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ConsensusDocs Guidebook

ConsensusDocs 299 – Joint Venture LLC Operating Agreement

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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 299*
Joint Venture LLC Operating Agreement

Agreement (article 1): Note: This form is set up for a JV among three Joint Venturers, but it should be adaptable with relative ease to situations involving two, four, or more Joint Venturers.

Indemnification and Wrongful Acts (section 3.2): This section is based on the assumption that the Joint Venturers wish to share their liabilities in proportion to their Percentage Interests, even if a mistake or negligence by one of the Joint Venturers caused the liability or cost. Under this approach, the indemnification in subsection 3.2.1 assures that liabilities remain split according to the Percentage Interests, except for certain defined exceptions, such as Wrongful Actions.

Some parties may prefer a different model, in which each Joint Venturer bears the liabilities associated with the portion of the Work for which it is responsible to perform. It may be possible to accommodate this approach by setting up subcontracts to the Joint Venturers pursuant to exhibit A. Otherwise, if Joint Venturers are not to share losses in accordance with their Percentage Interests, this section 3.2 would need to be revised accordingly. That alternative may have the perceived advantage of letting each party take responsibility for the work it is managing, and thus avoiding one party getting stuck with part of the cost for another's mistake. However, it may have offsetting disadvantages. Determining which Joint Venturer is responsible for a particular loss could be easier in theory than in practice. Further, if one Joint Venturer can blame the other for problems and liabilities, collaboration within the Joint Venture may suffer.

Subsection 3.2.1(b): The standard form JV agreement presumes that a typical JV will be integrated for most or all of its work. Under the integrated model, personnel and other resources are provided by the Joint Venturer best able to meet the need, as determined by the Executive Committee, and overall profits or losses are shared according to the Percentage Interests regardless of which Joint Venturer actually performed a particular task. On projects that are following the integrated model completely, use of exhibit A is not required.

In an integrated JV, where some work is to be performed exclusively by one of the Joint Venturers, or in a line item joint venture, where the JV allocates the performance of functions and the related financial consequences among the Joint Venturers, exhibit A provides a mechanism to do so by authorizing the JV to award subcontracts to the Joint Venturers.

* 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

In certain cases the parties may wish to accomplish a similar effect without the formality of a subcontract agreement. For example, if a federal contract incorporates small business subcontracting requirements, the parties may prefer to use work orders issued by the JV, rather than subcontracts, as the mechanism to assign tasks and related financial responsibility to a given Joint Venturer. If so, the language of the standard form should be modified accordingly.

Decisions of Executive Committee (section 4.3): The objective of the section is to promote decisions by consensus, with voting by majority of Percentage Interest used only if the parties cannot otherwise agree. In a 50-50 joint venture, where there is no majority Percentage Interest, the parties may wish to designate an alternative method for resolving an impasse. Options include designating one of the Joint Venturers or a third-party as the tie-breaker.

Capital Expenditures (subsection 4.3.2(h)): If the JV is expected to acquire substantial capital assets, such as real estate or major equipment, the parties may wish to consider drafting more detailed provisions regarding accounting methods, tax treatment, and disposition procedures for such assets.

Project Manager (section 4.6): The standard form assumes that the Project Manager will be an individual. If you want to designate a company as the PM, you may want to consider incorporating the relevant provisions of this section into section 4.5 Managing Joint Venturer.

Managing Joint Venturer, Tax Matters (subsection 4.8.2): Some state laws may require a Joint Venturer to include within its own "unitary" tax filing financial information for the JV. The Joint Venturers should determine the extent to which such taxes should be reimbursable from the JV.

Responsibility for the Work (section 6.1): Joint Venturers can offer value to the JV in various ways, including for example: credentials or connections that help win the project; working capital or bonding capacity; and personnel, equipment, or know-how to help deliver the project. There is no easy way to compare the value of such dissimilar contributions. The standard form proposes that the Executive Committee should endeavor in good faith to keep overall contributions proportional to the Percentage Interests. If it is contemplated that a particular Joint Venturer will make a disproportionate contribution in a given area, the parties may wish to modify the language accordingly.

Election of Remedies (section 7.2): This section does not limit remedies to those expressly set forth in the Agreement. If the parties desire to limit remedies, they should modify this section to specifically limit remedies to only those included in the Agreement and specifically exclude other remedies allowed by law or equity.

Insurance (section 9.1): The best approach for handling insurance will vary greatly depending on the Project, the Contract, and the normal insurance programs of the Joint Venturers. This section outlines a "default" approach for how the JV insurance may be handled, subject to the ultimate

control of the Executive Committee. The parties should not assume that the default option is necessarily best. Advice from a qualified insurance professional is strongly encouraged.
Bonds (section 9.2): This section is based on the assumption that the Joint Venturers will share responsibility for the bonding of the Project in proportion to their Percentage Interests. Sometimes this is not feasible, as when one Joint Venturer lacks the capacity to bond its portion or when the respective sureties otherwise do not agree. In such cases, the language of this section should be revised accordingly.

Communications/Notices (section 11.9): If the parties want to allow electronic communications as a proper form of notice, they should incorporate language in this section. Sample language may be found in the ConsensusDocs 200.2 Electronic Communications Protocol Addendum.

Non-Solicitation of Employees (section 11.10): The parties may want to consider including a remuneration amount if this provision is violated.

Subcontracts to the Joint Venturers (exhibit A): The form JV agreement presumes that a typical JV will be integrated for most or all of its work. Under the integrated model, personnel and other resources are provided by the Joint Venturer best able to meet the need, as determined by the Executive Committee, and overall profits or losses are shared according to the Percentage Interests regardless of which Joint Venturer actually performed a particular task. On projects that are following the integrated model completely, use of exhibit A is not required.

In an integrated JV, where some work is to be performed exclusively by one of the Joint Venturers, or in a line item joint venture, where the JV allocates the performance of functions and the related financial consequences among the Joint Venturers, exhibit A provides a mechanism to do so by authorizing the JV to award subcontracts to the Joint Venturers.

In certain cases the parties may wish to accomplish a similar effect without the formality of a subcontract agreement. For example, if a federal contract incorporates small business subcontracting requirements, the parties may prefer to use work orders issued by the JV, rather than subcontracts, as the mechanism to assign tasks and related financial responsibility to a given Joint Venturer. If so, the standard form should be modified accordingly.

Subcontract, Payments (exhibit A, section 4): The subcontract may incorporate exceptions desired by the parties from the general principle that all profits and losses are shared in accordance with the Percentage Interests. For example, the subcontract may document any special arrangements the parties intend for dividing incentive fees and/or liquidated damages.

Payments by the JV, Costs (exhibit B, section 3.1): If the parties intend that the budget be mandatory and to exclude costs not in alignment with the Budget, this section and section 3.3.11 may need to be modified.

Exhibit B, subsections 3.3.1 through 3.3.3 contemplate that the staff performing the required work of the JV will be on the payroll of the respective Joint Venturers, and will not be employees of the JV itself. If the parties prefer the model of a "populated" JV, in which the JV itself is the direct employer of certain personnel, the Agreement should be revised accordingly.

Exhibit B, subsection 3.3.11: The Executive Committee may wish to establish reimbursement policies for certain categories of costs, for example: management services; accounting services; computer-related hardware, software or services; cell phones; vehicles or vehicle allowances; legal expenses; insurance and bond premiums; and deductible or co-insurance costs for claims related to the Project.