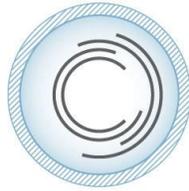


ConsensusDocs™
BUILDING A BETTER WAY

ConsensusDocs Guidebook

**ConsensusDocs 235 – Short Form Agreement Between
Owner and Contractor (Cost of Work)**

August 2013 Edition



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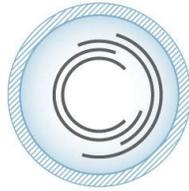
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Introduction to the ConsensusDocs Guidebook

ConsensusDocs is the product of leading construction associations, dedicated to identifying and utilizing best practices in the construction industry for standard construction contracts. The 36 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.

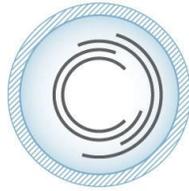
By starting with better standard documents that possess buy-in from all stakeholders in the design and construction industry, you reduce your transaction time and costs in reaching a final Agreement. By using fairer contracts helps eliminate unnecessary risk contingencies and thereby better pricing. 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.

Also, the ConsensusDocs catalog includes complete “families” of documents for each project delivery method that provide a coordinated set of Agreements and complimentary administrative forms. There also are short form agreements that address the Owner-Constructor (205), the Owner-Design Professional (245), and the Constructor-Subcontractor contractual relationships in a more abbreviated manner than do the standard Agreements (ConsensusDocs 200, 240, and 750 respectively).

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. ConsensusDocs contracts covered in this release of this Guidebook include the 200, 200.1, 200.2, 205, 220, 221, 235, 240, 260, 246, 261, 262, 263, 298, 300, 301, 310, 410, 415, 450, 460, 470, 471, 472, 473, 500, 702, 703, 710, 750, 752, and 803.

Please note that there has been a significant number of editing changes and section renumbering between the 2007 and 2011 versions that give the appearance that more substantive changes were made in the 2011 update than is actually the case. Consequently, a highlight sheet of changes was created to better pinpoint substantive changes. The 2011 update highlights sheet can be found [here](#) for free on the internet.

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 235* **Short Form Agreement Between Owner and Contractor (Cost of Work)**

Overview:

This document was comprehensively updated in 2012, and follows the general terms and conditions of the ConsensusDocs 205, which is a short form agreement. The main difference is that this is a Cost of the Work of Agreement instead of a lump sum form of payment.

Exhibits A & B (article 4): Listed below are exhibits which are specifically referenced in this agreement. A model to create an exhibit A is now being provided, which the user should carefully fill-in and modify based on project specific information as well as specific project needs. In addition, users should consider creating other exhibits and reference them appropriately in modifying this agreement as appropriate.

Mechanics and Construction Lien Information (section 7.3): Obtaining information regarding liens has become even more critical in light of today's challenging economic times.

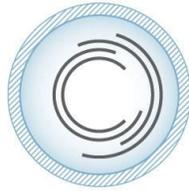
Section 12.2: Moved to 12.1 because this is a promise to procure obligation for insurance.

Bonds (article 13): For Cost of the Work agreements, the bond amount and premium is usually based upon the estimated cost of the work. If the estimated or actual Cost of the Work changes by more a certain percentage, than adjustments to the bond amount and penal sum should be considered in projects using bonds.

Cost of Dispute Resolution (section 17.7):

Attorney's Fees and Prevailing Party: The ConsensusDocs Drafters made this rather significant revision to help encourage settlement of potential litigation of claims. Users may wish to provide for a definition of prevailing party. The force and effect of such definition may vary based on state law. One possible example is as follows:

* This publication is designed to provide information in regard to the subject matter covered. It is published with the understanding that the publisher, endorsers of ConsensusDocs and contributors to this Guidebook are not engaged in rendering legal, accounting, or other professional services. If legal advice or other professional advice is required, the services of a competent professional person should be sought.



“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.”

In alternative provision that may help facilitate better settlement offers is as follows:

“In the event of any arbitration or litigation involving the parties, the prevailing party shall be awarded its share of the arbitration costs, arbitrator compensation, and its attorneys’ fees and expert witness fees. For the purpose of the application of this provision, the prevailing party shall be determined by the arbitrator(s) as follows. The prevailing party shall be that party whose last written settlement position (demand/offer) made before the commencement of the arbitration hearing(s) is closest to the final award rendered by the arbitrator(s). In order to be considered for the purpose of this provision, any settlement position (demand/offer) must be in writing and must have been delivered by certified mail to the other party. It is the intent of this provision for the arbitrator(s) to identify the true party prevailing in any arbitration proceeding. To that end, in the event that a settlement position has not been taken by a party seeking relief, i.e. the claimant, the arbitrator(s) shall consider the settlement demand to be the full relief requested in the arbitration demand. In the event that a settlement position has not been taken by the respondent, the arbitrator(s) shall consider the offer to be a complete rejection of the relief requested by the claimant. Where there are mixed claims and counterclaims, the determination of the prevailing party shall be within the discretion of the arbitrator(s) consistent with the intent of this provision.”