NASBP Endorses Newly Released ConsensusDocs Joint Venture Line Item Agreement

As we all know, the construction industry is ever-changing; and with those changes comes a need for new standard form contracts to address the different delivery systems, risk allocations, project responsibilities, and scope concerns. As construction practices evolve, ConsensusDocs revises current standard form contracts and creates new standard form contracts to further the goal of writing balanced and fair contracts to deliver better project results with less litigation.

To address those changes in construction practices, the ConsensusDocs Coalition drafted the first integrated project delivery contract, the first building information modeling contract, and the first comprehensive green building contract. The Coalition, after releasing these and other, revised documents, set its sights on drafting joint venture standard documents. While joint ventures have historically been an important arrangement in construction contracting, there has recently been a significant growing trend for construction companies to joint venture with other companies, in order for both to seek more contracting opportunities in the current, highly competitive environment.

In recognition of this growing trend for companies to form and seek work as joint ventures, on August 7, 2013, ConsensusDocs released the new ConsensusDocs 297 Joint Venture Line Item Agreement, which NASBP is pleased to endorse. This agreement is the first standard line item joint venture agreement that contemplates joint ventures between contractors, construction managers, design-builders, design professionals, and other parties. This form contract is for parties who want to include line items in the contract under which each joint venture partner is responsible for performing discrete items of the total scope of the contracted work. By allocating responsibility by specific work, the agreement simplifies getting contracts signed and work performed.

The ConsensusDocs 297 joins two other agreements in the ConsensusDocs “joint venture family” of documents: ConsensusDocs 298 Joint Venture Agreement and ConsensusDocs 299 Joint Venture LLC Operating Agreement. The Joint Venture Agreement, released June 6, 2012, is a contract between two or more parties to form a joint venture for a project. The Joint Venture LLC Operating Agreement, released February 7, 2013, is a contract between two or more parties to form an LLC version of a joint venture.

When ConsensusDocs 298 was being drafted, the ConsensusDocs Coalition identified the need to address situations where the joint venturers planned to subcontract various scopes of work to others or to use a line-item approach. Thus, the concept for ConsensusDocs 297 had its genesis in the drafting process of ConsensusDocs 298.

The line item version is a significant addition to the joint venture family because many joint ventures divide joint venture responsibility by specific work tasks rather than a general percentage of responsibility.
As do all ConsensusDocs standard contract documents, this new agreement takes a project-first approach and promotes collaboration and communication among the parties.

Bond producers, surety company professionals, and potential joint venture partners will be interested in understanding this new standard form contract. Below is a discussion of some of the key features of the ConsensusDocs 297 Joint Venture Line Item Agreement.

Article 1, Agreement

Article 1 contemplates that there will be three Joint Venturers; but it can be adapted to any number of joint venture parties. The stated purpose of the Agreement is (1) to establish a joint venture (JV) and (2) to pursue and perform a contract for specified work on a specified project.

Article 2, Relationship of the Joint Venturers

Article 2 addresses the formation of, term, and duration of the JV, the limited scope of the JV, and the manner and timing of dissolution of the JV. Section 2.1, Formation of the Joint Venture, provides that the purpose of the formation of the JV is to prepare and submit a proposal for the work and then to perform the work, if the owner accepts the proposal. Section 2.2, The Work, provides that the JV will perform the work identified in the Agreement and in the Owner Agreement. Section 2.3, Limited Scope, contemplates that the JV is for a limited scope and duration, for the work provided in the Owner Agreement and this Agreement.

Article 3, Interests of the Joint Venturers

Section 3.1 specifies the Percentage Interests of the Joint Venturers that arise out of the execution and performance of the Owner Agreement and this Agreement. Unless otherwise provided in the Agreement, the stated Percentage Interests apply to the following: profits, assets, capital contributions, contribution of personnel and other resources, surety support, losses, liabilities, and voting control.

Pursuant to section 3.2, each Joint Venturer must indemnify the other Joint Venturers from any liability or other loss arising from the project or the Owner Agreement, which exceeds their Percentage Interest share of the loss. This indemnification includes, without limitation, losses relating to the project that arise from the execution of surety bonds or surety indemnity agreements. A Joint Venturer shall not be liable for damages, beyond its percentage interest, to the JV or other Joint Venturers, for any error or omission with regard to the business of the JV. Exceptions are for a Joint Venturer's Wrongful Actions, which include fraud, bad faith, willful violation of the Agreement or willful misconduct, and theft.

Under section 3.3, an Employing Joint Venturer must indemnify the JV and other Joint Venturers from claims of its employees performing services for the JV but not actually on the JV payroll. Each Joint Venturer must waive and require its insurers to waive subrogation of this indemnification obligation.

Article 4, Management of the Joint Venture

Under section 4.1, the JV will be managed by the Executive Committee, which consists of a designated representative from each Joint Venturer. The Executive Committee has the responsibility to supervise and manage the business of the JV and performance of the Owner Agreement, including, but not limited to, establishing policies and procedures, preparing a budget and a schedule for the work, and amending agreements necessary to complete the work.

Pursuant to subsection 4.3.1, the Executive Committee must try to make all decisions by unanimous agreement. Ultimately, if a unanimous decision cannot be reached, the matter will be decided by majority vote of the Joint Venturers based on their Percentage Interests. Pursuant to subsection 4.3.2, certain decisions of the Executive Committee require unanimous approval by the representatives on the
committee, including the following: approval of the Owner Agreement or any amendment to the Owner Agreement; resolution of any dispute between any Joint Venturer or Joint Venturers and the JV; initiation or settlement of bid protests or other legal proceedings by or against the JV; distributions of profits or other assets of the JV, among other actions.

Under section 4.5, a Managing Joint Venturer is designated in the Agreement or appointed by the Executive Committee. The Managing Joint Venturer has direct charge and supervision of all matters necessary to the performance and completion of the Owner Agreement, subject to the authority of the Executive Committee. Under section 4.8, the Managing Joint Venturer has the responsibility for periodic financial reporting and cost accounting and primary responsibility for tax matters.

Pursuant to section 4.6, the Executive Committee must appoint an individual as Project Manager and that person is designated in the Agreement. Under section 4.7, the Project Manager shall act on behalf of the JV, subject to the authority of the Executive Committee. This section sets forth the following responsibilities of the Project Manager: prepare a budget and schedule for approval by the Executive Committee; be responsible for the management and coordination of the work; be responsible for carrying out the work in accordance with the Owner Agreement; receive all funds accruing to the Joint Venturers; serve as the JV’s contact with the owner, among other responsibilities.

Article 5, Financing the Joint Venture

Pursuant to section 5.1, a joint bank account or accounts (JV Account(s)) shall be opened in a bank or banks and under the description(s) as determined by the Executive Committee. All funds advanced by the Joint Venturers for the performance of the work and all money received from the owner and from others in connection with the performance of the work shall be deposited in the JV Account(s).

Pursuant to section 5.2, within ten business days from the execution of the Agreement, each of the Joint Venturers must pay into the JV Account(s) in cash, a designated amount as initial working capital for performance of the work. The Executive Committee shall determine any need for additional working capital, and each Joint Venturer must pay into the JV Account(s) its Percentage Interest share of the amount determined.

Pursuant to section 5.3, interim distribution of profits or any payments of JV funds to the Joint Venturers shall be made only when determined by the Executive Committee, except as provided in Article 6 (see below) or otherwise in the Agreement. Distributions of profits will be in proportion to the Percentage Interests.

Section 5.4 sets forth the manner of final distribution at the completion of the work and of the final audit and accounting.

Article 6, Performance of the Work

In section 6.1, Responsibility for the Work, the Joint Venturers are jointly responsible to the JV for the performance of the work, except for matters assigned to a particular Joint Venturer pursuant to a subcontract listed in Article 6. The Executive Committee will determine the allocation of specific functions to be performed and resources to be provided by the JV itself or its members.

Pursuant to section 6.3, the Joint Venturers are jointly responsible to the JV for the performance of the work, except as provided in section 6.4.

In section 6.4, the JV allocates the performance of certain defined portions of the work among the Joint Venturers. This section contains the line-item allocation of responsibility for certain discrete scopes of work. This section designates the responsible Joint Venturer and the specific work covered.
Pursuant to section 6.5, the Joint Venturers awarded subcontracts are responsible to the JV for the proper performance of the subcontract work. They will be permitted to sub-subcontract without approval of the JV, unless otherwise provided in the subcontract.

Pursuant to section 6.7, each Joint Venturer shall bill the JV monthly for its costs to which it is entitled under Article 7. The JV in turn bills the owner in accordance with the Owner Agreement.

**Article 7, Payments by the Joint Venture**

Pursuant to section 7.1, the JV will pay amounts owed by the JV to third parties, including, among other things, work done by subcontractors to the JV; costs of all materials, supplies, and equipment incorporated in the work, including costs of inspection and testing, if not provided by the Owner; and insurance or bonds procured directly by the JV; and water, power, fuel and other utility costs necessary for the work.

Under section 7.2, the JV will pay amounts owed by the JV to third parties that arise from operation of the JV: (1) audits of the JV books and records; and (2) legal expenses incurred by the JV that are not for the sole benefit of a particular Joint Venturer.

Sections 7.3 and 7.4 define what is recognized as a reimbursable cost and what is not recognized. No cost incurred by a Joint Venturer will qualify for recognition by the JV unless it is reasonable in amount and properly substantiated and the cost must be properly allocable to the JV under the Owner Agreement.

**Article 8, Events of Default and Remedies**

Section 8.1 defines and enumerates what will be considered an Event of Default by a Joint Venturer:

- **8.1.1** Any material breach of a Joint Venturer’s obligations under the Agreement, including, but not limited to: failure to timely contribute its required working capital; attempted assignment of it rights or obligations under this Agreement or the Owner Agreement; or inability to support its Percentage Interest share of bonds or other financial obligations.

- **8.1.2** Insolvency of a Joint Venturer, including, among others, the following: voluntary filing of a petition relating to bankruptcy or insolvency; seeking or consenting to appointment of a receiver, liquidator, or trustee for itself or substantial part of its property; and making an assignment for the benefit of creditors.

- **8.1.3** Any material misrepresentation of a Joint Venturer’s financial position.

Section 8.3 addresses the effect of a default. A Defaulting Joint Venturer will have no further voice or vote in the management of the JV or the work. A Defaulting Joint Venturer will have no right or interest in any working capital, assets, or profits until all non-defaulting Joint Venturers’ interests are satisfied. The Defaulting Joint Venturer will remain liable for its share of any of the losses as provided in the Agreement.

Section 8.4 addresses remedies available to the Executive Committee in the event a Joint Venturer fails to contribute its share of the required working capital.

Section 8.5 sets forth the option available to the Executive Committee, in response to an Event of Default, to terminate and dissolve the JV. If the termination precedes award of the Owner Agreement, the non-defaulting Joint Venturers may elect to pursue the award without further obligation to the Defaulting Joint Venturer.
Article 9, Documents and Records

Article 9 addresses ownership of and responsibility for the documents of the JV and the Joint Venturers.

Section 9.1 provides that the Joint Venturers may receive form one another confidential information, including proprietary information, as necessary to prepare the bid proposal or to perform the Owner Agreement. Confidential information must be designed as such in writing by the Joint Venturer supplying such information. If required by the Joint Venturer supplying the confidential information, a Joint Venturer receiving such information must execute a confidentiality agreement. A Joint Venturer receiving confidential information shall not use such information or disclose it to third parties, except as is consistent with the terms of any executed confidentiality agreement and for the purposes of performance of the work, or as required by law.

Article 10, Insurance and Bonds

Pursuant to subsection 10.1.1, unless determined otherwise by the Executive Committee, the following insurance requirements apply:

- Each Joint Venturer shall procure workers compensation, employers liability, and business automobile liability insurance covering the personnel and vehicles it is supplying to the JV.
- The Managing Joint Venturer shall extend its commercial general liability (CGL) insurance to cover the JV and the Joint Venturers for exposures arising out of the JV.
- The JV shall procure builder’s risk insurance, unless it is provided by the Owner.
- If Owner Agreement calls for the JV to provide design services, each Joint Venturer to perform such services will extend its professional liability insurance.
- The method to arrange for any other coverages required by the Owner Agreement or deemed advisable by the JV shall be determined by the Executive Committee.

Pursuant to subsection 10.1.2, all such insurance: (1) shall be primary and non-contributory with respect other insurance maintained by any Joint Venturer; (2) shall endorse the JV and each Joint Venturer as either a named or additional insured; and (3) shall waive subrogation rights against the JV and each Joint Venturer.

Pursuant to section 10.2, Bonds, any bonds required of the JV pursuant to the Owner Agreement shall be provided by the Joint Venturers. The Joint Venturers’ separate sureties shall act as co-sureties in proportion to the Percentage Interests. Each Joint Venturer shall execute all applications and indemnity agreements required by the sureties. Each Joint Venturer agrees that its indemnity shall be joint and several and not limited by its Percentage Interest in the JV.

Article 11, Dispute Mitigation and Resolution

Article 11 provides that the Joint Venturers shall continue to perform their respective obligations under the Agreement during any dispute mitigation or resolution proceedings. This article sets forth the dispute resolution process, which generally provides as follows:

- Direct discussions by/among the Joint Venturers
- Optional selected mitigation procedure—project neutral or dispute review board
- Mediation, if a mitigation procedure is not selected
- Binding dispute resolution, if the matter is unresolved after either a mitigation procedure or mediation—selection of either arbitration pursuant or litigation

The actual costs and reasonable attorneys’ fees of any binding dispute resolution procedure shall be paid by the non-prevailing Joint Venturer. The venue of any binding dispute resolution procedure shall be the location of the Project, unless the Joint Venturers agree on another location.
Article 12, Miscellaneous

Section 12.1 provides that the Agreement is exclusively for the benefit of the Joint Venturers and confers no rights or causes of action upon any person or entity not a party.

Section 12.3 provides that the Agreement shall be governed by the law of the location of the Project.

Section 12.10 provides that, during the term of the JV, each Joint Venturer shall deliver to the other Joint Venturers an audited balance sheet and income statement upon request and at the close of each fiscal year. Such documents will be handled as confidential information in accordance with section 9.1 (see above).

Section 12.13 requires that no Joint Venturer is permitted to solicit employees of the other Joint Venturers, for a designated period of time following completion of the Owner Agreement.

Section 12.14 provides for a limited mutual waiver of consequential damages of claims that the JV and the Joint Venturers may have against each other, including, but not limited to, loss of business, loss of financing, loss of profits not related to the project, loss of bonding capacity, loss of reputation, or insolvency. Excluded from this mutual waiver are losses covered by insurance, third-party consequential damages that flow through to the JV or any of the Joint Venturers; other remedies in the Agreement; and any designated exclusions.

Please note that the provisions in ConsensusDocs 297, Joint Venture Line Item Agreement discussed above are only a selection of key provisions. I recommend a careful review of the entire Agreement itself, which will help you understand all the default provisions and the alternative, optional provisions in the Agreement.

ConsensusDocs are standard industry contracts written and endorsed by 39 leading design and construction industry associations, including NASBP. For more information, please visit www.ConsensusDocs.org.

The author of this article is Martha Perkins, General Counsel at NASBP. Martha Perkins can be reached at mperkins@nasbp.org or (202) 686-3700.

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