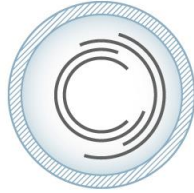


ConsensusDocs®
Keeping You Ahead of the Curve

ConsensusDocs Guidebook

ConsensusDocs 200 – Agreement and General Conditions Between Owner and Constructor (Lump Sum)

2016 Edition



ConsensusDocs®
Keeping You Ahead of the Curve

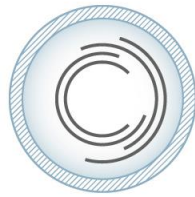
Copyright © 2016

by

ConsensusDocs LLC

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without permission in writing from the publisher. Requests for permission to make copies of any part of this publication should be mailed to:

Permissions
ConsensusDocs
2300 Wilson Blvd., Suite 300
Arlington, VA 22201



ConsensusDocs®
Keeping You Ahead of the Curve

Introduction to the ConsensusDocs Guidebook

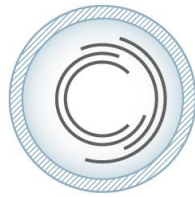
ConsensusDocs is the product of leading construction associations, dedicated to identifying and utilizing best practices in the construction industry for standard construction contracts. The 36 participating associations represent Design Professionals, Owners, Constructors, Subcontractors, and Sureties 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; 200.4; 200.5; 205; 220; 221; 235; 240; 246; 297; 298; 299; 300; 301; 310; 410; 415; 450; 460; 498; 500; 702; 702.1; 703; 710; 750; 751; 752; 803 and 842. The following exhibits exist for ConsensusDocs 300: Responsibility Matrix Sample, Risk Pool Plan - Template #1, and Risk Pool Plan - Template #2.

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.



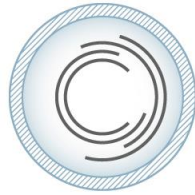
Comments and Recommendations regarding ConsensusDocs 200* Agreement and General Conditions Between Owner and Constructor (Lump Sum)

Overview:

Some general characteristics of the ConsensusDocs 200:

- Integrates the general terms and conditions with the contractual Agreement
- Emphasizes the primacy of the Owner-Constructor relationship and focuses on clear communication pathways as well as developing and maintaining positive relationships. The Design Professional is removed from the dispute process between Owner and Constructor
- Refers to General Contractors as a Constructor, which is a better reference term for an entity that adds value throughout the process rather than an indistinguishable commodity
- Clarifies that the Owner is responsible for design and design coordination; while the Constructor is responsible for design elements only if specifically noted. In that situation the Owner should supply all performance and design criteria
- Defines overhead (§2.4.12) in a more detailed and clear manner to assist in finalizing change orders and the associated costs (see §8.3.1.3) and would avoid disputes during the course of the project
- Clarifies that Parties specifically name authorized representatives (§3.4.4 for Constructors; §4.7 for Owners); the Constructor also names a safety representative (§3.11.3)
- Provides a clear and extensive definition of Cost of the Work, even though this is a lump sum agreement to facilitate potential change orders without disputes
- Establishes how electronic information exchanges may be relied upon.
- Establishes dates of Substantial Completion and Final Completion

* This publication is designed to provide information in regard to the subject matter covered. It is published with the understanding that the publisher, endorers 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.



- Addresses liquidated damages by giving Parties the option as to whether to use liquidated damages (“LDs”) or not (§6.5). The document also gives the option to use LDs both for Substantial Completion as well as Final Completion. The amount of the LDs is expressed as a lump sum amount, but the Parties may choose to use a per diem amount.
- Provides an order of precedence clause (§14.2).

Definitions (§2.4): Consider adding a definition of the Owner’s Program means an initial description of the Owner’s objectives that shall include budgetary and time criteria, space requirements and relationships, flexibility and expandability requirements, special equipment and systems, and site requirements.

AGC Comments for ConsensusDocs 200:

Additional comments on this document, including a discussion of pay-if-paid, can be found on AGC’s website at www.agc.org/contracts.

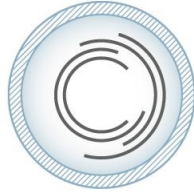
Preamble: Job number and Account code were added to all ConsensusDocs agreements in this revision cycle as a helpful administrative tool if applicable.

A Party shall be given notice at its above address, unless changed in writing (ARTICLE 1): The Parties may change the address after.

Owner (§2.1.1): “...except as provided in this Agreement or unless authorized in writing by the Owner’s Representative.” Was deleted to avoid any potential confusion with the delegated authority of Owners representative.

Ethics (§2.2): Note that language regarding a Constructor representing that is an independent contractor was moved to the General responsibilities in §3.1.

Design Authority and Responsibilities (§2.3): Under the *Spearin Doctrine*, the Party responsible for furnishing the completed design impliedly warrants its sufficiency and adequacy. *United States v. Spearin*, 248 U.S. 132 (1918). Constructors need to carefully consider the effect of specifying any design responsibilities in this fill-in-the-blank section. Also, a Constructor should pay particular attention to the ramifications of performance specifications, equipment selections, preparation of shop drawings, and the like in the context of §2.3. Similarly, post-award actions such as Constructor initiated value-engineering changes may alter the Parties’ responsibilities for the adequacy of the design of a particular system on the project. These actions may shift risk for design responsibilities to the Constructor. In addition, Constructors should be wary of modifications that add disclaimers to shift the risk of design flaws to a Party that was not responsible for the preparation of the design.



Exhibits (§2.4.1.1): The User is expected to create these referenced exhibits as applicable. These exhibits contain information that is largely based on a project and company specific information that varies. The Parties are encouraged to create other exhibits as appropriate and list the exhibits in this subsection.

A named exhibit, exhibit B for labor relations was eliminated in this edition. Users are encouraged to include an exhibit addressing labor relations and their effect on the Project, if applicable. Legal counsel is recommended.

Contract Time (§2.4.6): Contract Time is no longer to how much time actually occurred to now being measured by how much time was authorized to occur.

Final Completion (§2.4.13): See ARTICLE 6 for Final Completion.

Law Effective Date (§2.4.15): “Enacted” is new language as opposed to effective. The drafters believe this change is a best practice because those bidding on a project are on notice of a change in the law once it is enacted, as opposed to the effective, which would occur later.

Substantial Completion (§2.4.24): The certificate should state the respective responsibilities of the Owner and the 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.

Constructor’s Responsibilities (ARTICLE 3): Note that this language was previously located in §2.1 but was moved because it is a Constructor responsibility.

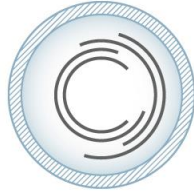
General Responsibilities (§3.1.1): Users may want to note that the obligations in the ConsensusDocs 750 Subcontract contain similar obligations as this subsection but they are spread throughout the agreement at §§3.14, 3.2.1, 3.1.2, 4.1, 4.3.

Responsibility for Performance (§3.3.1): The first sentence was eliminated because it was redundant with §3.3.2.

Reference to applicable Laws (§3.3.2): Note that the reference to lowercase laws (undefined) is used here to be more broad reference to applicable laws.

Tests and Inspections (§3.7.1): The Parties can always agree to alternate from the contract requirements, such as mutually changing who is responsible for procuring an independent lab.

Warranty Claims (§3.8): The Constructor shall assist the Owner in pursuing warranty claims to the extent that the selection criteria would have been followed by the Constructor.



Constructor shall obtain from its Subcontractors and Suppliers (§3.8.3): It is considered best practice to list and attached at such warranties as an incorporated exhibit. However, this is not being contractually required by the standard language to avoid confusion that the failure to list the warrant doesn't negate the warranty.

Correction of Defective Work (§3.9): The Constructor is to be notified of defective work during the warranty period and given the option to correct Correction of work even after the Correction of Work period expires.

Hazardous Materials (§3.13): Procedures for handling Hazardous Materials are detailed. Hazardous Materials provisions acknowledge that the Owner is responsible for conditions at the site. The Constructor may immediately stop Work in the affected area and is not required to perform Work related to or in the area of Hazardous Materials.

Safety Data Sheets (§3.13.7.1): The Hazard Communication Standard (HCS) requires chemical manufacturer, distributors, or importers, to provide Safety Data Sheets (SDS) (formerly known as Material Safety Data Sheets or MSDS) to communicate the dangers of hazardous chemical products. As of June 1, 2015, the HCS will require new SDS to be a uniform format. Visit www.osha.gov for more information.

Submittals (§3.14): This additional language is only to clarify that such extra work does not merit additional charges.

Constructor shall perform all Work strictly in accordance (§3.14.3): If a Constructor performs work before approval of the relevant submittal, they do so at their own risk.

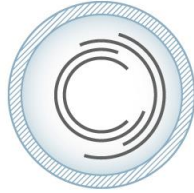
Professional Services (§3.15): When taking on design responsibility (See §2.3), the Constructor should also consider the provisions of §3.15 that obligates it to obtain professional services from licensed design professionals and to require the design professionals to carry E&O insurance as specified in §10.8.

Concealed or Unknown Site Conditions (§3.16.2): This is a differing site conditions clause.

Clean Up (§3.19): Describes the Constructor's responsibilities to keep the Worksite clean.

Permits and Taxes (§3.17): Responsibilities for permits and taxes are allocated below. §4.4 is referenced differentiating the Owner's responsibilities for building permits and approvals, including developer's fees.

Information and Services (§§4.1- 4.3 and 4.5): The Owner's responsibilities include providing information and services in a timely manner, including financial information, site information, and information necessary to give notice of or to enforce mechanics lien rights.



Owner Provided Information (§4.3.1): After Owner strike “pursuant to section §4.3” and substitute “that are Contract Documents.” Owner provided information is now not necessarily considered contract documents. Therefore, Constructor’s examination should be limited to documents which are designated contract documents. Otherwise, Constructors could be in a position of having to essentially rely on owner provided information that is disclaimed and therefore unreliable.

Owner Provided Information (§4.3.4): Changed “relevant” to “required” for a more objective and narrower standard for requests. An Owner may find it desirable to provide such information.

Building Permit, Fees, and Approvals (§4.4): Building permits, fees, and approvals that are not the responsibility of the Constructor as described in §3.17 are to be secured and paid by the owner.

Paper Contract Documents (§4.6): Depending on how the ConsensusDocs 200.2 is used and completed, the need to provide hard copy of the Contract Documents could potentially be eliminated.

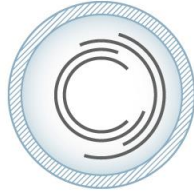
Documents in Electronic Format (§4.6.1): Electronic documents are increasingly being used by the industry. This provision requires a protocol to be established relating to the use of such documents. Constructors are strongly encouraged to use the protocol in Consensus DOCS 200.2 to ensure that the risks associated with use of electronic documents are clearly understood by all the Parties to a contract. At a minimum, the 200.2 can allow Constructors to rely upon e-mails and faxes, if the document is completed to indicate such a desire.

Cost of Correcting Damaged or Destroyed Work (§4.10): §4.10 establishes the Owner’s responsibilities regarding damage or loss caused by the Owner or Others.

Subcontractors (ARTICLE 5): The provisions of §5.2 and §5.3 govern the award of subcontracts as well as the binding of Subcontractors and materials suppliers to the Contract Documents as they apply to their work.

Labor Relations (§5.4): Labor Relations was deleted and moved into an elective exhibit, see comments notes above at §2.4.1.

Date Commencement (§6.1): It is common for the scheduled time period of commencement and the agreement signing date to be different. Parties need to specify if this is the case for this project. The default Date of Commencement will be the signing date of the agreement.



Schedule of Work (§6.2.1): Guidebook Users may want to add after "orderly completion of the Work," in accordance with the Contract Documents, including, the dates for Substantial Completion of each respective phase of the Work.

Delays and Extension of Time (§6.3.1): Delays justifying an equitable extension of the Contract Time and/or equitable adjustment in Contract Price are defined below.

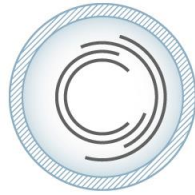
Liquidated Damages (§6.5): §6.5 is an optional liquidated damages provision, which allows the Parties to elect whether or not to provide for liquidated damages. In general, AGC members view liquidated damages negatively, and advise Constructors to take extreme caution before electing to provide any liquidated damages in this section. Liquidated damages are intended to compensate the Owner (and serve as a substitute for) the Owner's actual delay damages, such as lost revenues. Thus, a contract which allows the Owner to recover liquidated damages, but otherwise bars both Parties from collecting consequential damages, is not truly mutual; it allows the Owner to have its cake and eat it too. If liquidated damages are elected, the Constructor should recognize that the limited mutual waiver of consequential damages contained in §6.6 is not truly mutual. In addition, Constructors should not agree to liquidated damages measured from final completion.

Note that this section contains blanks for the Parties to fill in to establish the appropriate dollar amounts (one tied to substantial completion and one tied to final completion) if the Parties elect to provide for liquidated damages. The amount of the LDs is expressed as a lump sum amount but the Parties may choose to use a per diem amount.

Limited Mutual Waiver of Consequential Damages (§6.6): The Parties agree to waive consequential damages except for items specified in §6.5. A mutual waiver of consequential damages benefits the Constructor if the waiver is truly mutual, meaning that liquidated damages are not specified in §6.5.

Setting aside the interplay between liquidated damages and a "mutual" waiver of consequential damages, the Parties should also carefully consider whether liquidated damages are, themselves, desired. Many sophisticated General Contractors today desire, and may even insist upon, the inclusion of a liquidated damages provision in their contracts, because – perhaps among other reasons - it allows them to better quantify their risk. Moreover, some General Contractors and Construction Managers insist that the contract provide for liquidated damages and that the liquidated damages be capped at some amount, such as one-half of the Construction Manager's fee (under a cost-plus-fee contract). By doing this, the Constructor/Construction Manager truly can attain a real limitation of damages.

Listing an item of damages in this blank space would allow for either Party to make a claim, if appropriate, for any consequential damages. If no items are listed then consequential damages not covered by insurance are waived.



Principal office and Overhead are now considered a direct project expense and therefore, are not automatically waived in a waiver of consequential damages.

Changes (ARTICLE 8): Value Engineering – Consider adding to Guidebook, and incorporate into future documents:

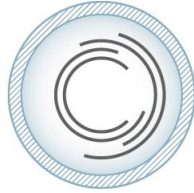
Value Engineering is an evaluation process conducted by the Owner, Constructor and Design Professional to improve the value of the Work. Value can be increased by either improving the function or reducing the cost of the Project. The intent of the Value Engineering process is for basic functions to be preserved and not be reduced as a consequence of pursuing value improvements.

A Proposed Value Improvement is a measure introduced by the Owner, Constructor and Design Professional to improve the function or reduce the cost of the Project. In any case where a Proposed Value Improvement has been presented by the Owner, Constructor and Design Professional, each parties' obligations are defined as follows. The Design Professional shall perform an analysis of the Proposed Value Improvement to insure that it will function within the Project's design and not adversely affect any essential element of the Project. The Design Professional shall inform the Owner and Constructor, in writing, of the results of such analysis.

Constructor shall perform a constructability analysis and a preliminary estimate to determine the feasibility of implementing the Proposed Value Improvement and its effect on the Cost of the Work and the Contract Time. The Constructor's estimate for a Proposed Value Improvement shall include the entire effect on the Cost of the Work and the Contract Time including any changes to Constructor's means and methods, sequencing, or schedule.

Design Professional and Constructor shall present their determinations to the Owner. Owner shall decide whether the Proposed Value Improvement will be implemented. Upon approval of a Proposed Value Improvement by Owner, Design Professional will prepare or revise the Contract Documents to fully incorporate all design changes necessitated by implementation of the Proposed Value Improvement into the Project. The Constructor shall revise the estimate of the Cost of the Work and schedule. The GMP shall be adjusted by Change Order by the increased or decreased amount of the Constructor's estimate of the Proposed Value Improvement on the Cost of the Work.

The obligations identified in this paragraph are not affected by the identity of the Party who proposes the Proposed Value Improvement. The parties acknowledge that the Constructor is not a registered professional design professional and is not obligated to



perform any design work related to a Proposed Value Improvement except as may be required for its means and methods in the performance of the Work.

Change Order (§8.2.3): Users may consider adding in language to help define what would constitute a cardinal change. Some possible language might include: “In no event shall Constructor be required to proceed with changes in the Work to the extent that the total of all changes in the Work covered by Interim Directed Changes would exceed [**XX**] percent of the current Contract Price. In such event, the Constructor may decline to proceed with the changes which would cause the total to exceed [**XX**] percent until sufficient Change Orders are fully executed such that the total value of outstanding Interim Directed Changes is reduced to less than five percent of the Contract Price.

Unit Prices (§8.3.5): The provision below governs equitable adjustment when unit prices are indicated in the Contract Documents.

Incidental Changes (§8.5): This language was taken from §7.9 of the ConsensusDocs 750 Subcontract. This added language provides for greater clarity for the project participants and provides a consistent approach across the ConsensusDocs family of contracts.

Schedule of Values (§9.1): The Constructor prepares a Schedule of Values apportioning the various divisions or phases of the Work, the total of which equals the Contract Price.

Progress Payments (§9.2): Progress payment applications are described, including the treatment of stored materials and equipment, partial liens waivers and affidavits, and retainage.

Applications (§9.2.1): A short time period required by Law, namely a state law, that shorter period would supersede the contractual 15 days period.

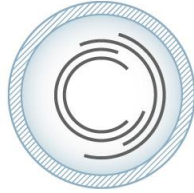
Retainage (§9.2.4): Retainage is referring to applicable statutory requirements applying to retainage.

Adjustment of Constructor’s Payment Application (§9.3): Under specified circumstances the owner may adjust or reject the Constructor’s payment application.

Payment Delay (§9.5): §9.9 defines the payment due date.

Substantial Completion (§9.6.1): The Owner may want to seek the assistance of its Design-Professional to compile such list.

Affidavit (§9.8.4.1): For example, payrolls or invoices for materials or equipment.



Indemnity, Insurance, and Bonds (§10.1): The Contractor indemnifies the Owner, Design Professional, and Others as defined in this Agreement, and the Owner causes other contractors to indemnify the Constructor. Contractual indemnification is governed by state law and the states differ as to the types of indemnification agreements they will enforce. Consultation with legal and insurance counsel with knowledge of the jurisdiction is recommended.

Indemnity (§10.1): Under §10.3.

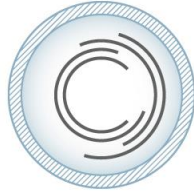
Insurance (§10.2): Generally, construction contracts require that insurance policies include at least 30 days advanced written notice to the owner (or an upstream contractual party) if an insurance policy is canceled or allowed to expire. This has generally been satisfied through certificates of insurance as evidence of compliance. The Association of Cooperative Operations Research and Development (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 receive 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.

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 cancellation. The ConsensusDocs notice of cancellation solution references where such language should be inserted into ConsensusDocs contracts (ConsensusDocs 200, §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.

Insurance Requirements (§10.2.1): New language was added to provide a stronger mechanism to ensure the proper procurement of insurance. This approach already existed in the ConsensusDocs 750 Subcontract §9.2, and this addition provides a more consistent approach across the ConsensusDocs families of contracts.

Employers’ Liability Insurance (§10.2.1.1): While compliance with Laws already requires this, consider that If Work is to be conducted over water, policy shall be endorsed to provide benefits prescribed by the US Longshoreman and Harbor Workers Act. Should Work entail the use of vessels, coverage shall be endorsed to provide coverage prescribed by the Jones Act.

Commercial General Liability Insurance (§10.2.1.3): Users may want to consider adding the following language to this section at the end of the limits.



- Contractual liability coverage sufficient to meet the requirements of this Contract Agreement (including defense costs and attorney's fees assumed under the contract, which shall be payable in addition to the limit of liability.)
- Personal Injury Liability (with contractual exclusions deleted)
- Perils of Explosion, Collapse, & Underground (XCU)
- Additional Insured coverage must be primary and non-contributory
- No separation of insured exclusion
- No subsidence exclusion
- No damage to Work performed by Subcontractor exclusion (CG 22 94 or similar)

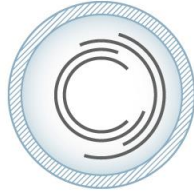
Users maybe consider including at end of this section.

The insurance shall include:

- Coverage for bodily injury, death and property damage arising out of ownership, maintenance or use of any motorized vehicle on or off the site of the Project, and Contractual Liability coverage
- If hauling of hazardous waste is part of the Scope, Automobile Liability Insurance with a \$1,000,000 combined single limit per occurrence for bodily injury and property damage applicable to all hazardous waste hauling vehicles, and include MCS 90 endorsement and the ISO Form CA 9948 (Pollution Liability Broadened Coverage for Business Automobile).
 - If CGL 12/04 or later edition is provided, the CA0051 1204: Mobile Equipment Subject to Motor Vehicles Laws shall also be provided. This additional endorsement is not required if the 2006 ISO Auto form is provided.

Employers' Liability, Business Automobile Liability, and CGL (§10.2.2): Excess liability is typically written on a "follow form" basis, meaning that it matches the coverage provided by the underlying Employers Liability, Commercial Automobile Liability, and Commercial General Liability policies, except as modified by endorsement. An Umbrella form is typically comprised of its own insuring agreement, which may be broader or narrower than the underlying policies.

Property Insurance (§10.3): 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. The Association of Cooperative Operations Research and Development (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.

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 cancellation. The ConsensusDocs notice of cancellation solution references where such language should be inserted into ConsensusDocs contracts (ConsensusDocs 200, §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..

Property Insurance (§10.3.2): If Owner directs Constructor not to buy the property insurance, the Owner should consider issuing a deductive Interim Directive.

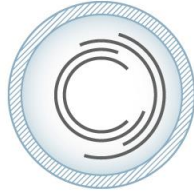
Owner Elects to Purchase the Property Insurance (§10.3.3): If Owner directs Constructor not to buy the property insurance, the Owner should consider issuing a deductive Interim Directive.

Additional Liability Coverage (§10.4): This provision requires the Owner to obtain property insurance on the entire project.

The Constructor and Owner should discuss and indicate whether procurement of additional insured liability insurance is required. The Constructor should later provide evidence if additional costs are incurred and therefore reimbursable, if additional insured insurance is indicated.

Bonds (§10.6): Users should consider getting riders to bonds when the Contract Price increases a certain amount. It may be advisable to set a certain amount in your contract as a threshold to require an increase in the penal sum amount. Increasing the Penal Sum amount should require the surety to be involved and potentially perform an underwriting for the increased amount. However, it would also be advisable to state what would happen if the threshold for increasing the penal sum was reached but that the surety did not approve an increase in the penal sum.

Professional Liability Insurance (§10.7): Professional liability insurance is written on a claims-made basis, and defense is included within the limit. It is expensive. Practice policies respond to claims made during the policy period, and defense costs erode the applicable limit. It is typically not advisable to require a firm to purchase higher practice limits to perform work, as doing so does not guarantee that coverage will be available should a claim arise out of any given project. Should higher limits be required, project-specific limits are dedicate to the covered project and are not eroded by claims arising out of other projects.



Coverage under a professional liability policy is typically not activated until the self-insured retention has been paid (this is inherently different from a deductible, which the insurer often pays “on behalf of” the Named Insured. Many policies stipulate that the SIR may only be paid by the first named insured, meaning that coverage is not available if that party is unable to make payment. Some contracts require a provision that allows the contracting party to satisfy the SIR in the event the First Named Insured is unable to do so.

Suspension by Owner for Convenience (Article 11): If properly used, mediation can be a quick and inexpensive dispute mitigation tool that gives parties a satisfactory result. Unfortunately, mediation is not always used effectively, and sometime Parties simply go through the motions in mandatory mediation. Other times, settlement occurs, but it is “late in the game” and close in time to a decision by a court or arbitration.

There are many possible ways to use mediation effectively. One possible way to use mediation as an effectively is through something that has recently been called, Guided Choice mediation. While the name is a new, the concepts embodied in Guide Choice mediation are well known to the most successful construction mediators. Users of ConsensusDocs contracts may want to utilize these mediation processes and techniques when setting up their dispute mitigation and resolution procedures. Note, however that ConsensusDocs agreements call for the Parties to communicate directly initially to resolve disputes, and these section may need to be modified as Guided Choice is spelled out in more detail in the following article: “Guided Choice: Early Mediated Settlements and/or Customized Arbitrations,” Journal of the American College of Construction Lawyers, Vol. 7, No 2, Summer 2013 by Paul Lurie.

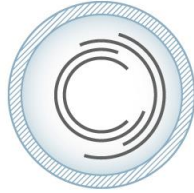
Guide Choice mediation is used as early as possible in the dispute in which clients drive decisions and customize the mediation process. Mediators help the parties customize the dispute resolution process based on their understanding of what impasses must be overcome to reach a settlement. Proper diagnosis is essential to a successful mediation process.

Owner Suspension (§11.1.1): A Change order for time or cost adjustment from suspension is handled by the changes section as well as addressed in ARTICLE 5.

Notice to Cure a Default (§11.2): The Owner’s rights in a situation where the Constructor has failed to cure a default within the requisite period of time are outlined in this section.

Owner’s Right to Terminate for Default (§11.3): The Parties’ respective rights when the Owner exercises its right to terminate the Agreement for cause are detailed.

Constructor’s Right to Terminate (§11.5): The Constructor has the right to terminate the Agreement for specified reasons.



Work Continuance and Payment (§12.1): The Constructor is expected to continue performance of the Work and the Owner is expected to continue payment for Work Performed during dispute resolution proceedings.

Direct Discussions (§12.2): In the event the Parties cannot reach an Agreement about the matter in dispute, they are obligated to engage in “good faith” negotiations at the next level in a step approach which moves from field representative to those representatives with greater authority in an effort to resolve the dispute; then if resolution is not achieved within five business days of the first discussion, it moves to the next level of senior executives and if resolution fails within fifteen days of the first discussion, it moves to mitigation.

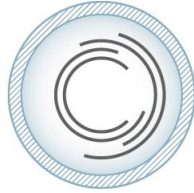
Parties execute a DRB Addendum (§12.3.3): Users are encouraged to review the ConsensusDocs 200.4 Standard DRB Addendum as well as 200.5 Standard DRB Agreement for use.

Attorney’s Fees and Prevailing Party (§12.5.1): 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:

“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.”

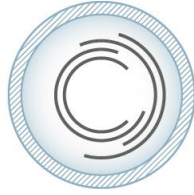
In alternative provision that may help facilitate better settlement offers is as follows:

“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.”

Order of Precedence (§14.3): If an order of precedence is not used, alternative language that users might consider, is as follows: Among all the Contract Documents, the term or provision that is most specific or includes the latest date shall control. Information identified in one Contract Document and not identified in another shall not be considered to be a conflict or inconsistency. If any provision of this Agreement conflicts with or is inconsistent with any other provision of other Contract Documents, the provision of this Agreement governs, unless the other provision specifically refers to the provision it supersedes and replaces in this Agreement.



COAA Comments for ConsensusDocs 200:

(Additional comments on this document can be found at COAA's website, www.coaa.org, in the members-only area.)

Design Authority and Responsibilities (§2.3): The language of §2.3 raises concerns about having to coordinate design work provided under the construction contract with the design provided by the project's Design Professional. Many contracts will require engineering or other design services from the Constructor. Those design expectations should be clearly identified in the pertinent technical specification. Other design services will be a function of the construction means and methods selected by the Constructor (e.g. falsework, shoring, etc.). Owners should be able to expect that the Constructor will perform all Work shown on, or reasonably inferable from, the Contract Documents without having to separately delineate what design services are included in the scope of Work. Owners should modify this section to accurately reflect the Owner's expectations of the scope of Work to be performed by the Constructor.

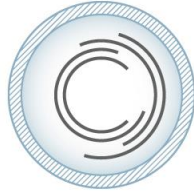
Ownership of Construction Documents (§2.3.1): The design professional's contract may be written to the effect that the Owner owns the final delivered construction documents. If that's the case, section 2.3.1 then should be rewritten so that the Owner, not the Design Professional, is granting a license to the Constructor and its Subcontractors to use the documents. If that's not the case, and the Design Professional owns the final delivered construction documents, the Owner should ensure that appropriate licenses for use have been obtained from the Design Professional for the Constructor and its subs. This section should reflect the appropriate Ownership of the documents.

Worksite Information (§4.3): Owners may want to modify this language to specifically disclaim the accuracy of information provided to the Constructor. COAA recommends that local legal counsel be consulted to draft appropriate language modifying section 4.3 in those instances.

Owner's Representative (§4.7): Few Owners give their representative the complete authority that Section 4.7 requires. COAA recommends revising the language of section 4.7 to say that the Owner will define, in writing, the authority that has been granted to its representative.

Contingent Assignment of Subcontracts (§5.5.1.2): Owners should consider deleting the term "and obligations" from this section. COAA recommends that local legal counsel be consulted to eliminate the Owner's exposure to Subcontractors for preexisting claims against the Constructor.

Limited Mutual Waiver of Consequential Damages (§6.6): The ConsensusDocs mutual waiver of consequential damages provision represents a positive departure from similar provisions found in other contract forms commonly used in the industry. Consequential damages are one of the most important subjects for an owner to be familiar with in the construction context. COAA highly recommends that every owner seek the advice of competent local construction counsel prior to



executing this contract containing waivers of consequential damages. Owners should assess the consequential damages risks associated with each project. Potential outcomes of the assessment could include, but are not limited to, a decision that the risks are small and consequential damages can be waived, that the risks can be captured through liquidated damages, or that the risks are such that the Owner is not willing to waive consequential damages.

Claims for Additional Cost or Time (§8.4): Owners should consult local legal counsel regarding the exposure of the Owner to potential claims by Subcontractors being passed through by the Constructor. The Owner may want to include the following additional language in section 8.4: "Prior to submitting any claim by a Subcontractor for additional compensation, the Constructor shall have examined any such claim and verified its accuracy and completeness, and the Constructor shall have identified any Claim or portion of the Claim that is not the responsibility of the Owner."

Constructor Acceptance of Final Payment (§9.8.7): COAA recommends deleting §9.8.7.

Insurance (§§10.2–10.5): COAA recommends that its members review with competent local counsel or risk managers especially coverage limits and the additional insured provisions. Failure to carefully contemplate the handling of these exposures could result in significant unanticipated losses.

ASA Comments for ConsensusDocs 200:

(Additional comments on ConsensusDocs can be found on ASA's website at www.asa.org.)

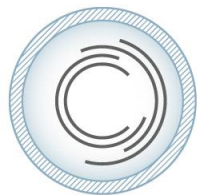
Constructor's Responsibilities (article 3):

The scope of work should be limited to all work actually indicated in the plans and specifications which was the subject of the Constructor's bid.

Constructors should not ordinarily accept responsibility for design. When design services are requested, the delegation should be specific and should include all design and performance criteria. Constructors should be responsible for promptly reporting defects they actually discover, but cannot be responsible for other design defects that it is claimed they "should have" recognized, or for design requirements that violate code standards.

Clear lines of authority to authorize payments and changes should be established in the general conditions.

One-sided terms that deny a Constructor any right to collect damages for delay, often called "no-damage-for-delay" clauses, are unacceptable. Mutual waivers of consequential damages, such as



the Constructor's extended home office overhead and the Owner's loss of use or added financing expenses, are beneficial and encouraged. A Constructor may reserve the right to assess a Subcontractor for a share of liquidated damages actually paid to the Owner, but only to the extent such share is proportionate to the fault of the Subcontractor in causing a delay.

A Constructor's warranty should provide that work is free of defects and performed in workmanlike manner, but should exclude defects inherent in the design or specified materials, ordinary wear and tear, improper maintenance, abuse, modifications, and implied warranties. A Constructor's warranty should have a time limit which should run from either substantial completion or issuance of a certificate of occupancy to the Owner, whichever is earlier. A Constructor's warranty should reserve the right of the Constructor to notice and an opportunity to cure any claimed breach of the warranty, by providing for waiver of any warranty claims where the Constructor is not provided an opportunity to cure.

Expenses claimed as backcharges should not be incurred before notice, and reasonable opportunity to cure, are provided to a Constructor. Backcharges should be billed within a reasonable time and not saved until the end of the project.

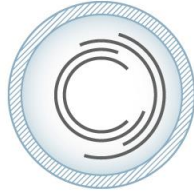
Deadlines for claims should be based on actual knowledge of facts giving rise to a claim (rather than constructive knowledge) and should permit a reasonable time for claims; time extensions should be required for all causes reasonably beyond the Constructor's control; price adjustments should include the entire cost of delays not caused by Constructor (including overhead) and should include a reasonable amount of overhead and profit for extra work. A Constructor should have the right to payment for any extra work that is performed at the Owner's direction, provided that the Constructor confirms verbal instructions in writing before starting work.

A Constructor may be required to conduct a site visit, make observations, and report discovered discrepancies, but should not have an affirmative duty to discover problems in the site conditions or design that a person in the Subcontractor's trade would not ascertain by a reasonable, visual inspection. Constructors should be entitled to rely on the accuracy and completeness of the plans and specifications, and on the accuracy of reports of conditions furnished by the Owner.

Approved submittals should bind the Owner in the same manner as the specifications which are "contract documents."

Owner's Responsibilities (article 4): A Constructor should have access to complete project financing information, including change orders, in order to evaluate its risk of nonpayment. Disclosures that demonstrate adequate project financing are a necessary condition to a commencement or continuation of a Constructor's performance.

See ASA comments under article 3 pertaining to Constructor site visits.



See ASA comments under article 3 pertaining to clear lines of authority.

Contract Time (article 6): See ASA comments under article 3 pertaining to one-sided terms that deny a Constructor any right to collect damages.

See ASA comments under article 3 pertaining to deadlines for claims.

Changes (article 8): See ASA comments under article 3 pertaining to deadlines for claims.

Payment (article 9): See ASA comments under article 3 pertaining to clear lines of authority.

Owner payments to the Constructor should be held in trust for the Constructor's Subcontractors and suppliers. The Constructor should be provided a firm deadline of not more than seven days by which it should disburse funds it receives from the Owner for payment of Constructor's Subcontractor's and suppliers. The Owner should expressly preserve its authority to pay a Subcontractor directly who is not paid by the Constructor.

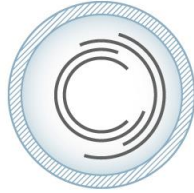
Past due payments should bear interest at a reasonable rate, so long as payment delay is not the fault of the Constructor. A Constructor should reserve an express right to stop work for non-payment whenever non-payment is not the Constructor's fault, upon reasonable notice and opportunity to cure, including costs of shut-down, delay and start-up. A Constructor should be entitled to payment for suitably stored materials.

Language requiring one Party to sign waivers in whatever form is considered suitable by the other Party is generally unacceptable. Any waiver form should be specified before the contract is signed, should be conditional on payment (except for payments already received), should not apply to funds still held as retainage, and should not apply to claims unrelated to the payment security rights of the Constructor.

General conditions should require Constructors to provide copies of any payment bond to Subcontractors on request, and should expressly exempt steps to preserve lien rights from any dispute resolution requirements.

Retainage should be due on substantial completion, less only those amounts sufficient to pay for punch list items. Substantial completion should be objectively defined as the time when the project is sufficiently complete to be occupied or utilized, such as when a certificate of occupancy is issued. Final payment should not constitute a waiver of claims previously asserted in writing and still pending at the time of final payment.

Indemnity, Insurance, Waivers and Bonds (article 10): Hold-harmless terms should be limited to bodily injury and property damage (other than the Work itself). Such terms should also be limited to provide indemnity only to the extent of the Constructor's negligence, and should



provide for payment of attorneys' fees rather than including a duty to "defend." Ideally, hold harmless terms flow in both directions and provide mutual obligations to indemnify the other Party to the subcontract against the consequences of the indemnitor's own negligence.

See ASA comments under article 3 pertaining to one-sided terms that deny a Constructor any right to collect damages.

Any requirements to name additional insureds on any of the Constructor's liability insurance policies, and any waivers of subrogation for claims covered by the Constructor's liability insurance policies (particularly workers compensation), are unacceptable. Requirements to provide special notices of policy cancellation or policy non-renewal often cause great difficulties and friction although they have never been shown to provide any benefits to anyone, and are also unacceptable. Requirements for continuation of coverage beyond the policy period, in the absence of a binding commitment from an insurer to provide that coverage, are also unacceptable. Separate liability insurance to cover the Owner and the Constructor for liability arising from "general supervision" of the project, such as Owners and Contractors Protective Liability Insurance ("OCP" - CG 00 09) or Project Management Protective Liability Insurance ("PMPL"—CG 31 15), may be required in lieu of any requirements to name additional insureds or to waive subrogation on the Constructor's liability insurance policies. The Owner or Constructor should be responsible to purchase all-risk property insurance including coverage for the interests of Subcontractors in installed work and in materials delivered, suitably stored or in transit.

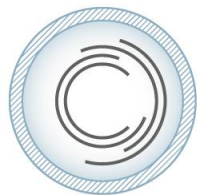
Suspension, Notice to Cure and Termination of the Agreement (article 11): See ASA comments under article 3 pertaining to Constructor site visits.

Where termination is not due to the Constructor's default, then the Constructor should be entitled to its contract damages, i.e., profit and overhead on uncompleted work, plus all expenses related to termination (such as termination of subcontracts and attorneys' fees), plus payment for work completed and expenses for labor and materials to the date of termination.

The Constructor should be entitled to claim time and price adjustments for any suspension of work which is not the fault of the Constructor. The Constructor should be able to terminate the contract for unreasonably long suspensions measured in the aggregate, and not by consecutive days. Terms restricting recovery where work "would have been" suspended anyway due to Constructor's fault merely restate common law requirement for causation.

See ASA comments under article 4 pertaining to Constructor access to project financing information.

Dispute Resolution (article 12): Early mediation of disputes is beneficial and should be a condition precedent to the use of any other dispute resolution procedure. Should mediation not



resolve a dispute, arbitration by an industry professional such as an architect, engineer, Constructor or Subcontractor is always preferable to litigation before a judge or jury. Arbitration should always be conducted subject to the terms of the written subcontract, so specific contract terms can assist Constructors to ensure that arbitration will provide a quick and efficient mechanism for resolving disputes. For example, contract terms can expressly provide that “The award shall be made within nine months of the filing of the notice of intention to arbitrate (demand), and the arbitrator(s) shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by Agreement of the Parties or by the arbitrator(s) if necessary.” (Drafting Dispute Resolution Clauses—A Practical Guide, AAA 12/7/2000.) Or, contract terms may require direct participation by the Parties (not merely through their representatives) for

- selection of the arbitrator (to ensure an industry professional is selected),
- any Agreement or ruling to permit a continuance, and
- Agreement or ruling to permit any discovery (particularly depositions, which add considerable time and expense) beyond the discovery of information contemplated by Rule F-7 of the AAA’s Construction Industry Arbitration Rules, Fast Track Procedures in fast track cases (no claim or counterclaim exceeds \$75,000), or Rule R-22 of the AAA’s Construction Industry Arbitration Rules, Regular Track Procedures in regular track cases (\$75,001-\$500,000), or Rule L-4 of the AAA’s Construction Industry Arbitration Rules, Procedures for Large, Complex Construction Disputes.

See ASA comments under article 9 pertaining to general conditions requiring Constructors to provide copies of any payment bond to Subcontractors on request.

Miscellaneous Provisions (article 13): Contracts should provide that the appropriate venue for dispute resolution procedures such as litigation or arbitration is the place where the project is located, and also that the law of the place where the project is located shall govern.

Contract Documents (article 14): See ASA comments under article 3 pertaining to scope of work limitations.