

ConsensusDocs™
BUILDING A BETTER WAY

ConsensusDocs Guidebook

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

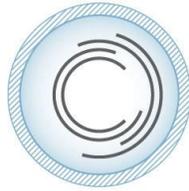
April 2017 Edition

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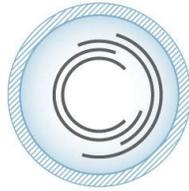
Introduction to the ConsensusDocs Guidebook

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

Overview:

This document was comprehensively updated in 2017, 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.

Worksite Information (section 6.2): Fulfilling Owner’s responsibilities are at Owner’s expense.

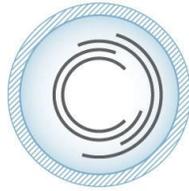
Legal Descriptions (subsection 6.2.1): Consider adding language from the long form describing the information required by legal descriptions. “Legal descriptions shall include easements, title restrictions, boundaries, and zoning restrictions. Worksite descriptions shall include existing buildings and other construction and all other pertinent Worksite 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 Constructor in laying out the Work.”

Attorney’s Fees and Prevailing Party (15.5.1): ConsensusDocs allows the prevailing party to seek reimbursement of attorneys’ fees 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

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



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 who’s 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.”