



# ConsensusDocs™

BUILDING A BETTER WAY

## Best Practices for Contracting Between Design Professionals: And How ConsensusDocs Contracts Can Help

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# Learning Objectives:

- Identify and discuss best practices for contracting between a responsible design professional and a subcontracting consultant design professional
- Understand how the new ConsensusDocs 250 Standard Design Professional to Consultant Agreement addresses the unique risk management issues confronting contracting design professionals
- Identify and understand keys contractual clauses design professionals and consultants should discuss and consider using to address their unique project and business needs.



# ConsensusDOCS™

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 Construction Industry Round Table		 Associated Builders and Contractors, Inc.	 Lean Construction Institute <small>Building Knowledge in design &amp; construction</small>	 FINISHING CONTRACTORS ASSOCIATION
 Mechanical Contractors Association of America	 NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION	 National Insulation Association <small>www.insulation.org</small>	 NATIONAL ROOFING CONTRACTORS ASSOCIATION	 PAINTING AND DECORATING CONTRACTORS OF AMERICA
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ALL

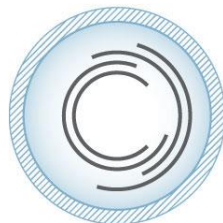
# The ConsensusDocs Coalition

## 40 Leading Construction Industry Associations



# ConsensusDocs Library of 100+ Documents

- 200 Series: General Contracting
  - 222 (Quals), 240 (DP Long), 245 (DP short)
- 300 Series: IPD/Collaborative
  - 300, 301, 310
- 400 Series: Design-Build
  - 420, 422, 499 JV
- 500 Series: Construction Management
- 700 Series: Subcontracting
- 800 Series: Program Management
  - 803; Commissioning



**ConsensusDocs**<sup>TM</sup>  
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# ConsensusDocs 250

- Overview
  - Standard agreement for use by prime "Design Professional" and design "Consultant" ("250").
- Purpose
  - Fair allocation of risk
  - Consistent with CD agreements
  - Flow-down the requirements imposed upon the prime
- Working Group Project Team
  - Volunteers from CD orgs. and practicing attorneys
    - Led by: Charlie Rogers, Charlie Vantine and Mike Lapicola.

# Unique Issues Facing Relationship

- Competing Owner & Design Professional (DP) interests for design costs & oversight
- Redesign issues impacted by prime agreement + design changes/modifications
- Time on site/supervision/review of submittals/etc. –
- Need for contract administration by Consultant for Consultant's scope

# Predominant Issues Arising Between Design Professionals

- Flow-Down Provision (Section 1.1)
- Priority of Agreements (1.1)
- Scope/Proposal (1.2)
- Insurance (Article 4)
- Cost Estimates (6.2.2)
- Submittals, etc. (6.3.1-6.3.4)
- Site Visits/Project Oversight (6.3.5-6.3.8)
- Additional Services (6.4)
- Indemnity (8.2) & (10)
- Payments; Pay-When(if?)-Paid (9)
- Consequential Damages (11)
- Termination (12)
- Disputes/Multi-Party Dispute Resolution (13)
- Ownership of Instruments of Service and Other Documents (14)
- Strive for consistency with Consensus Docs 240 and 245



# Consistency

## Between Prime & Consultant Agreements

- Intent of Working Group was:
  - Consistency in using terms
  - Concise and Flexible (use *either* long form 240 or short form 245 owner/design professional agreement)
  - Flow Down Prime Agreement provisions as controlling
  - Eliminate Gaps

# Prime Agreement Flow-Down § 1.1

- Consistency in Documents!
  - Explicit Flow Down to Consultant
  - What to leave out
  - Seamless and non-conflicting provisions
  - Avoid promising what one cannot deliver
- However, **NO FLOW-DOWN** is **FOOL-PROOF!**
  - Negotiated concessions to Owner may be problematic to Consultant vis-à-vis relationship with DP
  - Carefully negotiated terms in DP/Consultant agreement

# Priority of Contract Documents §1.1

- What if...
  - Conflict between Prime and Consultant Agreement?
  - Which agreement should Govern?
    - Both routes have their own issues?
  - Consultant Agreement (250) has priority if there is a conflict since both parties signed
    - Priority of Prime Agreement should be negotiated, not default

# Scope – §1.1 - 1.2

- Incorporate C's proposals or NOT to incorporate?
  - Difficult to decide
  - Upstream v. downstream perspective
  - End goal
    - Make contracting easier; AND
    - Clarify intent/interpretation/supremacy issues.
- Best practices:
  - Spend some time identifying inconsistencies in proposal and agreement and modify accordingly.
  - Proposal helps establish specific details of scope

## Scope – §. 1.1-1.2, Cont.

*“However, the Consultant’s proposal shall not be considered to vary, modify, contradict, amend, supplement or interpret the terms and conditions of this Agreement other than the description of services contained in Article 6, and any conflict between the Consultant’s proposal and this Agreement outside of that limited context shall be resolved in favor of the terms and conditions of this Agreement, which supersede the proposal and all prior negotiations, estimates, representations or agreements, either written or oral.”*

# Insurance – Article 4

- Who has what covered?
- Check for Consistency with requirements of Prime:
  - Coverages;
  - Limits;
  - Subrogation;
  - Other Requirements
- **Best Practices:**
  - NO GAPS to protect BOTH DP & Consultant.

# Cost Estimates

- Consultant... any obligations?
  - IF included in Prime Agreement, Consultant shall likewise undertake those obligations (Sec 6.2.2):
    - Assist in preparation, review and approval
    - Provide cost estimates relative to Consultant's scope of work
- Redesign to keep within Owner's stated cost objective or cost parameters?
  - Yes - but with a compromise
    - If within "X"%....no additional obligation of Consultant absent additional compensation.

# Scope of Service – Consultant Obligations for Submittals, Etc.

- Consultant shall (sections 6.3.1-.3.4):
  - Provide interpretation and clarification as requested (including providing responses to RFI's);
  - Review Submittals within 5-7 days;
  - Assist DP with requests for CO's; and
  - Assist DP in Pay App review
  - Provisions intended to ensure consistency with DP's obligations in Prime.





# To Be or Not to Be . . . On-Site?

- Ambiguity will burn one or the other
  - Conduct project specific assessment of need; encourage express agreement on number of site visits for both oversight/administration of the construction contract and project meetings should prevent:
    - DP from getting bill for Additional Services that were not anticipated (and may not be paid by Owner); and
    - Consultant from being left holding the bag for additional site visits not in Consultant's estimate for time & cost
- **Best Practice:**
  - Transparency benefits both DP & Consultant.

# “Who” is on First? (Sec. 6.3.5 - 6.3.8)

- 6.3.5 The Consultant shall **visit the worksite** no less than [\_\_] ([\_\_]) times, or pursuant to such schedule established in Exhibit D to this Agreement, to become **generally familiar with the quality of the Constructor's work related to Consultant's scope of services** and to determine in general whether the Constructor's work is proceeding in accordance with the **Construction Documents prepared by Consultant**. The Consultant shall not be responsible for ensuring that the Constructor's work is in accordance with the Construction Documents, but shall make a report to the Design Professional after each worksite visit.
- 6.3.6 The Consultant shall **attend up to [\_\_] ([\_\_]) Project meetings** with the Design Professional, Owner and Constructor, or, if requested by the Design Professional, with the Owner and Constructor. Consultant shall prepare and furnish to Design Professional written minutes or a report of the substance of any meetings attended by the Consultant but not the Design Professional.
- 6.3.7 The Consultant shall **assist** the Design Professional and Owner in conducting up to [\_\_\_\_]([\_\_]) **inspections to determine date or dates of the Constructor's Substantial Completion** of the Constructor's work; and up to [\_\_\_\_] ([\_\_]) inspections to determine the Constructor's final completion of its work.
- 6.3.8 The Consultant shall make up to [\_\_] ([\_\_]) visits to the worksite during the Constructor's **one-year correction period to assist** the Design Professional and Owner in evaluating the need for corrective measures.
  - *[Emphasis Added to Each]*

# Additional Services – Sec. 6.4

- Express exclusion of certain services from base scope results in those services being “additional” when required
- **Unique approach to dealing with the always anticipated need for the performance of services outside of base scope: Get it Writing Ahead of Time:**
  - (a) Typical component - written authorization required:
    - *Consultant shall not proceed with the performance of Additional Services absent written authorization from the Design Professional, which shall not be unreasonably withheld where Additional Services represent an increase in or departure from the scope of the Consultant Services. [emphasis added]*

# Additional Services –§. 6.4 Cont.

- (b) Unique component - Emergency Services:
  - *However, in the event Consultant reasonably believes that Additional Services are necessary for compliance with the standard of care, or to ensure compliance with scheduling requirements of the Project...Consultant shall have the right to negotiate compensation for such Additional Services even if provided in advance of Design Professional's written authorization. Such Additional Services shall be referred to as Emergency Services.... If Design Professional has properly and timely objected to the proposed Emergency Service as set forth herein, and the Parties are unable to resolve their disagreement, the matter shall be reserved for resolution pursuant to Article 13. Except as otherwise provided for in this section for Emergency Services, Consultant shall not be entitled to compensation for Additional Services absent Design Professional's written authorization or consent. [emphasis added]*

# Indemnity

- Upstream indemnity for delay-related damages, which are almost always included in Prime Agreements (Sec 8.2)
- General indemnity (Art. 10) - Considerations:
  - Limitation in General Indemnity (negligence based, property/personal injury limitations);
  - Consideration of Anti-Indemnity Laws ( differs in various jurisdictions);
  - Broader, more specific indemnity for delays
- **Best Practices:**
  - Negotiate Specific indemnity provisions based on specific agreements;
  - Indemnity should be neither broader nor narrower than DP's upstream obligations

# Article 9 - Payment

- “Pay-if-Paid” and “Pay-When-Paid” . . . Is there a difference? Maybe . . .
  - Requirement that DP receive payment from Owner prior to obligation to pay Consultant could be construed as “pay-when-paid”; but:
    - Some jurisdictions require specific language to enforce “pay-when-paid” provisions, but never enforce “pay-if-paid” provisions
    - No express “magic” language required for other jurisdictions for either “pay-if-paid” or “pay-when-paid”
    - Some jurisdictions do not enforce either type of provision
- **Practice Pointer:** Negotiate and insert modifications to be consistent with applicable jurisdictional law



# Consequential Damages (Art. 11)

- Waiver, Limited Waiver and No Waiver
- Owner, DP, & Consultant have Differing Views:
  - Compromise position:
    - 1. Limited Waiver;
    - 2. Excludes losses covered by insurance; and
    - 3. Excludes specific damage items enumerated by the parties
- **Best Practice:**
  - Critical to have consequential damages provisions consistent from DP perspective - otherwise could get caught being responsible to Owner w/o recourse against Consultant (particularly given standard indemnity).

# Termination (Art. 12)

- Mutual Termination "For Cause" Provision.
  - "Material breach" with "no fault" of initiating Party
- DP can terminate "Without Cause"
- Consultant entitled to:
  - Payment for services performed through date of termination
  - Costs of termination (these should be specifically negotiated and identified if possible)
  - Premium \$\$\$
    - No reciprocal right for Consultant to terminate without cause
      - b/c this would leave DP damaged.



# Dispute Resolution (Art. 13)

- Direct Discussions
- AAA Mediation as "Condition Precedent"
- Option of:
  - Arbitration
  - Litigation
- Multiparty proceeding
  - Addressed b/c nature of construction disputes is that they touch more than one entity's scope
    - Same proceeding OR same arbitration panel or court
- Prevailing party attorney's fees.

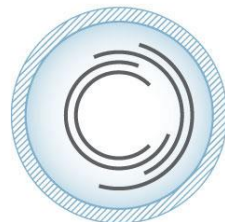


# Ownership of Documents (Art. 14)

- Ownership v. License for Owner's use of Consultant's Instruments of Service and other Property Rights?
  - Committee ultimately determined that ownership provides fewer potential issues relative to Owner's use
  - Takes into account Prime Agreement
  - Excepts Copyrights
- Ownership commences upon "final payment"
  - Hotly debated "final payment" v. payment of "undisputed amounts"
- DP has obligation to ensure defense & indemnity for improper use of documents.

# Final Agreement? ConsensusDocs 250!

- Fair allocation of risk
- Provides best opportunity for consistency with Prime Agreement
- Simple to use
- Integration of best practices.



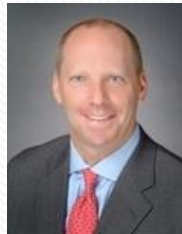
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## Standard DP/Consultant Agreement

Samples, Articles, Purchase at  
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## QUESTIONS?