



ConsensusDocs®
BUILDING A BETTER WAY

ConsensusDocs Guidebook

ConsensusDocs 410 – Agreement and General Conditions Between Owner and Design-Builder (Cost of the Work Plus Fee with GMP)

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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 more than 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.

This Guidebook you will find comments by individual associations regarding particular contract documents. These comments are organized by numeric sequence. Association comments are expressions by an association to its association membership only to highlight issues of particular interest.

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.



Comments regarding ConsensusDocs 410* **Agreement and General Conditions Between Owner and Design-Builder (Cost of the Work Plus Fee with GMP)**

Overview:

Design-build delivery project delivery methodology offers some benefits, but you should be design-build Agreements contain different risks from traditional delivery methods. In order for a design-build project to be successful, the design-build Agreement should effectively define and allocate the risks associated with one Party assuming the responsibility for the design and construction of the project.

ConsensusDocs 410 is a balanced document that is reflective of the market. It reflects the collaborative efforts of Owners, Contractors, design-builders, Subcontractors, engineers, and sureties. The Agreement is an improvement from previous standard design-build Agreements and the CD 410 was updated in March of 2017. It addresses risks associated with relatively new construction issues, such as the use and maintenance of electronic data, while clarifying several risk provisions common to most standard form design-build Agreements. For example, this Agreement simplifies claim procedures, identifies excusable compensatory damages, and adopts the limited consequential damages provision that has become popular among Contractors and Owners.

You may access a sample redline of the 2014 and 2017 editions as a sample document of the CD 410 at <http://www.ConsensusDocs.org/catalog/designbuild/>

Exhibits (subsection 2.4.1): The User is expected to create these referenced exhibits as applicable. These exhibits contain information that is largely based on project and company specific information that varies.

The Parties are encouraged to create other exhibits as appropriate and list the exhibits in this subsection.

* 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.

—From the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations



Exhibit B (subsection 2.4.2): The “Owner's Program” is an initial description of the Owner's objectives that may include budget and time criteria, space requirements and relationships, flexibility and expandability requirements, special equipment and systems, and site requirements.

General Provisions (subsection 2.4.9): The term “Contractor” should be replaced by “Design-Builder.”

Substantial Completion (subsection 2.4.29): The certificate should state the respective responsibilities of the Owner and Design-Builder for security, maintenance, heat, utilities, or damage to the Work, and insurance. The certificate should also list the items to be completed or corrected, and establish the time for their completion and correction, within the timeframe, if any, established in Amendment 1 for the date of Final Completion

Ownership of Documents (subsection 3.1.8): The Parties have the option of "checking-the-box" as to the Ownership of copyrights for the project's "Documents." Documents include all documents, drawings, specifications, and electronic data and information. The Parties have the option of defining "electronic data" in article 4.6. The Agreement allows the Parties to include a negotiated fee for the Ownership of copyrights. Unless the Parties agree otherwise, copyright Ownership for all documents remains with the Design-Builder.

Use of Documents in Event of Termination (subsection 3.1.8.3): Pursuant to Section 11.6.

Designer's Use of Documents (subsection 3.1.8.6): The GMP provisions are provided in section 3.2. The particulars of the GMP (its basis, the concept of including a contingency sum under the Design-Builders control etc.) are clearly delineated. The GMP will be prepared (if the Owner requests) when the drawings and specifications are sufficiently complete, thus not trying the Design-Builder to a specific, and possibly inappropriate, moment in time when the GMP must be prepared. Further, the GMP (and date of Substantial Completion) are added later via Amendment No. 1

Review & Adjustment (subsection 3.2.3): The GMP and the Date of Substantial Completion or the Date of Final Completion shall be subject to modification in article 9 (See 9.2.3)

Subsection 3.2.4: Owners can include additional requirements for which the Proposal should include, such as a self-performed work.

Subsection 3.2.5.2: In accordance with section 12.3.

Section 3.3.8: One of the options should be checked and the other option deleted.



Emergencies (section 3.6): This section was moved from section 9.7 in the last 2007 edition.

Worksite Information (subsection 4.3.1): Legal descriptions shall include easements, title restrictions, boundaries, and zoning restrictions. Worksite descriptions shall include existing buildings and other construction and all other pertinent site conditions. Adjacent property descriptions shall include structures, streets, sidewalks, alleys, and other features relevant to the Work. Utility details shall include available services, lines at the Worksite and adjacent thereto and connection points. The information shall include public and private information, subsurface information, grades, contours, and elevations, drainage data, exact locations and dimensions, and benchmarks that can be used by Design-Builder in laying out the Work.

Responsibilities During Design Phase (section 4.5): As set for in sections 3.1 and 3.2.

Electronic Documents (section 4.8): The Agreement recognizes the importance of electronic data and documents in the design and construction process. Article 4.6 allows the Parties to develop a project-specific protocol to facilitate the sharing of electronic data. Among other things, the protocol is intended to: define the scope of electronic data and identify the types of electronic documents the Parties expect to use; manage the sharing and coordination of electronic data; identify electronic formats that are acceptable to the Parties; establish security parameters for electronic data; and create mechanisms for storing and retrieving electronic data. Because there are many potential sources of electronic data and programs that manipulate electronic data, the Parties are encouraged to develop a protocol to fit their specific needs.

Labor Relations (section 5.5): If applicable, Users should insert here or attach as exhibit as necessary any conditions, obligations or requirements relative to labor relations and their effect on the Project. Legal counsel is recommended.

Substantial Completion (section 6.2): A date of substantial Completion may be established in the GMP Amendment. If no GMP is established, the parties may establish a date of Substantial Completion in Amendment No. 1 and proceed on a cost plus a fee basis

Delays in the Work and Delay Claims (section 6.3): Owners and Contractors expressed dissatisfaction with forms that failed to identify examples of compensable delay. Article 6.3 expressly lists events that give rise to compensable delays. This is a significant improvement over standard form Agreements that leave the Parties to determine for themselves whether excusable delays are compensable or not. The Agreement also provides a more detailed list of excusable delays – those delays caused by events beyond the Parties' control. Examples of excusable delays include traditional force



majeure events, such as fire, terrorism, and governmental actions, and Owner-caused delays, such as Owner changes, Owner-authorized delays, and Owner-ordered re-sequencing of the work.

Limited Waiver of Consequential Damages (section 6.5): The right to claim consequential damages is a contentious point in many contract negotiations. Article 6.5 enables the Parties to list consequential damages that are not waived. Article 6.5 allows for reimbursement of consequential damages otherwise recoverable under applicable insurance policies. In this regard, the Agreement provides a "limited" waiver of consequential damages that recognizes the allocation of risks among the Owner, Design-Builder, and their insurers.

Compensation (Article 7): Compensation for the Design-Builders is split into two parts—that due in the design phase (section 7.1), and that due in the construction phase (section 7.2).

Adjustment in Design-Builder's Fee (subsection 7.1.1): As established in section 7.3. Adjustments may be made pursuant to 7.4.

Payments (subsection 7.1.7): Compensation for the Design-Builders services is split into two parts—that due in the design phase (section 7.1) and that due in the construction phase (section 7.2)

Cost Items for Construction Phase Services (section 8.2): While the 200 is a Lump Sum Agreement, a more extensive delineation of the Cost of the Work is being provided to provide clarity in regard to the cost of the work for changes. This language is being derived from existing language from the ConsensusDocs 500 Construction Management At-Risk agreement with some minor appropriate modifications.

Subsection 8.2.2: The actual function performed by the employee rather than the payroll title should be the criterion used by the Parties to determine the eligibility of an employee's services for payment under this provision;

Concealed or Unknown Site Conditions (section 9.4): This is a differing site conditions clause.

Cost of Work Estimate (section 9.5.4): The Cost of the Work estimate is subject to 3.2.8, which provides for audit rights and reasonable skill and judgment in preparing such.

Claims for Additional Cost or Time (section 9.6): The Design-Builder's notice of a claim should be made within 21 days after the occurrence, or recognition of the occurrence, whichever is later. The Design-Builder's written documentation supporting the claim should be submitted within 21 days after its notice. The Owner's response to the claim



should be made within 14 days after the Owner receives the Design-Builder's documentation. The Agreement eliminates guesswork when an Owner fails to respond; the Owner's failure to respond is deemed a denial. At the end of this section, in the sentence "Owner's failure to so respond..." the term "Contractor" should be replaced by the term "Design-Builder."

Section 10.1.2: Users are advised to check state statutes to determine if there is a shorter period required by state law regard to the time period required for payment.

Notification of Cancellation Insurance, ACORD Form Change (section 10.2.1 and 10.2.4): In April 2012, ConsensusDocs agreement forms were modified to incorporate the previously suggested language in this Guidebook. These changes were made to reflect changing practices in the Association of Cooperative Operations Research and Development (ACORD) forms.

Generally, construction contracts require that insurance policies include at least 30 days advanced written notice to the owner (or an upstream contractual party) if an insurance policy is canceled or allowed to expire. This has generally been satisfied through certificates of insurance as evidence of compliance. ACORD, the licensing company for insurance forms, has amended their certificate requirements (e.g. ACORD 25). Consequently, contractors and subcontractors may no longer be able to received certificates of insurance language that proclaims that the insurance company or insurance broker, should any policies be canceled before the expiration date thereof, "endeavor to mail 30 days written notice to the certificate holder." Therefore, contractual requirements that 30 days advanced notice be included in insurance policies may not be commercially available and altering ACORD forms to purport to do so may run afoul of state law. Consequently, current contract language addressing notice of cancellation for insurance policies no longer reflect the reality in today's construction marketplace.

Consequently, a working group of experts drafted language which reflects reality, while giving the Owner sufficient notice. The language provides an owner timely third-party notification of cancellation by the insurance company as well as creates an obligation on a party to give notice of cancellation to the owner or other upstream party. Lastly, the drafted solution looks to limit costs as well time efficiency issues by allowing for electronic notification by the insurance company or the insurance broker as a designee depending who is in the best position to have such information and can give appropriate notice. In addition, reference to prompt notice is expected to be soon as practical, but in no case longer than 5 days from first learning of cancellation or nonrenewal of an insurance policy without replacement.

The ConsensusDocs proposed contractual solution differentiates between nonrenewal, cancellation, and other changes like lapses in coverage. In the case of active nonrenewal by the insurance company, the company or designee is in the position to



provide advanced notice. In the case of cancellation, it is not possible for the insurance company to provide advanced notice so notice would be provided very shortly after cancellation occurs. The most common example is late payment of premium. In this case, the company may cancel if payment is not received, however, if payment is received cancellation would be rescinded and any advanced notices would also have to be rescinded causing unwarranted confusion and inefficiencies. In other cases such as a lapse in coverage, only the design builder may be aware of the lapse and therefore only the design builders could provide that notice.

The ACORD form change impacts all standard contract documents, including the ConsensusDocs 200 and the AIA A201®, and most manuscripted construction contracts that contractually require insurance policies provide a 30-day advanced notice of cancelation. The ConsensusDocs notice of cancelation solution references where such language should be inserted into ConsensusDocs contracts (ConsensusDocs 200, section 10.2.4). However, the ConsensusDocs proposed solution is equally applicable to other contracts that are now out-of-date due to the ACORD change. The ConsensusDocs Guidebook is being updated to respond to today's changing construction marketplace in a timely fashion and was deemed too pressing to wait until the next revision cycle.

Here is how the language was modified.

Section 10.2 In the ___ line, after the “and broad from property damage.” insert, “The Constructor shall maintain completed operations liability insurance for one year after Substantial Completion, or as required by the Contract Documents, whichever is longer.

To the extent commercially available to the Design-Builder from its current insurance company, insurance policies required under subsection 10.2.1 shall contain a provision that the insurance company or its designee must give the Owner written notice transmitted in paper or electronic format: (a) 30 Days before coverage is nonrenewed by the insurance company and (b) within 10 Business Days after cancelation of coverage by the insurance company. Prior to commencing the Work and upon renewal or replacement of the insurance policies, the Design-Builder shall furnish the Owner with certificates of insurance until one year after Substantial Completion or longer if required by the Contract Documents. In addition, if any insurance policy required under subsection 10.2.1 is not to be immediately replaced without lapse in coverage when it expires, exhausts its limits, or is to be cancelled, the Design-Builder shall give Owner prompt written notice upon actual or constructive knowledge of such condition.”

Section 10.3.2: Insurance coverage implies that there is a positive indication that there is an acceptance of liability for the loss.



Indemnity (Article 11): Contractual indemnification is governed by state law and states differ as to the types of indemnification agreements that they will enforce. Consultation with insurance and legal counsel with knowledge of the jurisdiction is recommended.

Bonding (section 11.7.2): These provisions provide the terms with which the Owner and the Design-Builder may terminate the agreement.

Termination (article 12): The Agreement's termination provisions protect the Owner in the event of the Design-Builder's default while providing protections against unwarranted terminations-for-cause. Termination for cause requires two levels of notice. First, the Owner may perform the Design-Builder's obligations if the Design-Builder fails to begin to cure contractual deficiencies after 7 days' written notice. Second, after an additional 7 days' written notice to both the Design-Builder and the Design-Builder's surety, the Owner may terminate the Agreement if the Design-Builder fails to cure or commence and continue to cure during the period. Any termination that does not follow article 12.2's termination-for-cause procedures is deemed a termination-without-cause under article 12.3. Under article 12.3, the Owner should pay the Design-Builder for all work executed, all proven loss, cost, or expense in connection with the Work, and all demobilization costs. Payment to the design-builder is to a penalty, but rather reflects a Contractor's lost business opportunity.

Dispute Resolution (article 13): The Agreement offers the Parties a number of dispute resolution procedures in lieu of judicial litigation. First, the Parties are encouraged to conduct direct good faith discussions to resolve the dispute. After direct discussions, the Parties have the option of dispute mitigation with a project neutral/dispute review board or mediation. If the Parties choose dispute mitigation, the project neutral/dispute review board will create a nonbonding finding that the Parties may use in a subsequent binding proceeding.

If the Parties do not choose dispute mitigation, the Parties "shall endeavor" to mediate the dispute. Mediation should be complete within 45 business days of the first discussion between the Parties. Mediation is not required.

The Agreement allows the Parties to choose between arbitration and litigation as the binding resolution procedure. Arbitration or litigation is a last resort if mitigation or mediation fails to resolve the dispute.

Mitigation (section 13.3): Select only one option if a mitigation selection is desired.

Subsection 13.3.3: Users are encouraged to review the ConsensusDocs 200.4 Standard DRB Addendum as well as 200.5 Standard DRB Agreement for use.



Multiparty Processing (subsection 13.6): Section 13.6 provides for the concept of the multiparty dispute resolution procedure in which all parties necessary to resolve a claim will be parties to the same arbitration proceeding.

Contract Documents, (c) (section 15.1): List here or attach exhibits to identify the binding contract documents. This is important section to fill out carefully so as to distinguish documents provided for information purposes only versus binding contract documents which can be relied upon.

ADDITIONAL ASSOCIATION COMMENTS BELOW



AGC Comments for ConsensusDocs 410:

(Additional comments by AGC can be found on AGC’s website at members only [page](#))

Standard of Care (section 2.1): A definition of the standard of care applicable to architectural and engineering services performed under this Agreement is not included in this Agreement (previous additions of AGC contracts did include such a definition). The drafters of the new Consensus documents determined that it would be better for the design professionals to be held to a standard imposed on them by their own profession, rather than one defined by this Agreement.

Contractors and Owners should not modify this Agreement by adding language that would hold any design professional to a standard of care that is above that which is customary and normal for design professionals in the same time and location, because that might result in the unintended consequence of voiding errors and omissions coverage available to the respective design professionals.

Relationship of Parties (section 2.1): This section requires the Design-Builder to proceed “on the basis of trust, good faith and fair dealing” and take all actions “reasonably necessary” to perform “in an economical and timely manner.” Under article 3, the Design-Builder “shall exercise reasonable skill and judgment in the performance of its services.”

Standard of Care (section 2.2): The Agreement removes the architect/engineer’s standard of care from the former and no longer published AGC 410 section 2.2. CAUTION: Contractors and Owners should not modify this Agreement by adding language that would hold any design professional to a standard of care that is *above* that which is customary and normal for design professionals in the same time and location, because that might result in the unintended consequence of voiding errors and omissions coverage available to the respective design professionals.