



Highlights of Draft Revisions to the ConsensusDOCS Agreements

I. Revisions in the General Terms and Conditions to 200/240/410/500/750 Core Contract Agreements

1. Party Names

Contractor has been globally replaced with “Constructor.” Architect/Engineer has become “Design Professional.”

Changing “Contractor” to a “Constructor” as a party name derives from the ConsensusDOCS 300 IPD agreement and reflects an expectation that a builder provides services that add value to a project.

2. Attorneys’ Fees

The losing Party is now responsible to pay the prevailing party’s attorneys’ fees. The potential cost of attorneys’ fees will be used as an added incentive for parties to negotiate a settlement of claims.

2011	12.5.1 The costs of any binding dispute resolution procedures and reasonable attorneys’ fees shall be borne by the non-prevailing Party, as determined by the adjudicator of the dispute.	2007	12.5.1 The costs of any binding dispute resolution procedures shall be borne by the non-prevailing Party, as determined by the adjudicator of the dispute.
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3. Tax Identification Number

A new federal law that requires government, nonprofits, and businesses of all sizes to file Form 1099s with the IRS when goods or services are purchased without a credit card from another business exceed \$600 in a year is now in effect. Consequently, the party receiving payment is now asked to give their tax identification number (Article 1).

4. Review of Contract Documents

Constructor’s review of contract documents, including design documents, has been given a clearer standard of review by eliminating reference to “as being necessary to produce the indicated results” (Section 3.1.1). Unchanged is language that clarifies the Constructor’s review is to facilitate the Work and does not create an affirmative duty to discover errors.

2011	3.1.1 The Constructor shall provide all labor, materials, equipment, and services necessary to complete the	2007	3.1.1 The Contractor shall provide all labor, materials, equipment and services necessary to complete the
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	Work, all of which shall be provided in full accord with and reasonably inferable from the Contract Documents.		Work, all of which shall be provided in full accord with and reasonably inferable from the Contract Documents as being necessary to produce the indicated results.
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5. Submittals

Submittal requests are mandatorily sent to the Design Professional in addition to the Owner (3.14).

2011	3.14.1 The Constructor shall submit to the Owner and the Design Professional all shop drawings, samples, product data, and similar submittals required by the Contract Documents for review and approval. Submittals shall be submitted in electronic form if required in accordance with ConsensusDOCS 200.2 and subsection 4.6.1. The Constructor shall be responsible for the accuracy and conformity of its submittals to the Contract Documents. At no additional cost, the Constructor shall prepare and deliver its submittals in a manner consistent with the Schedule of the Work and in such time and sequence so as not to delay the performance of the Work or the work of the Owner and Others. . . .	2007	3.14.1 The Contractor shall submit to the Owner, and, if directed, to its Architect/Engineer, for review and approval all shop drawings, samples, product data and similar submittals required by the Contract Documents. Submittals may be submitted in electronic form if required in accordance with ConsensusDOCS 200.2 and Subparagraph 4.6.1. The Contractor shall be responsible to the Owner for the accuracy and conformity of its submittals to the Contract Documents. The Contractor shall prepare and deliver its submittals to the Owner in a manner consistent with the Schedule of the Work and in such time and sequence so as not to delay the performance of the Work or the work of the Owner and Others. . . .
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6. Overhead

Deductibles paid on any insurance policy and costs related to the correction of defective work have been eliminated from the definition of Overhead. Also, Overhead is no longer considered a project specific cost (Subsection 2.4.12).

2011	2.4.18 "Overhead" means (1) payroll costs and other compensation of Constructor employees in the Constructor's principal and branch offices; (2) general and administrative expenses of the Constructor's principal and branch offices including charges against the Constructor for delinquent payments; and (3) the Constructor's capital expenses, including interest on capital used for the Work.	2007	2.4.12 The term Overhead shall mean 1) payroll costs and other compensation of Contractor employees in the Contractor's principal and branch offices; 2) general and administrative expenses of the Contractor's principal and branch offices including deductibles paid on any insurance policy, charges against the Contractor for delinquent payments, and costs related to the correction of defective work; and 3) the Contractor's capital expenses, including interest on capital used for the Work.
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7. Improper Termination for Cause

An improper Termination for Cause is now automatically treated as a Termination for Convenience (Section 11.3.5). However, this provision has not been added to the 750 or 751 Subcontract agreements. The subcontract agreements allow the Constructor to terminate if the Owner terminates (CD 750 section 10.4).

2011	11.3.5 If the Owner terminates this Agreement for default, and it is later determined that the Constructor was not in default, or that the default was excusable under the terms of the Contract Documents, then, in such event, the termination shall be deemed a termination for convenience, and the rights of the Parties shall be as set forth in section 11.4.	2007	N/A
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8. Owner Supplementation

Clarified that if Owners terminate for cause, possess alternative remedies to exercise at their discretion to terminate or supplement work.

2011	. . . the Owner without prejudice to any other rights or remedies may: (a) take possession of the Worksite; (b) complete the Work utilizing reasonable means; (c) withhold payment due to the Constructor; and (d) as the Owner deems necessary, supply workers and materials, equipment, and other facilities for the satisfactory correction of the default, and charge the Constructor the costs and expenses, including reasonable Overhead, profit, and attorneys' fees.	2007	<p>11.2 . . . the Owner without prejudice to any other rights or remedies may:</p> <p>11.2.1 supply workers and materials, equipment and other facilities as the Owner deems necessary for the satisfactory correction of the default, and charge the cost to the Contractor, who shall be liable for the payment of same including reasonable Overhead, profit and attorneys' fees;</p> <p>11.2.2 contract with Others to perform such part of the Work as the Owner determines shall provide the most expeditious correction of the default, and charge the cost to the Contractor;</p> <p>11.2.3 withhold payment due the Contractor in accordance with Paragraph 9.3; and . . .</p>
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9. Optional incentives Clause

Added standard language for an incentive award in the ConsensusDOCS Guidebook. If users are stipulating liquidated damages, such terms may be instructive in determining award incentives, if appropriate.

2011	ConsensusDOCS Guidebook at section 6.7:	2007	N/A
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	<p>For those projects where an incentives clause is appropriate, the following standard language developed by the ConsensusDOCS drafters could be inserted as follows:</p> <p>6.7 AWARD INCENTIVE. The maximum amount of incentive shall be _____. To receive an incentive award based upon early completion, the Constructor must provide the Owner a written notice of its intent to achieve completion early no later than 60 days prior to the contract date of Substantial Completion. If achieved, the Contract Price shall be adjusted by Change Order to reflect the Contractor's incentive award. Incentive award payment will be made upon receipt of a proper application for final payment after execution of that Change Order.</p>		
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III. Revisions in the ConsensusDOCS 240 Owner-Design Professional Agreement

1. Standard of Care

An objective standard of care for performing design services has been added that conforms to the common law standards, as well as accounting for an individual project's size, scope, and complexity, as well as the time of performance.

2011	<p>... Services shall be performed in accordance with the standard of professional skill and care required for a Project of similar size, scope, and complexity, during the time in which the Services are provided.</p>	2007	<p>N/A [Defaults to the common law standard of care for applicable jurisdiction.]</p>
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1. Sustainable Design and BIM

Sustainable Design or green building design is now included as a Basic service if such goals are in the Owner's program. There is now a specific call-out for additional services (and additional compensation) for the Design Professional to perform the services expected of a Green Building Facilitator, such as submitting LEED certification documentation (Sections 3.2 and 3.3). Use of BIM and other electronic documents have also been added as a Basic Service if BIM is included in the Owner's program [Subsection 3.2(e)].

2011	<p>3.2 BASIC SERVICES The Design Professional's Basic Services consist of any ... (d) design services that are required by elected green measures and green status identified in the Owner's program. If additional services are required, such as serving as a green building facilitator or submitting documentation for LEED certification, such services shall be included as Additional Services.</p>	2007	<p>3.2 BASIC SERVICES The Architect/Engineer's Basic Services consist of any ... If professional design services are to be furnished by the Owner, Contractor or Others, the Architect/Engineer shall indicate all performance and design criteria to be satisfied in accordance with the Owner's Program, and the Owner, Contractor or Others shall not be responsible for the adequacy of such</p>
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	<p>Documents shall be in a format consistent with the Owner's Program, including the use of Building Information Modeling (BIM), which shall be governed by the ConsensusDOCS 301 BIM Addendum or a separate addendum: If professional design services are to be furnished by the Owner, Constructor, or Others, the Design Professional shall indicate all performance and design criteria to be satisfied in accordance with the Owner's Program, and the Owner, Constructor or Others shall not be responsible for the adequacy of such performance and design criteria. Design services furnished by a Party other than the Design Professional shall be obtained from licensed design professionals, who shall affix their signature and seal on all drawings, specifications, calculations, and submittals prepared by them, and the Design Professional shall be entitled to rely upon the adequacy, accuracy, and completeness of such design services.</p>	<p>performance and design criteria. Design services furnished by Party other than the Architect/Engineer shall be obtained from licensed design professionals, who shall affix their signature and seal on all drawings, specifications, calculations and submittals prepared by them, and the Architect/Engineer shall be entitled to rely upon the adequacy, accuracy and completeness of such design services.</p>
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2. Design Coordination/Delegation

Explicitly added a provision that design coordination does not affirmatively require Design Professional to detect errors, omissions or inconsistencies in the design consultant services that are not retained by the Design Professional.

2011	<p>3.2.6 . . . The Design Professional shall promptly report any known errors or omissions to the Owner. However, the Design Professional does not assume an affirmative responsibility to detect errors, omissions, or inconsistencies in the design consultant's services that are not retained by the Design Professional.</p>	2007	N/A
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3. Right to Cure

Adding a right for Design Professional to cure defective work in a manner similar to Constructor's opportunity to cure (Section 8.1).

2011	<p>8.1 TERMINATION BY EITHER PARTY Should either Party be in material breach of this Agreement, the other Party may give written notice to the breaching Party that it intends to</p>	2007	<p>8.1 TERMINATION BY EITHER PARTY Either Party may terminate this Agreement upon seven (7) Days' written notice if the other Party materially breaches its terms through</p>
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	<p>terminate this Agreement for default absent appropriate corrective action upon seven (7) Days from receipt. Upon such time and absent appropriate corrective action, the non-breaching party may terminate this Agreement in writing.</p>	<p>no fault of the initiating Party.</p>
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4. Transmitting Copyrighted Materials

Added an explicit express warranty that the copyright of transmitted information by the Owner or the Design Professional is with copyright ownership or permission (Section 3.9 and 4.3).

<p>2011</p>	<p>3.9 ROYALTIES, PENALTIES, AND COPYRIGHTS . . . The Design Professional warrants that it possesses the copyright or permission to use the copyright of materials, methods, or systems selected by the Design Professional and incorporated in the design documents of the Design Professional. The Design Professional shall defend, indemnify, and hold the Owner, the Constructor, and Subcontractors harmless from all suits or claims for infringement of any patent rights or copyrights arising out of such selection.</p> <p>4.3 ROYALTIES, PENALTIES, AND COPYRIGHTS . . . The Owner warrants that it possesses the copyright or permission to use the copyright of materials, methods, or systems required by Owner to be incorporated in the design documents of the Design Professional.</p>	<p>2007</p> <p>N/A</p>
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5. Transmitting Documents Electronically

Greater flexibility to provide documents in electronic format if consistent with an Owner's program.

<p>2011</p>	<p>Section 3.2.4 Design Documents & Section 3.2.5 Construction Documents . . . Unless documents are required to be transmitted in electronic form, two printed sets and one reproducible set of Design Development Documents shall be provided to the Owner.</p> <p>10.3 . . . Notwithstanding other</p>	<p>2007</p> <p>3.24 and 3.2.5 . . . Two printed sets and one reproducible set of Design Development Documents shall be provided to the Owner.</p> <p>10.3 . . . N/A.</p>
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	provisions in this Agreement, printed documents and sets shall not be required if such documents are required to be prepared and transmitted in electronic form.		
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III. Revisions in the ConsensusDOCS 750 Subcontract Agreement

1. Consequential Damages

Consequential Damages flowed to the Subcontractor have been explicitly limited to damages for which an Owner is entitled to collect (Section 5.4.1).

2011	5.4.1 Except for any (a) liquidated, consequential, or other damages that the Owner is entitled to recover against the Constructor under the prime agreement, and (b) losses covered by insurance required by the Subcontract Documents, the Constructor and the Subcontractor mutually waive all claims against each other for consequential damages, including damages for loss of business, loss of financing related to the Project, loss of profits not related to this Project, loss of bonding capacity, loss of reputation, or insolvency. . .	2007	5.4.1 Except for damages provided for by the Subcontract Documents as liquidated damages and excluding losses covered by insurance required by the Subcontract Documents, the Contractor and Subcontractor waive claims against each other for consequential damages arising out of or relating to this Agreement, to the same extent the Owner-Contractor agreement furnished to the Subcontractor in accordance with Paragraph 2.3 provides for a mutual waiver of consequential damages by the Owner and Contractor, including to the extent provided in the Owner-Contractor agreement, damages for loss of business, loss of financing, principal office overhead and expenses, loss of profits not related to this Project, loss of bonding capacity, loss of reputation, or insolvency. . .
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2. Owner Information

Subcontractor is now entitled to receive material changes in Owner's financial ability to pay that the Constructor has received. (Section 4.2.1).

2011	4.2.1 Unless expressly prohibited by the prime agreement, the Constructor shall promptly provide to the Subcontractor the following information received from the Owner: (a) upon the Subcontractor's request, information regarding the Owner's financial ability to pay for the Work, and (b) notice of any material variation in the Owner's financial ability to pay. The Constructor, however, does not warrant the accuracy or completeness	2007	4.2.1 The Subcontractor shall have the right upon request to receive from the Contractor such information as the Contractor has obtained relative to the Owner's financial ability to pay for the Work, including any subsequent material variation in such information. The Contractor, however, does not warrant the accuracy or completeness of the information provided by the Owner.
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3. Retainage

When an Owner reduces the retainage held from the Constructor, the Constructor must similarly reduce its retainage for Subcontractor. The revised language benefits early finishing trades whose subcontract work has been accepted.

2011	8.2.2 RETAINAGE The rate of retainage shall be [] percent ([]%), which is equal to the percentage retained from the Constructor's payment by the Owner for the Subcontract Work. If the Subcontract Work is satisfactory and the prime agreement provides for reduction of retainage, the Subcontractor's retainage shall also be reduced when the Constructor's retainage of the Subcontract Work has been so reduced by the Owner.	2007	RETAINAGE The rate of retainage shall be _____ percent (_____ %), which is equal to the percentage retained from the Contractor's payment by the Owner for the Subcontract Work. If the Subcontract Work is satisfactory and the Subcontract Documents provide for reduction of retainage at a specified percentage of completion, the Subcontractor's retainage shall also be reduced when the Subcontract Work has attained the same percentage of completion and the Contractor's retainage for the Subcontract Work has been so reduced by the Owner.
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4. Right to Cure Defective Work

A second notice to cure defective work, in a manner similar to CD 200 has been added (Section 10.1.1).

2011	10.1.1 If the Subcontractor fails within three (3) Business Days after written notification to commence and continue satisfactory correction of the default with diligence and promptness, then the Constructor shall give a second notice to the Subcontractor and surety, if any, to correct the default within a two (2) Business Day period. If the Subcontractor fails to promptly commence and continue satisfactory correction of the default following receipt of such second notice, the Constructor without prejudice to any other rights or remedies, shall have the right to any or all of the following remedies:	2007	If the Subcontractor fails within three (3) business Days after written notification to commence and continue satisfactory correction of the default with diligence and promptness, then the Contractor without prejudice to any other rights or remedies, shall have the right to any or all of the following remedies:
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5. Subcontractor's Review of Contract Documents

Subcontractor's review of contract document has been changed from "careful analysis and comparison" to "examine and compare." This revised language provides consistent terminology

throughout the ConsensusDOCS library. Language similar to the ConsensusDOCS 200 has been added to clarify that the Subcontractor does not have an affirmative duty to discover errors.

2011	The Subcontractor shall examine and compare the drawings, specifications, other Subcontract Documents, and information furnished by the Owner relative to the Subcontract Work. Such examination and comparison shall be solely for the purpose of facilitating the Subcontract Work and not for the discovery of errors, inconsistencies, or omissions in the Subcontract Documents nor for ascertaining if the Subcontract Documents are in accordance with Laws. The Subcontractor shall not have liability for errors, omissions, or inconsistencies discovered under this subsection unless the Subcontractor knowingly fails to report a recognized problem to the Constructor.	2007	The Subcontractor shall make a careful analysis and comparison of the drawings, specifications, other Subcontract Documents and information furnished by the Owner relative to the Subcontract Work. Such analysis and comparison shall be solely for the purpose of facilitating the Subcontract Work and not for the discovery of errors, inconsistencies or omissions in the Subcontract Documents are in accordance with applicable laws, statutes, ordinances, building codes, rules or regulations.
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IV. Miscellaneous

ConsensusDOCS 300 IPD Agreement

The contract title has been revised to “Standard Tri-Party Agreement for Integrated Project Delivery.” Previously, Collaborative Project Delivery was referenced instead of IPD.

V. Revisions in the ConsensusDOCS 410 Design-Build Agreement and General Conditions

1. Added an accounting for deductions to Design-Builder’s contingency with each application for payment (Section 3.2.7).
2. Cost of the Work (section 8.2) was narrowed to no longer include Design-Builder’s demobilization costs resulting from suspension of the work, and damages and defense costs resulting from copyright infringements. Costs associated in a change in law is no longer considered a cost of the work, but may give rise to a change order. Additionally, the Owner now has a right to audit costs.
3. Design-Builder’s encountering of unknown site conditions now requires immediate Work stoppage and written notice to the Owner.

2011	9.4 . . . the Design-Builder shall stop the affected Work and give the Owner prompt written notice of the condition. The Design-Builder shall not be required to perform any Work relating to the unknown condition without the written mutual agreement of the Parties.	2007	9.4 . . . The Design-Builder shall provide the Owner with written notice within the time period set forth in Paragraph 9.6.
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4. The definition of Contract Documents is now called out separately and now includes Owner-approved schematic, design-development and construction documents (section 15.1).

VI. Revisions in the ConsensusDOCS 500 Construction Manager at Risk Agreement

Allowable cost of the work items were narrowed to no longer include Construction Manager’s demobilization costs resulting from suspension of the work, and damages and defense costs resulting from copyright infringements. Costs associated with a change in the law is no longer considered a cost of the work, but may give rise to a change order. Additionally, the Owner now has a right to audit costs (Section 8.2).

VII. Technical Revisions in the General Terms and Conditions

1. Definition of Contract Documents (CD 200, 2.4.4):
 - a. The definition of existing contract documents has been clarified and better mirrors the order of precedence clause (section 14.2). Now, an Owner must designate if a provided document is considered a contract document.
 - b. Approved submittals are no longer considered contract documents.
 - c. Alternates have been eliminated as contract documents from the 750 Subcontract.
 - d. Note that addenda, like the Green and BIM addendum are still considered contract documents as a modification.

2011	<p>Section 2.4.4 The “Contract Documents” consist of this Agreement, the existing Contract Documents listed in section 14.1, drawings, specifications, addenda issued and acknowledged prior to execution of this Agreement, information furnished by the Owner pursuant to subsection 3.13.4, and modifications issued in accordance with this Agreement.</p> <p>4.3 WORKSITE INFORMATION To the extent the Owner has obtained, or is required elsewhere in the Contract Documents to obtain, the following Worksite information, the Owner shall</p>	2007	<p>2.4.4 The Contract Documents consist of this Agreement, the drawings, specifications, addenda issued prior to execution of this Agreement, approved submittals, information furnished by the Owner under Paragraph 4.3, other documents listed in this Agreement and any modifications issued after execution.</p> <p>4.3 WORKSITE INFORMATION Except to the extent that the Contractor knows of any inaccuracy, the Contractor is entitled to rely on Worksite information furnished by the Owner pursuant to this Paragraph 4.3. To the extent the Owner has</p>
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	provide at the Owner's expense and with reasonable promptness:		obtained, or is required elsewhere in the Contract Documents to obtain, the following Worksite information, the Owner shall provide at the Owner's expense and with reasonable promptness:
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2. "Compliance with Laws" has been added (3.21.1), and a definition of Laws has been added (2.4.10).

2011	3.21 COMPLIANCE WITH LAWS The Constructor shall comply with all Laws at its own costs. The Constructor shall be liable to the Owner for all loss, cost, or expense attributable to any acts or omissions by the Constructor, its employees, subcontractors, and agents for failure to comply with Laws, including fines, penalties, or corrective measures. However, liability under this subsection shall not apply if notice to the Owner was given, and advance approval by appropriate authorities, including the Owner, is received.	2007	N/A
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3. Cost of Work

A detailed section defining Cost of the Work has been added to the lump sum agreements to be used for change order pricing as an option (Section 8.3.1.3).

- a. The definition is based upon but not identical to the definition used in CD 500.
- b. Intention is to provide more clarity for change orders conducted based upon cost of the work.
- c. Auditing rights by Owner have been added to this new section.

4. Time

An explicit provision stating that "time is of the essence" has been added to all agreements (CD 200 Section 6.1.2).

5. Professional Liability Insurance

Owner may not unreasonably withhold approval of insurance requirements provided by a Design Professional or its consultants (CD 240 Section 7.2.4).