



ConsensusDocs®
BUILDING A BETTER WAY

ConsensusDocs Guidebook

ConsensusDocs 200.4 – Dispute Review Board (DRB) Addendum Specification

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by

ConsensusDocs LLC

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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 200.4* Dispute Review Board (DRB) Addendum Specification

Key Features of ConsensusDocs DRB Addendum Specification and TPA

The DRB Addendum and TPA are intended to provide a guidance specification; assist in the appointment of appropriately qualified and neutral DRBs; promote uniformity of practice across projects using ConsensusDocs; and implement DRB best practices. The ConsensusDocs DRB Addendum and TPA, based on the DRBF Guide Specifications and TPA, addresses the following topics:

- General Provisions Regarding DRB Responsibilities
- DRB Member Qualifications
- Establishment of the DRB
- DRB Meetings
- DRB Advisory Opinion Process
- DRB Dispute Submission Process
- DRB Hearing Process
- DRB Reports
- Miscellaneous Administrative Provisions

The key features to focus on are the following:

Ethics:

The DRB Addendum has comprehensive conflict of interest and disclosure requirements. The TPA requires DRB members to follow certain ethics guidelines that are modeled on the DRBF Canons of Ethics, thus making them a contractual requirements. There are repeated references to impartiality throughout the documents in relation to various DRB activities.

Selection:



DRB selection is done early in the project. The parties jointly select the DRB, including the option to select the Chair.

Dispute Prevention:

The DRB Addendum expressly gives the DRB broad jurisdiction, allowing project teams to raise any issue arising out of the project. Another dispute prevention tool the parties have available is to use the DRB for advisory opinions.

Hearing Process:

The hearing process is informal, but orderly. Legal processes are not used. Lawyer participation is limited and under the control of the DRB. Expert participation also is under the control of the DRB.

Summary of ConsensusDocs 200.4

A. ConsensusDocs 200

By way of background, ConsensusDocs 200 is that standard form of agreement between Owner and Constructor. Article 12 deals with disputes mitigation and resolution. The parties are obligated to engage in direct discussions to try to resolve any disagreement relating to or arising under the agreement (Section 12.2). After direct discussions have failed, the parties may proceed with pre-selected “dispute mitigation procedures”, either the use of a project neutral (Subsection 12.3.1) or a Dispute Review Board (Subsection 12.3.2). If a DRB process is selected the parties are directed to enter into the DRB Addendum. If the parties do not resolve the disagreement after following the selected dispute mitigation procedure, they proceed by one of two pre-selected binding dispute resolution processes, either arbitration or litigation (Subsections 12.3.3 and 12.5).

B. ConsensusDocs 200.4 (DRB Addendum Specification)

Article 1: General

The parties agree to establish a DRB and enter into the TPA (Section 1.1 and 1.2). The 200.2 Agreement terms govern, if there is a conflict between it and the DRB Addendum or TPA (Section 1.3). Except as provided otherwise, all matters that arise from performance of the Agreement, and any unresolved dispute, may be referred to DRB by



either party (Section 1.4). The parties may also ask the DRB to “address any issue arising out of the Project” (Section 1.4).

Article 2: Definitions

The definitions primarily relate to conflict of interest issues that are covered in Article 3. These include:

- Consulting Capacity (Section 2.1)
- Financial Ties (Section 2.3)
- Involved Entity (Section 2.4)

Article 3: DRB Qualifications

DRB members shall be experienced in the type of construction to be performed; in the interpretation and application of contract documents; and in the resolution of construction disputes (Section 3.1). DRB members also shall be familiar with alternative dispute resolution techniques and trained in DRB best practices (Section 3.1).

DRB members also must meet certain eligibility and disclosure requirements. DRB members are subject to the following specific ethical obligations regarding actual or potential conflicts of interest:

- No current direct employment and past employment must be disclosed and party permission obtained (Subsection 3.2.1)
- No current consulting capacity and past consulting must be disclosed and party permission obtained (Subsection 3.2.2)
- No financial ties (unless waived) and previous and certain current financial ties must be disclosed (Subsection 3.2.3)
- No close personal or professional ties and past ones must be disclosed (Subsection 3.2.4)
- Past and current service as a DRB member on a project with the Parties or Involved Entities must be disclosed and there cannot be any prior involvement with the project (Subsection 3.2.5)
- Continuing obligation to avoid conflicts/disclose and comply with the ethical obligations under Three Party Agreement (Section 3.3)

Article 4: Establishment of the DRB



Within 14 days after the effective date of the underlying agreement, the Parties investigate prospective DRB nominees and confer and jointly select a pool of prospective nominees (Sections 4.1 and 4.2). The Parties provide a list to DRB prospects of the Parties and Involved Entities for a conflicts check (Section 4.3). The DRB prospects provide resumes and disclosures to the Parties and the Parties jointly select the DRB and notify the DRB members of their appointment. (Subsection 4.3.1). The Parties may designate the Chair if they wish; otherwise the DRB nominates the Chair for Party approval (Subsection 4.3.2). The TPA is executed no later than the first DRB meeting (Section 4.3).

Article 5: DRB Operations

In consultation with the Parties, the DRB shall adopt Operating Procedures that must be consistent with the contract documents but also flexible and subject to adjustment as needed to carry out the DRB's responsibilities (Section 5.1). The DRB will visit the project site periodically and as the Parties request (Section 5.2). The initial DRB meeting is to occur no later than 45 days after effective date of the Agreement, and the Parties are to supply the DRB with relevant project information in advance (Section 5.3). The Parties are to provide project update information to DRB (Section 5.4). The periodic meetings include a site visit with the Parties (Section 5.5).

The primary purpose of the DRB shall be to avoid disputes and help the Parties mitigate the effect of unforeseen events (Section 5.6). With Party permission, a Party's attorney may attend the periodic meetings, as a silent observer (Section 5.6). Statements at DRB meetings are not admissible and are deemed to be settlement discussions (Section 5.7). Other Involved Entities or stakeholders may be invited to attend periodic meetings (Section 5.8).

The DRB may give verbal advisory opinions (Section 5.9). The advisory opinion is a method for potentially avoiding a DRB hearing and may be implemented as part of the Parties' direct discussions at periodic meetings (Subsection 5.9.1). When jointly requested by the Parties, the DRB, in its discretion, may give a verbal advisory opinion on any issue that could lead to a dispute referable to the DRB. (Subsection 5.9.2). The DRB Chair establishes the procedure and schedule for the advisory opinion process (Subsection 5.9.2). If the issue is not resolved by the advisory opinion, the Parties may pursue a formal claim and the prior proceedings shall not be considered (Subsection 5.9.2)

Article 6: Formal Dispute Resolution Process



The Parties are reminded that prior to referring a dispute to the DRB, there must be direct discussions per Agreement Subsection 12.2—this process can involve asking the DRB for an advisory opinion (Section 6.1). Either party may refer a dispute to the DRB (Subsection 6.2.1.1). The dispute referral in writing is made to the DRB and other Party, and shall concisely define the scope of the dispute and the DRB report requested (Subsection 6.2.1.2). Within 10 days after receipt, the Chair shall confer with parties about the details and timing of the dispute process (Subsection 6.2.1.3).

The Parties shall submit pre-hearing position papers that include:

- A joint statement of the dispute and scope of relief requested (Subsection 6.2.2.2.a)
- A common set of documents that the parties will refer to (Subsection 6.2.2.2.b)
- The basis for each Party's position, including citation to the contract and other supporting documents (Subsection 6.2.2.2.c)
- When a dispute concerns time, the referring Party shall include a schedule impact analysis (Subsection 6.2.3)
- When dispute concerns costs or monetary damages, the referring Party shall include back up documentation (Subsection 6.2.4)

The hearing facilities shall be at or near the project or other location as agreed (Subsection 6.2.5.1). Prior to the hearing date the Chair shall set a time for the submission and exchange of hearing presentation materials (Subsection 6.2.5.2). The Parties shall require attendance at the hearing of persons directly involved in the dispute and participants in good faith negotiations prior to submittal of the dispute to the DRB (Subsection 6.2.5.3.1). Prior to the hearing date the Chair shall set a time for submission and exchange of proposed attendee lists (Subsection 6.2.5.3.2). Attorneys shall not participate in the hearing without the consent of the other Party and the DRB (Subsection 6.2.5.3.4). Subcontractors with "pass-through claims" must attend the hearing (Subsection 6.2.5.3.4).

The conduct of the DRB hearing shall be as per the Operating Procedures and generally consistent with the following:

- The referring Party goes first, followed by the other Party (Subsection 6.2.5.4.a)
- Both parties are allowed successive rebuttals until the dispute has been presented in full—the DRB is permitted to ask questions, seek clarification, and seek additional information (Subsection 6.2.5.4.b)



- No cross-examination is allowed, but the Parties, with DRB permission, can ask questions or seek clarification (6.2.5.4.c)

If either Party fails to deliver a timely pre-hearing submittal, the DRB determines whether and when to proceed (Subsection 6.2.6.1). If some or all of a Party's representatives fail to appear at a hearing, the DRB shall proceed with the hearing as if all Party representatives were in attendance (Subsection 6.2.6.2).

Experts must be disclosed at least 30 days before the pre-hearing position paper is due (Subsection 6.2.7.1). The other Party may then retain expert and make expert disclosure at least 10 days before its pre-hearing position paper is due (Subsection 6.2.7.2). Expert reports intended to be used at the hearing shall be exchanged as part of pre-hearing submittals, with the timing set by the DRB Chair (Subsection 6.2.7.3).

The DRB's formal report shall include findings and recommendations that cover the following (Subsection 6.2.8.1):

- Issue in dispute and relief requested
- Parties' positions
- Findings of fact
- Analysis and rationale for recommendation(s)
- Recommendation(s)

The formal report can include a minority report that identifies the areas of disagreement, but all DRB members sign without identifying the member that did not agree all parts of the report (Subsection 6.2.8.2). The formal report is admissible in subsequent proceedings and the Parties waive any objections to the relevancy and admissibility of the report (Subsection 6.2.8.3).

Requests for clarification and reconsideration are permitted within certain restrictions and time frames (Subsections 6.2.8.4 and 6.2.8.5). Although the Parties agree that great weight should be given to the DRB's report, it is not binding on any Party. Within 14 days after receipt of the report (or later if clarification or reconsideration is requested), the Parties submit written acceptance or rejection of the report (Subsection 6.2.8.6.1). Acceptance of a report on entitlement does not bind a Party to any particular quantum (Subsection 6.2.8.6.2). If either Party rejects the DRB report, it may proceed with the binding dispute resolution process designated in the agreement (Subsection 6.2.8.3). The Parties may also agree to mediation (Subsection 6.2.8.7).



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.