 include a handful of the changes to the ConsensusDOCS 200 identified above. In addition, the following document-specific changes were made.

Contingency

A provision was added requiring the design-builder to provide an accounting of any costs deducted from the design-builder's contingency concurrently with each application for payment.[68] The provision does not change the design-builder's control of the contingency; it merely requires accounting and documentation consistent with the general requirements of cost-plus contracts.

Cost of the Work

The cost-of-the-work provision was deleted to remove (a) the design-builder's demobilization costs arising from suspension of the work and (b) costs arising from copyright infringement claims.[69] The demobilization costs were determined to be more appropriate to be treated as a change (if circumstances allowed) rather than an included cost of the work. In contrast, copyright infringement claims were determined to be a constructor's responsibility rather than an owner's responsibility as a cost of the work.

Differing Site Conditions

The language regarding the time in which a design-builder must notify the owner of a differing site condition was changed. In addition, the design-builder must stop work in the affected area until the owner is given notice of the differing site condition. The initial version required written notice to the owner within the standard claim time (21 days).[70] The language has been modified to specify the design-builder must stop work in the affected area and "give the Owner *prompt* written notice."[71] Although the committee recognized that "prompt" was susceptible to interpretation, it was determined that what timing constitutes prompt notice is project-specific and was left better undefined so that it could be evaluated in terms of what was appropriate on a specific project.

Contract Documents

As noted above, the definition of *contract document* now requires that documents be specifically identified and includes design documents at each phase *after* they are approved by the owner.

ConsensusDOCS 703 Purchase Agreement

It is common in the industry for constructors and subcontractors to purchase goods and materials directly for incorporation into the project work. There are a wide variety of forms in use, with widely varying levels of sophistication and comprehensiveness. The National Association of Electrical Distributors (NAED) joined the ConsensusDOCS coalition because current contractual practices in use today are particularly poor in the consistency of terms and conditions used throughout the contractual chain in purchase orders and agreements.[72] Consequently, ConsensusDOCS formed a working group, and

the working group determined that it would be best to create a new standard Purchase Agreement for Non-Commodity Goods.[73] The working group will later publish a standard purchase order for commodity goods.

The ConsensusDOCS 703 (2011) is a standard purchase order agreement that is intended to provide an order form, and the terms and conditions for the purchase of material supplies, by a constructor. The major differences between the new ConsensusDOCS 703 and the original ConsensusDOCS 702 are that the newer document

- expressly allows the buyer to choose to repair, rather than to return, nonconforming materials. In this regard, the buyer is to make a written demand on the seller to commence and continue correction of the problem.[74]
- allows the buyer to order the seller to "suspend, delay, or interrupt the performance of this Agreement . . . for the convenience of the Owner." If the buyer does this, the price and delivery schedule "shall be equitably adjusted" to account for the cost and delay that result from any suspension.[75]
- allows the seller to terminate the agreement if, through no fault of the seller, the agreement is suspended for a period of 120 days.[76]
- tweaks the warranty provisions to provide for an 18-month warranty (running from the delivery date) that extends not only to the buyer but also to the owner and their respective successors and assigns.[77]
- provides that "in no event" may the buyer require the seller to sign an unconditional waiver of lien or claim before it receives payment (or for an amount in excess of what it has been paid).[78]
- waives consequential damages regardless of whether the owner-buyer agreement has such a waiver.[79]
- simplifies the dispute resolution procedures of the ConsensusDOCS 702 (2007) form to simply require representatives of each party to meet within five days after a dispute arises to endeavor to resolve the dispute in good faith. If disputes are not resolved this way, they will be subject to mediation under American Arbitration Association Rules.[80]
- adds a box for the parties to "check" whether they are agreeing to any contractual limitation of liability. If there is a limitation of liability, the form provides a space for the parties to add the language memorializing the specifics of the limitation.[81]

ConsensusDOCS 725 Subsubcontract Agreement

The increasing specialization in the industry and use by subcontractors of their own subsubcontractors led the ConsensusDOCS to create a standard form document that subcontractors and subsubcontractors can use when entering into a subsubcontract. The ConsensusDOCS 725 (2009) represents the industry's first form contract between a subcontractor and a subsubcontractor. The document features streamlined provisions and vocabulary intended to reflect the unique, and sometimes simpler, relationship between the parties.

A Better Alternative

ConsensusDOCS 725 provides a better alternative to using an adapted subcontract. Until now, sophisticated parties have adapted subcontracts to try to fit the "subsub" relationship. Most modern subcontract documents—and the ConsensusDOCS 750 is no exception—are lengthy and include dozens of provisions that may not be needed in a limited-scope subsubcontract. Many subcontractors believe it will be easier to get a short-form subsubcontract signed with their subsubs. The ConsensusDOCS 725 is a brief six-page subsubcontract alternative meant to be used with subsubcontractors who have a limited scope of work.

The ConsensusDOCS 725 is far superior to the uncertainty of proceeding without a formal contract.

Superior to Using No Formal Contract

It is not uncommon for many subsubcontract relationships to be governed by either purchase orders or bid proposals. Although those documents guarantee simplicity, unfortunately there is not much legal certainty in such a relationship. The ConsensusDOCS 725 is far superior to the uncertainty of proceeding without a formal contract. The ConsensusDOCS form ensures that many job-specific requirements flow downstream to the subsubcontractor. The document provides space to include a description of the subcontract work, drawings and specifications, the progress schedule, and other job-specific items. Both the subcontractor and the subsubcontractor benefit from the shared vision for the job.

The subsubcontractor also gets to enjoy similar protection that the subcontractor receives on important job-related issues such as change orders and suspension of the work. The subcontractor, in turn, gets the benefit of having downstream parties integrated into the project to fairly share responsibility for the completion and quality of the work.

The ConsensusDOCS 725 contains many of the key provisions one would expect in a ConsensusDOCS form agreement. For example:

- Change orders must be in writing.[82]
- Subsubcontractors will get a time extension if the work is somehow delayed.[83]
- Subsubcontractors may collect delay damages

where appropriate.[84]

- The subcontractor must pay the subsubcontractor on a "pay-when-paid" basis, and payments must be made within seven days after they have been received from the constructor.[85]
- If the constructor fails to pay, the subcontractor still must pay the subsubcontractor within a reasonable time.[86]
- The subsubcontractor can stop working on seven days' written notice if payment is not timely.[87]
- The subsubcontractor must indemnify the subcontractor, but only to the extent caused by its own negligence.[88]
- The parties can mutually agree upon a retainage percentage, and the funds will be released as the upstream retainage is released.[89]

ConsensusDOCS 725 is drafted to work with upstream agreements. Provisions governing time for payment and stop-work rights are very similar to provisions in the ConsensusDOCS 750 and AIA-A401 subcontract agreements. Like ConsensusDOCS 750, the subsubcontract channels dispute resolution through direct discussions, followed by mediation, terminating in the parties' "check-box choice" between litigation and arbitration. Also, like the 750, the subsubcontract strongly encourages multiparty dispute resolution.

ConsensusDOCS 725 requires no specific lien waivers or other documentation from the subsubcontractor in order to receive payment. Most upstream agreements require a subcontractor to submit both lien waivers and itemized applications for payment in order to be paid. Because of these differences, the subcontractor may face payment risks that are not shared with the subsubcontractor, unless an exhibit is attached setting forth the proof of payment required.

ConsensusDOCS 725 does not require the subsubcontractor to warrant the quality of the work. It does not address correction of nonconforming work. It also does not cover constructor-requested uncovering of the work for inspection. In other words, the subcontractor's burden to ensure the quality of the work is not directly shared with the subsubcontractor.

There are other upstream provisions not covered by the subsubcontract, but many of them are minor. Still, parties that need more detail from their agreements have options. ConsensusDOCS 750 provides a more comprehensive agreement, and minor changes will convert it into a subsubcontract as well. And the ConsensusDOCS 725 is flexible—parties can add detailed exhibits to address complex issues like payment risk and work quality on a customized basis.

Insurance Exhibit

A new insurance exhibit for the ConsensusDOCS 725 has been released. It provides a list of commonly required insurance, with blanks for the parties to insert the required limits of insurance.

Anticipated Future Revisions to ConsensusDOCS

The ConsensusDOCS coalition has established a five-year cycle for its revision process but may elect to revise and add documents sooner, based on industry or legal developments.[90] Proposed documents that have been approved by the ConsensusDOCS Content Advisory Council include joint-venture agreements, a teaming agreement, a design professional consultant, and a federal version of the design-build design professional agreement. In addition, by adding endorsing organizations ConsensusDOCS expects to continue growing usership by double-digit percentages. Considering that the overall number of contracts is down, ConsensusDOCS appears to be gaining significant market share in a down but starting to recover economy. Most important, ConsensusDOCS looks to continue to advance contractual best practices and fair-risk allocation to benefit the entire design and construction industry.

Endnotes

1. James B. Groton, AAA Handbook on Construction Arbitration and ADR (2d ed. 2010) (citing findings of the Construction Industry Institute).

2. R. Zaghloul & F. Hartman, *Construction Contracts: The Cost of Mistrust*, 21:6 Int'l J. Project Mgmt. 419 (2003). *See also* Mohan M. Kumaraswamy, Florence Y.Y. Ling, M. Motiar Rahman & Siew Ting Phng, *Constructing Relationally Integrated Teams*, 131:10 J. Constr. Eng'g & Mgmt. 1076 (2005); *also see* Patrick J. O'Connor, *Integrated Project Delivery: Collaboration Through New Contract Forms*, Presented at the 2008 Associated General Contractors 90th Annual Conference at 6 (citing a Canadian study that approximates that up to a 20% premium in prices is added for just five of the most common exculpatory clauses).

3. Larry D. Harris & Brian M. Perlberg, *Advantages of the ConsensusDOCS Construction Contracts*, Constr. Law., Winter 2009, at 5.

4. "In forming a Collaborative Project Team, the Parties expect that design consultants and Trade Contractors will be selected to provide preconstruction services early in the preconstruction phase. These parties shall sign Joining Agreements, as they become members of the Team, accepting the principles and methods of collaboration set forth in this Agreement." ConsensusDOCS 300, § 3.2 (2007).

5. *See id.*

6. *Id.*

7. Despite the recession, the green building market grew 50% in the last two years and represents 25% of all new construction activity in 2010, according to McGraw-Hill Construction's *Green Outlook 2011* report.

8. Some bid documents are requiring contractors to ensure LEED certification or a certain amount of energy savings. Such a guarantee leaves contractors wide open to claims should a certain level of LEED certification or energy savings not be achieved.

9. First published in November 2009.

10. *See* ConsensusDOCS Guidebook for ConsensusDOCS 310 at 3 (July 31, 2010), *available at* http://consensusdocs.org/downloads/All+Documents.

11. ConsensusDOCS 310, art. 8 (2009).

12. *Id.* art. 4.

13. *Id.* §§ 4.5, 4.7, and art. 5.

14. *Id.* § 8.3.

15. *Id.* § 8.1.

16. *Id.* § 8.2.

17. For a more in-depth discussion of the ConsensusDOCS 301 BIM Addendum, see Richard H. Lowe & Jason M. Muncey,

ConsensusDOCS 301 BIM Addendum, CONSTR. LAW., Winter 2009, at 17.

18. *See* ConsensusDOCS 200, § 4.6.1 (2007).

19. *See id.* art. 8.

20. *See* ConsensusDOCS 200, art. 8 (2011).

21. *See* ConsensusDOCS 500, § 8.2 (2007).

22. However, changes in the law impacting contract time or contract price may give rise to a change order. *See* ConsensusDOCS 200, § 3.21.1 ("The Contract Price or Contract Time shall be equitably adjusted by Change Order for additional costs resulting from any changes in Laws, including increased taxes, which were not reasonably anticipated and then enacted after the date of this Agreement.").

23. *See* ConsensusDOCS 200, § 8.2 (2011).

24. *Id.* § 12.5.1.

25. CONSENSUSDOCS GUIDEBOOK, *supra* note 10, to ConsensusDOCS 703 at § 27.5.1 ("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.").

26. *See* ConsensusDOCS 200, § 14.1 (2011).

27. *See* ConsensusDOCS 200, § 4.3.3 (2007).

28. *See* ConsensusDOCS 240, § 2.1 (2011).

29. *See* ConsensusDOCS 410, § 15.1 (2011).

30. *See id.* § 2.4.1.

31. *See id.* §§ 15.1, 3.6.4.

32. *See id.* § 15.2.

33. *See id.* § 15.2.

34. ConsensusDOCS 200, § 4.1 (2011).

35. *Id.* § 2.4.12.

36. CONSENSUSDOCS GUIDEBOOK, *supra* note 10, for ConsensusDOCS 200 at § 6.7.

37. ConsensusDOCS 200, § 11.2.1 (2011).

38. *Id.*

39. ConsensusDOCS 240, § 2.1 (2011).

40. *Id.* § 3.2.

41. *Id.* § 3.3.

42. *Id.* § 3.2(e).

43. *Id.* § 3.1.6.

44. *Id.* § 3.2.6.

45. *Id.* § 7.2.4.

46. ConsensusDOCS 240, § 8.1 (2007).

47. ConsensusDOCS 240, § 8.1 (2011).

48. Jerome Bales, Mark Heley & John Markert, *ConsensusDOCS 240: What You Don't Know Can Hurt You*, CONSTR. LAW., Winter 2010, at 21, 27.

49. ConsensusDOCS 240, § 10.1 (2011).

50. The subcontractor is entitled to payment within seven days after the contractor is paid. ConsensusDOCS 750, § 8.2.5 (2011) (which "pay when paid" provision allows the contractor a reasonable period of time to make payment rather than making the contractor's receipt of payment a condition precedent to the subcontractors' right to be paid for their work). When the subcontractor is not timely paid, it has the right to stop work. *Id.* § 8.2.6. Conflicts between documents are construed in favor of the subcontract terms. *Id.* § 2.4. Indemnification is limited to the subcontractor's negligence. *Id.* § 9.1.1. The subcontractor's review of plans/specs does not imply constructability. *Id.* § 3.3. Unconditional mechanic's lien waivers are prohibited. *Id.* § 8.8. Liquidated damages are limited to the subcontractor's actual responsibility. *Id.* § 5.5. Litigation or arbitration must take place where the project is located. *Id.* § 11.7. The subcontractor is not required to indemnify the contractor for the contractor's willful and repeated safety violations. *Id.* § 9.1. An additional insured endorsement is not mandated. *Id.* § 9.2.11.1.

51. *Id.* § 4.2.1.

52. *Id.* § 5.4.1.

53. *Id.* § 8.2.2.

54. ConsensusDOCS 750, § 3.1.1 (2007) (emphasis added).

55. ConsensusDOCS 750, § 3.1.1 (2011).

56. *Id.* § 3.3.

57. *Id.* (emphasis added).

58. *Id.*

59. *Id.*

60. *Id.* § 10.4.

61. *Id.* § 10.5.

62. *See, e.g.*, Questar Builders, Inc. v. CB Flooring, LLC, 410 Md. 241, 281, 978 A.2d 651 (2009) (the covenant of good faith and fair dealing applies to the exercise of a termination for convenience clause. The court explained that "the obligation to act in good faith and deal fairly prohibits a party from terminating its contract (or otherwise exercising its discretion) to 'recapture' an opportunity that it lost upon entering the contract.").

63. ConsensusDOCS 200, § 11.3.5 (2011).

64. Such as "bid shopping" or the bad faith termination for convenience (to get a lower price) found in the *Questar* case. 410 Md., at 281. For a general discussion of bid shopping, see Donald W. Gregory & Eric B. Travers, *Ethical Challenges of Bid Shopping*, CONSTR. LAW., Summer 2010, at 29.

65. ConsensusDOCS 750, § 10.1.1 (2007).

66. ConsensusDOCS 750, § 10.1.1 (2011).

67. ConsensusDOCS 200, § 11.3.1 (2011).

68. ConsensusDOCS 410, § 3.2.7 (2011).

69. *Id.* § 2.4.16.

70. ConsensusDOCS 410, § 9.4 (2007).

71. ConsensusDOCS 410, § 9.4 (2011).

72. The Water and Wastewater Equipment Manufacturers Association (WWEMA) joined this effort and were particularly active in contributing input into this document. Ultimately they endorsed the finished document and joined the ConsensusDOCS coalition.

73. With publication of the ConsensusDOCS 703, the ConsensusDOCS 702 Standard Purchase Order Form is being retired.

74. ConsensusDOCS 703, § 13.1 (2011).

75. *Id.* § 14.

76. *Id.* § 14.2.

77. *Id.* § 16.

78. *Id.* § 17.

79. *Id.* § 21.

80. *Compare* ConsensusDOCS 702, §§ 25.2 (Direct Discussions), 25.3 (Mitigation), 25.3.1 (Mitigation Procedures), 25.3.2, & 25.4 (Mediation) (2007), *with* ConsensusDOCS 703, §§ 27.2 (Direct Discussions) & 27.3 (Mediation) (2011).

81. ConsensusDOCS 703, § 29 (2011).

82. ConsensusDOCS 725, § 8 (2009).

83. *Id.*

84. *Id.* § 13.2.

85. *Id.* § 9.2.

86. *Id.*

87. *Id.* § 9.5.

88. *Id.* § 10.

89. *Id.* § 9.3.

90. ConsensusDOCS procedures can be found at http://consensusdocs.org/about/procedures/.

