

**A201 2007 ed.  
&  
Consensus DOCS:  
What do they mean to your business?**

**Builders Association  
October 10, 2007**

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The Walsh Group

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## **AGC Task Force Members**

- Paul Hoffman, Chairman
- Bill Ernstrom
- Mark Guetzko
- Mike Hurst
- Jim O'Connor
- Kevin Peartree
- Kathy Stamm
- Eric Stenman
- Eric Wilson

## **Outline**

- The Task Force prioritized changes:
  - Highest Priority
  - High Priority
  - Other issues
- Additional issues for discussion.

## **THE ISSUES**

## HIGHEST PRIORITY

- Contractor's standard of care with respect to inspecting construction performed by others
- Delays caused by labor disputes

### Review of CDs & Field Conditions

#### 3.2

- 3.2.2 & .3: "Contractor shall promptly report to Architect any errors. . . discovered by or made known to the Contractor."
  - Review is in "Contractor's capacity as a contractor and not a design professional"
- 3.2.4: If the Contractor fails to perform these "obligations", Contractor pays damages to Owner "as would have been avoided"
  - Deleted 1997 requirement for Contractor liability only when Contractor "knowingly" failed to report to Architect the error recognized by Contractor.

## **Standard of Care**

### **6.2.2**

- If Work depends on “upon construction by a separate contractor Contractor “shall”
  - “inspect such other construction”
  - Report “reasonably discoverable defects. . .”
- A201, 1997 edition used the objective standard of “apparent discrepancies” as opposed to “reasonably discoverable”.
- Higher standard than Contractor’s review of contract documents: “report errors discovered or made known” 3.2.2
- See Architect’s obligation: “report known deviations. . .and “defects. . . observed”. 4.2.3
- In 2007 B101: AIA changed Architect’s obligation for Construction Administration obligations from “make on-site inspections” to “on-site observations”

## **Labor Disputes**

### **8.3.1**

- Delays and extensions of time
  - Contractors only entitled to time extensions for labor disputes if “unrelated to the Project”

## **HIGH PRIORITY**

- Supervision and construction procedures
- Mediation

### **Supervision and construction procedures**

#### **3.3.1**

- If means and methods specified are not safe Contractor gives notice; Architect provides written instructions
- If Contractor proceeds Owner is liable for any loss or damage “arising solely from those Owner required means, methods, techniques, sequences or procedures.”

## **Mediation**

### **15.2.6**

- Initial decision final and binding “subject to mediation and, if the parties fail to resolve their dispute through mediation, to binding dispute resolution.” 15.2.5
- Initial decision
  - Within 30 days, demand that other party file for mediation within 60 days of initial decision. 15.2.6.1
  - If party receiving demand fails to file for mediation within time required: “both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision.”

## **OTHER ISSUES**

- Electronic document exchange
- Applicable Laws
- Contractor approval of shop drawings
- Allowances
- The role of the Architect
- Owner/Architect review of Subcontractors
- Delays and extensions of time
- Withholding certification
- Progress payments
- Hazardous Materials
- Insurance issues
- Assignment
- Termination
- The parties’ continuing contractual obligations.

## **Electronic documents exchange**

### **1.6.1**

- If parties are going to transmit documents in electronic format “they shall endeavor to establish necessary protocols governing such transmissions”
- Need agreement on conditions to be in place prior to any exchange.
  - Listing of general subject areas to be addressed.
  - Costs need to be addressed.

## **“Applicable” Laws**

### **3.7.3**

- Addition of “applicable laws” and “lawful orders of public authorities” is not as clear as the language in the 1997 edition.
- Language should not be changed.

## **Contractor “Approval” of Shop Drawings**

### **3.12.5 & 3.12.6**

- By submitting the shop drawings the Contractor represents it has “reviewed and approved” the shop drawings.
- Review and approval must be performed in “accordance with the submittal schedule approved by the Architect.”

## **Allowances**

### **3.8.3**

- Change obligation on Owner to select materials and equipment under an allowance from “in sufficient time to avoid delay in the Work” to “with reasonable promptness”.
- How is this change going to impact a contractor’s ability to recover for delay?

## **The Role of the Architect**

### **4.2.2 & 4.2.3**

- What is the Architect's role in reviewing the project's progress & guarding the Owner against defects and deficiencies in the Work?
  - Architect is not a "representative of the Owner"
  - Will no longer "endeavor to guard" the Owner against defects and deficiencies in the Work – only keep O "reasonably informed"
  - Only report obligation is with respect to "known deviations" and defects and deficiencies "observed"
  - Determines "in general if the Work observed" is in accordance with the Contract Documents.

## **Owner/Architect review of Subcontractors**

### **5.2.1**

- In 1997 this provision related to the O & A/E's right to review qualifications of subcontractors. The Owner had to "promptly reply"
- Now: 14 day window with the Architect having the right to reply in 14 days that "the Architect requires additional time to review".

## **Delays and Extensions of Time**

### **8.3.1**

- Current provision does not address equitable adjustments in cost.
- Inserted in the last sentence should be the phrase: “then the Contract Time should be extended and cost, including general conditions, overhead, profit, etc. shall be included in a Change Order for such reasonable time as the Architect may determine.”

## **Withholding Certification**

### **9.5.1.2**

- No change from 1997 despite request
- Reported owner abuse for withholding monies for suspected future 3<sup>rd</sup> party claims
- August 2005 draft exempted such claims where insurer or surety acknowledged responsibility for the full claim amount.

## **Progress Payments**

### **9.6.1**

- The payment requirement needs to be consistent with most states' prompt pay statutes: "The Owner shall make payment within 14 days in the manner and within the time provided in the Contract documents, and shall so notify the Architect."
- In 9.6.2 the AIA has obligated the GC to pay subs within 7 days.

## **Hazardous Materials**

### **10.3.2**

- At the end of the last sentence the following language should be added:  
"Contractor's reasonable additional costs of shut-down, delay and start-up, including general conditions, overhead, profit, etc."

## **CGL Insurance issues**

### **11.1.2, 11.1.3, 11.1.4**

- Completed Operations coverage 11.1.2
  - Continuation of liability coverage thru “completed operations coverage”.
- Certificates of Insurance 11.1.3
  - Provide certificate “upon renewal or replacement of coverage until completion of completed operations
- Additional Insured status 11.1.4
  - O, A/E & A/E consultants as additional insureds
    - What if dispute involves professional liability exposure?
  - Limited to extent of “claims arising from Contractor’s negligent acts or omissions. . .”

## **Assignment**

### **13.2.2**

- 1997: Lender “shall” assume Owner’s rights and obligations
- Now: Lender “will” assume those obligations.
- Why the change & what does it mean?  
Does the lender have some leeway it didn’t have in 1997.

## **Termination**

### **14.1.3 & 14.4.3**

- Change “reasonable” overhead & profit to “remaining” overhead & profit.
- This is a circumstance beyond the Contractor’s control (Owner default & termination for convenience).
- A severe penalty to Contractor.

## **Contractor’s Continuing Performance Obligation**

### **15.1.3**

- Add obligation for Owner to continue to make payments in accordance with the Contract Documents, including 50% of the cost of the disputed Work, pending resolution in accordance with the terms of processes defined in the Contract Documents.
- Vests both parties with the incentive to promptly and fairly resolve the dispute.

## **ADDITIONAL ISSUES for DISCUSSION**

- Financial Disclosure
- Differing Site Conditions
- Designation & changing Superintendents
- Submittals
- Joint checks
- Subcontractor payments issues
- Hazardous Materials
- Governing Law
- Consequential Damages
- Dispute resolution

## **Project Financing Information**

### **2.2.1**

- When can the Contractor request financial information of the Owner?
  - When Owner “fails to make payments to Contractor” as required
  - When there is a change in the Work which “materially changes the Contract Sum.
  - When “the Contractor identifies in writing a reasonable concern regarding the Owner’s ability to make payment when due.”
- No longer without limitation.

## **Differing Site Conditions**

### **3.7.5**

- Contractor must recognize & identify “human remains” or “the existence of burial markers, archaeological sites or wetlands”. Do you know what legally constitutes a “wetland”?
- The result:
  - Suspend operations
  - Owner required to obtain gov’t approval to resume
  - Price and time adjustments.

## **Project Superintendents**

### **3.9.2 & 3.9.3**

- Designation
  - As soon as practicable after award:
    - Name and qualification of superintendent
    - Architect has 14 days to reply
    - Contractor may not use superintendent to whom Owner & Architect have “made reasonable and timely objection”
- Changing
  - Contractor shall not change superintendent without Owner’s consent.

## **Submittals**

### **3.10.2**

- Contractor shall prepare submittal schedule
- For Architect's "approval"
- If Contractor fails to submit: "Contractor shall not be entitled to any increase in Contract Sum or extension of Contract Time based on time required for review of submittals."
  - The "penalty" far exceeds the "crime".

## **Joint Checks**

### **9.5.3**

- If the Architect withholds certification the Owner may issue joint checks for subcontractors and suppliers "to whom the Contractor failed to make proper payments for Work properly performed and material or equipment suitably delivered."

## **Subcontractor Payment Issues**

### **9.6.4**

- Owner can request written evidence from Contractor or proper payment to Subs & Suppliers
- If Contractor does not furnish w/i 7 days Owner has the right to contact Subs & Suppliers directly.

## **Hazardous Materials**

### **10.3**

- 10.3.4: Owner responsible for materials required by CDs “except to extent of Contractor’s fault or negligence in the handling of those materials”
- 10.3.5: Contractor must indemnify Owner in certain situations.
  - Negligent handling of materials
  - Failure to stop Work except if due to Owner’s negligence.

## **Governing Law**

### **13.1.1**

- **Governing Law**
  - Place where the project is located
  - If arbitration is selected the Federal Arbitration Act governs
    - Is it enforceable?

## **Consequential Damages**

### **15.1.6**

- Mutual waiver of consequential damages stays
- AIA deleted “direct” in reference to the waiver not precluding “liquidated damages”.

# Dispute Resolution

## Article 15

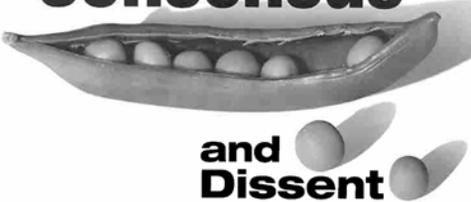
- Dispute resolution choice (in A101)
  - Selection of Initial Decision Maker made in A101, 6.1
    - “render initial decisions on Claims in accordance with Section 15.2” & “certify termination” (A201, 1.1.8)
    - Architect prepares COs & certs for payment “in accordance with the decisions of the Initial Decision Maker” (15.1.3)
    - No role in disputes between Contractor and parties other than Owner (15.2)
  - Selection of “Arbitration, litigation or other” in A101
- Process (in A201)
  - Initial decision – 30 days from referral of Claim. 15.2.1
  - Mediation – be careful of 15.2.6.1
  - Binding dispute resolution
- Consolidation 15.4.
  - Hinged on having “materially similar procedural rules”. 15.4.3.1

THE CONSTRUCTION WEEKLY September 24, 2007 • enr.com The McGraw-Hill Companies

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# Consensus



**and Dissent**

Owners and contractors agree on model contracts, but architects go it alone

► News coverage starts page 106

McGraw-Hill CONSTRUCTION

CONTRACTS

# New Standard Forms Seek Unity on Fairness



Consensus documents by owner and contractor groups focus on industry best practices

The cooperatively produced standard-form contracts written mainly by owners and contractors under the ConsensusDOCS banner contain new payment security for subcontractors among other terms. With all of the 70-plus forms due to be released Sept. 28, the effort represents three years of work by 23 industry

associations and an attempt to speed up contract negotiations and build trouble-free projects by starting from mutually agreed ideas of what is fair.

ConsensusDOCS developed agreements "to the best interest of the project" and "owner satisfaction," says Stephen E. Sweeney, CEO of the Associated General Contractors of America. "Each of us had an equal voice at the table," says E. Colleen Nelson, executive vice president of the American Subcontractors Association.

Lynn M. Schwartz, president of the Surety & Fidelity Association of America, says her members had become concerned about the "increasing shifting of risk in contracts." The open discussions held by the participating ConsensusDOCS associations awarded her that

points prepared to endorse any of the ConsensusDOCS' pending completion of its review, says William Davis, a Richmond, Va.-based attorney and spokesman for EJLB.

The American Institute of Architects represents a more contentious problem to ConsensusDOCS. As the industry powerhouse in standard-form agreements, AIA politely declined to participate in ConsensusDOCS.

A key AIA staff member fails to see the value of uniting behind a single set of documents. "When they first brought it up and we had a big meeting about it three years ago, they wanted everyone who was currently publishing any documents to turn their intellectual property over to the new nonprofit the ConsensusDOCS," says Suzanne Hartman, AIA managing director and counsel for contract documents. "You could see, if you have a successful program, that is risky."

Terms of participation later were relaxed but AIA still was not interested, she says. "We just had a fundamental question of whether there is a need for new programs," says Hartman, who notes that AIA counsels all industry groups in preparing

new versions of its documents. "It seems the market is well-served and offers people a choice. It's hard to see the value in only having one program, a monopoly if you will."

EJLB's Dillon says that organization's review of ConsensusDOCS' design-build agreement will be critical to its decision on whether to fully participate in the program. Even so, EJLB's participation so far has been "pretty significant," says Brian Pfeilberg, AGC's senior counsel for construction law and contract document programs.

Updates to several 10-year-old AIA standard forms of agreement are due in November.

Standard agreements from both ConsensusDOCS and AIA have been written with changing industry technology, such as building information modeling (BIM), in mind.

ConsensusDOCS' standard-form agreements grapple with some of the stickier aspects of risk. For example, ConsensusDOCS forms require dispute mitigation, mediation and the parties decide at the time of contract signing on whether to use arbitration or litigation as the last resort.

In AIA's latest version of its A201 agreement, General Conditions for the Contract for Construction, all initial claims are subject to an initial decision by the architect before the parties move to mediation or arbitration.

ConsensusDOCS has another key improvement for subcontractors: the contractor-sub agreement does not require subs to indemnify the contractor, owner, architect or others for all kinds of claims but instead limits the indemnity to the extent caused by the negligent acts or omissions of the subcontractor and its subs. This represents "a great improvement over clauses seen in most contracts," wrote R. Russell O'Rourke, an attorney, in an ASA journal published in early summer.

ConsensusDOCS forms also provide



A **United, ASA's** **Blasko** (left) says that each of the participating groups had an equal voice for a limited waiver of consequential damages. "The owner wants to be made whole and the specialty contractor wants to cap liability so its whole business is not at risk," says Pfeilberg. So ConsensusDOCS provides for a limited mutual waiver except for damages itemized as liquidated damages, he explains.

There apparently is convergence between ConsensusDOCS and AIA when it comes to payment security for subcontractor. For example, the ConsensusDOCS subcontractor and the

## Engineers are the newest kids on the block in the ConsensusDOCS writing and review process.

forthcoming AIA updated documents require the contractor to pay each subcontractor within seven days after payment is received from the owner. AIA already had largely eliminated the "pay-if-paid" approach to subcontractor payment in its 1997 version of its agreement, and AIA's new documents will continue many of those concepts, reports David R. Hendrick, another attorney writing for the ASA journal.

ConsensusDOCS also establishes the subcontractor's right to be paid no matter whether the owner has paid the prime contractor. In agreeing to that provision, AGC abandons the "pay-if-paid" clause in its current standard agreement, notes O'Rourke.

Hendrick writes that AIA's forthcoming updated documents need to keep more risk on subs than the older versions while ConsensusDOCS contractor forms tend to diminish subcontractor risks.

One of the groundbreaking aspects of the ConsensusDOCS effort is the participation of a large number of owner associations, including the National Association of State Facilities Administrators, Construction Users Roundtable, Construction Owners Association of America, Construction Industry Round Table and Building Owners and Managers Association.

"There is a growing frustration in the industry that parties, owner in particular, are presented with heavily modified standard-form documents that hardly resemble the original form," notes a primer from ConsensusDOCS. "Parties often perceive standard documents ultimately drafted by a singular organization as products of that organization," Contract

chase results.

Ricardo Aparicio, president of CURT and a contracts manager for Central Electric, says there has been a perception that it's "very difficult for an owner to dictate terms of contracts because the owner has the money and can dictate and that doesn't allow for dialogue." Disputes, not power, is what's best, he says. With ConsensusDOCS, "we get a framework and parties are able to use risk-allocation formulas according to what makes the most sense."

Adri Boyd Block, a director of the Construction Owners Association of America. "These documents force communication and dialogue and get us away from litigation."

"The ConsensusDOCS drafting process was similar to negotiation for a specific project contract," says the ConsensusDOCS group. "Parties with different viewpoints who have a large stake in the project each had a vote before the contract was signed off." There was sparring gained from those various viewpoints. ■

By Richard Egan

# ConsensusDOCS™

ConsensusDOCS™ proudly endorsed by the following:


**CONSENSUSDOCS 300**

## STANDARD FORM OF TRI-PARTY AGREEMENT FOR COLLABORATIVE PROJECT DELIVERY

## **What's So Important?**

- We have main-streamed successful project ideas
  - Created new documents – best practices
  - Electronic protocol/collaborative environment/BIM
- We have created an industry-wide forum
  - A place to come when industry wants to discuss issues
  - Explore new frontiers & new approaches
- Documents today; industry change tomorrow.

## **Current Consensus DOCS Documents**

- 200: Standard Form of Agreement and General Conditions Between Owner and Contractor
- 200.2: Electronic Communications Addendum
- 240: Standard Form of Agreement Between Owner and Architect/Engineer
- 410: Standard Form of Agreement and General Conditions Between Owner and Design-Builder
- 500: Standard Form of Agreement and General Conditions Between Owner and Construction Manager
- 750: Standard Form of Agreement Between Contractor and Subcontractor.

# **Consensus DOC 200: The Cornerstone Document**

Changes to 200 flow through to other documents.

## **New Elements:**

- Liquidated Damages
- Limited Mutual Waiver of Consequential Damages
- Delays: traditional force majeure clause.

## **New Elements:**

- **Additional Liability Coverage**
  - Optional coverage
  - Choice of AI for Ongoing or Completed Operations
  - OCP for Ongoing Operations
  - Potential cost.

## **New Elements:**

- **Dispute Mitigation and Resolution**
  - Mitigation Procedures
    - Project Neutral/DRB
  - Binding DR
    - Arbitration, or
    - Mitigation.

## **New Elements:**

- Claim Documentation after notice
- Stored Materials
- Indemnity: reimbursement for costs in excess of liability
- Property Insurance: Terrorism
- Bonds – rider for over 10% change
- Conflicts of Interest.

## **Consensus DOC 300: Tri-Party Agreement for Collaborative Project Delivery**

## **Background to The Collaborative Agreement**

- CDC/PIAC White paper
- Collaborative technologies
- Lean Project Delivery principles
- Sutter Health
- Alberici experience.

## **Collaborative/Lean Principles**

- Collaboration before and throughout design and construction as well as post-construction
- Increased relatedness of project participants
- Network of commitments
- Optimize project as whole, not the pieces
- Couple action with learning.

## **Collaborative Project Delivery**

- IT IS NOT Lump Sum, DB or CM
- IT IS, up front and continuous collaboration and project teamwork
- IT IS a break the mold approach
- IT IS NOT for every project or every Owner

## **Symptoms of a Broken System**

- Numerous RFIs and change orders
- Redesign
- Delays
- Cost surprises, spiraling project cost
- Loss of scope to stay in budget
- Claims and disputes
- Changing cast of players
- Poorly functioning, un-maintainable designs
- Unmet expectations
- Productivity losses
- No fun
- Worst case - lawsuits

# How is the Collaboration Process Different?

- Relational versus transactional contract
- Led by Management Group
- Select subcontractors based on ability not just price
- Uses innovative planning/scheduling techniques
- Defines required behaviors
- Incorporates theories of Lean Construction
- Collaborate intensely
- Optimize the whole
- Improve continuously
- Innovate
- Build trust

# The Collaboration Document

- Trust/Collaboration
- Management Group is decision making body
- Tri-party agreement with each party maintaining individual responsibilities
- Drives out waste by
  - Eliminating RFIs
  - Eliminating rework
  - Using innovative scheduling/planning techniques
  - Only doing what is necessary to obtain permits and permit field to perform work
  - Resolve disputes early/independent expert/discourage lawsuits
  - Eliminate GMP which eliminates counterproductive behavior
- Target Value Design making explicit that value, cost, schedule & constructability are basic components of design.

## **The Collaborative Agreement**

- Tri-party Agreement
  - Owner, Designer and Constructor all sign
  - Collaborative Core Management Group
    - Consensus decision-making
    - Critical specialty contractors, suppliers can join Management Group through joining agreements but voting rights remain with original Management Group members
    - Management Group selects other team members.

## **The Collaboration Agreement**

- Reliable Commitments
- Communications Protocol
- Electronic Communications protocol.

## **The Collaborative Agreement**

- Incentives
  - Goal
  - Financial Incentive Program
- Risk sharing.

## **The Collaborative Agreement**

- Collaborative Planning
- Collaborative Design
- Collaborative Problem-solving and Dispute Resolution.

## **The Collaborative Agreement**

- Overall Project Budget
- Construction Control Estimate
  - Construction Phase Contingency
- Zero RFI goal
- No LDs.

## **Management Group**

- Management Group = Owner, Designer and Contractor
- Provide day-to-day leadership and governance to the project
- Define project criteria
- Establish communication protocol
- Manage budget and design process
- Implement production control (Last Planner System)
- Select other team members
- Resolve problems
- Optimize the whole

## **Attributes Required of Management Group**

- Candor and thick skin
- Enthusiasm for change and improvement
- Commitment to goals and principles
- Ability to decide and commit
- No hierarchy

## **Important Revelations**

- GMP Contracts and management styles drive counterproductive behaviors
- GMP Contracts drive territorial behavior
- Parties are often afraid to make decisions
- In traditional Contracts cooperation can actually reduce profit
- Every man for himself – no incentive for trades to work collaboratively in the execution of the project