



**ConsensusDocs®**  
BUILDING A BETTER WAY

# ConsensusDocs Guidebook

## ConsensusDocs 200.5 – Three-Party Agreement for a Dispute Review Board (DRB)

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by

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## **Introduction to the ConsensusDocs Guidebook**

ConsensusDocs is the product of leading construction associations, dedicated to identifying and utilizing best practices in the construction industry for standard construction contracts. The 40+ participating associations represent Design Professionals, Owners, Constructors, Subcontractors, and Sureties that literally spell the DOCS in ConsensusDocs. ConsensusDocs contracts and forms attempt to fairly and appropriately allocate risks to the Party in the position to manage and control the risk. The practices articulated in the documents are forward-thinking, and may not always represent the status quo, but rather a better path forward to achieve project results. The goal of the multi-disciplined drafters was to create documents that best place the Parties to a construction contract in a position to complete a project on time and on budget with the highest possibility of avoiding claims.

By starting with better standard documents that possess buy-in from all stakeholders in the design and construction industry, you reduce your transaction time and costs in reaching a final Agreement. By using fairer contracts helps eliminate unnecessary risk contingencies and thereby better pricing. In addition, “fill-in-the-blanks” are intended to lead to productive discussions about how particular risks should be allocated on specific projects before a contract is finalized.

In this Guidebook you will find comments by individual associations regarding particular contract documents. These comments are organized by numeric sequence of the ConsensusDocs contract documents. The overview sections highlight issues and innovative features of the documents generally. Association comments are expressions by an association to its association membership. These comments highlight provisions or alert their membership to consider possible project-specific modifications to a consensus standard Agreement or form.

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



## **Comments regarding ConsensusDocs 200.5\*** **Three-Party Agreement for a Dispute Review Board (DRB)**

### **ConsensusDocs 200.5 (DRB Three Party Agreement)**

#### Article 1 Agreement

The Three Party Agreement is made among the Owner, Constructor and the three DRB members (Article 1 preamble). Reference is made to the underlying agreement for the project, including the selection of a DRB as a dispute mitigation procedure (Section 1.A and 1.B).

#### Article 2 Purpose and Role

The DRB is charged with assisting in and facilitating avoidance of disputes and the timely and impartial resolution of disputes (Section 2.A). Ex parte communications, except for administrative communications with the DRB Chair, are prohibited (Section 2.B). Regardless of the appointment method, the DRB shall be neutral and not a Party representative (Section 2.C).

#### Article 3 DRB Scope of Work

The DRB is responsible to appoint a Chair (if the Parties have not already done so); stay abreast of project developments through periodic site visits and review of updates; and facilitate communications between the Parties to avoid or mitigate disputes or impacts to the work from unexpected events during the progress of the work (Section 3.A. 1 to 3). The DRB is required to prepare Operating Procedures that govern the details of the DRB process, consistent with the underlying agreement and DRB Addendum (Subsection 3.B.1). After review and approval by the Parties, the DRB adopts the Operating

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Procedures, subject to adding or modifying them as agreed by the DRB and Parties (Subsection 3.B.2 and .3).

The DRB is to provide advisory opinions as requested jointly by the Parties and as deemed appropriate by the DRB (Subsection 3.C.1). Upon referral of a dispute confer with the Parties to schedule and conduct a timely and orderly hearing process (Subsection 3.C.2). The DRB convenes internal conferences and meetings as needed determine the outcome of the dispute and formulate the report (Subsection 3.C.3). The DRB is required to issue timely reports that include the DRB's supporting rationale and recommendation(s) (Subsection 3.C.5). The DRB is to provide written requests for clarification or reconsideration when requested and deemed appropriate by the DRB (Subsection 3.C.5). Finally, the DRB is to perform all other services and assume such responsibilities, as agreed by the Parties and as may be required to achieve the purposes of the DRB Addendum (Section 3.D).

#### Article 4 Ethics and Responsibilities

The DRB has the following ethical and other responsibilities:

- Act ethically, maintain impartiality, and avoid conflicts of interest, including disclosure of any development that could be perceived as a conflict of interest, throughout the life of the project (Subsection 4.A.1)
- Not engage in any ex parte communications, except as provided in the Operation Procedures (Subsection 4.A.2)
- Refrain from communicating any opinions of merit prior to issuance of a report, except for advisory opinions (Subsection 4.A.3)
- Not use information acquired during DRB activities for personal advantage or divulge any confidential information unless approved by the Parties (Subsection 4.A.4)
- Conduct meetings in an expeditious, diligent, orderly and impartial manner (Subsection 4.A.5)
- Impartially consider all disputes, basing reports solely on the contract documents and the facts of the dispute (Subsection 4.A.6).
- Strive to reach unanimous recommendations, but if that is not possible include a minority report without identifying the dissenting member (Subsection 4.A.7).
- Receive compensation only as specified in the TPA and not receive any bonus or commission payments (Subsection 4.A.8).



The Owner has the following responsibilities:

- Except for participation in the DRB's activities, do not solicit advice or consultation with the DRB on matters dealing with conduct of the work or resolution of problems that might compromise DRB impartiality on future disputes (Subsection 4.B.1).
- Furnish to each DRB member copies of specified documents pertinent to the performance of the Agreement and necessary for the DRB to conduct its operations (Subsection 4.B.2).
- Coordinate DRB operations in cooperation with Constructor (Subsection 4.B.3).
- Arrange for or provide conference facilities at or near the site, and provide logistical services as needed to support the DRB's operations (Subsection 4.B.4).
- Cooperate with Constructor and the DRB to facilitate avoidance of disputes and the timely and impartial resolution of disputes referred to the DRB (Subsection 4.B.5).
- Pay the fees and costs agreed to in this TPA (Subsection 4.B.6).

The Constructor has the following responsibilities:

- Except for participation in the DRB's activities, do not solicit advice or consultation with the DRB on matters dealing with conduct of the work or resolution of problems that might compromise DRB impartiality on future disputes (Subsection 4.C.1).
- Furnish to each DRB member copies of documents not furnished by the Owner as the DRB may request (Subsection 4.C.2).
- Cooperate with the Owner to facilitate avoidance of disputes and the timely and impartial resolution of disputes referred to the DRB (Subsection 4.C.3).
- Pay the fees and costs agreed to in the TPA (Subsection 4.C.6).

#### Article 5 Duration of DRB Activities

Unless the DRB Chair has been previously identified by the Parties, the DRB shall begin its activities by selecting the Chair and receiving Party approvals of the appointment (Section 5.A). The TPA shall survive the termination, resignation, incapacity, or death of any DRB member (Section 5.B). The DRB's jurisdiction under the TPA shall end on the date of final payment under the Agreement, unless the Parties mutually agree in writing to extend the DRB's term or to terminate the DRB earlier (Section 5.A).



#### Article 6 Cost of the DRB Process

The Parties shall each bear their respective in-house costs and costs of providing their DRB-related services (Section 6.A) The Parties shall equally bear the cost of the DRB's services (Section 6.B).

#### Article 7 Payment to DRB

Payments made to the DRB members shall constitute full compensation for work performed, travel time and services rendered, and for all materials, supplies and incidentals necessary to serve on the DRB (Section 7.A). Payment for services rendered by DRB members shall be at the rate and conditions agreed to between the Parties and each DRB member (Section 7.B). DRB members shall be reimbursed for specified actual direct, non-salary expenses, subject to any limitations imposed by the underlying project Agreement (Section 7.C). DRB members shall individually submit invoices for work completed to Constructor not more often than once per month; based on the agreed compensation together with expense receipts; and accompanied by a description of services performed (Subsections 7.D. 1 to 3). Constructor shall promptly seek approval of Owner to pay the DRB invoices; shall pay the accepted invoices within thirty (30) days after Owner approval; and shall be reimbursed for Owner's share of the costs (Section 7.F).

#### Article 8 Confidentiality and Recordkeeping

All information provided to and communications with the DRB shall be deemed confidential and for settlement purposes only, unless otherwise agreed in writing by the Parties (Section 8.A). No DRB member shall divulge to third parties information that has been acquired during DRB activities without obtaining prior written approval from the Parties (Section 8.B). DRB members shall maintain cost records pertaining to the TPA for inspection by Owner and Constructor for a [specified] period following the completion or termination of the TPA (Section 8.C).

#### Article 9 Assignment

No party to the TPA shall assign any duty established under the TPA (Article 9).

#### Article 10 Termination

The TPA may be terminated by mutual agreement of the Parties at any time upon not less than thirty (30) days written notice to the DRB (Section 10.A). Individual DRB members may be terminated only by agreement of both the Parties; provided, however, if there is a disagreement on this issue the Parties agree to the underlying project



Agreement dispute mitigation procedure (Section 10.B). If a DRB member resigns, is unable to serve, or is terminated he or she shall be replaced within thirty (30) days in the same manner as he or she was originally selected (Section 10.C).

### Article 11 Legal Relations

The Parties expressly acknowledge that each DRB member is acting in the capacity of an independent contractor and not as an employee of Owner or Constructor (Section 11.A). DRB members shall not participate in, or be required to participate in, any subsequent dispute or legal proceedings regarding the operations of the DRB, including, but not limited to, depositions, testimony, or disclosure of any information regarding the deliberations of the DRB (Section 11.B). The Parties acknowledge that each DRB member is acting in a capacity intended to facilitate the avoidance and resolution of disputes and to the fullest extent permitted by law shall be accorded quasi-judicial immunity for any actions or decisions associated with DRB activities (Section 11.C). To the fullest extent permitted by law, the Parties, jointly and severally, shall defend, indemnify and hold harmless each DRB member from any and all claims, losses, demands, costs, and damages (including reasonable attorneys' fees) for bodily injury, property damage, or economic or other loss arising out of or related to the DRB members carrying out DRB activities (Section 11.D).

### Article 12 Disputes Regarding the DRB

Disputes among the Parties arising out of the TPA that cannot be resolved by negotiation and any actions to enforce any right or obligation under the TPA shall be initiated a court of competent jurisdiction in the location of the Project, unless the Parties agree on another mutually convenient location; the DRB members consent to the personal jurisdiction of the Court of the designated jurisdiction (Article 12).

### Article 13 Funding Agency Review

The agency funding the project has the right to attend DRB meetings and hearings and to review DRB reports, but not to attend private DRB deliberations (Article 13).

### **Conclusion**

The issuance of ConsensusDocs DRB Addendum and TPA reinforces the use of DRBs as an industry best practice in the United States. The DRBF Manual Update Committee will be taking into account the form of the ConsensusDocs DRBF Addendum and TPA as a recent indication of industry input on DRB best practices.