Contracts Built by Consensus for the Project’s Best Interest

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Construction Trends
Collaboration and Integration

- Role of Owner, Contractor, Subcontractor, and Designer
- Alternative Project Delivery
- Collaboration
- Preconstruction Services
- Value Engineering
- BIM and Technology
- Green Construction
- Frustration with Litigation and Inefficiencies
ConsensusDOCS – A better path forward

“It is ironic that the one industry in the country which more than all others depends upon coordination, cooperation and teamwork among multiple participants should be the country’s most adversarial industry.”

- Construction Industry Institute
Why Consensus is Needed?

- Perception of Bias
  - Traditionally drafted by One Association

- 54 different “standard documents” in some markets

- Modifications Exceed the length of the original “standard” agreement

- Parties try to Push Risk Away, rather than Properly Allocation and Manage Risk
ConsensusDOCS
The New Voice of the Industry

- One Rule - Best Practices and Fair Risk Allocation

- A CONSENSUS drafted by, Designers, Owners, Contractors, Subcontractors & Sureties (DOCS)

- All Parties held a Seat & Equal Voice at the drafting table
Who are the ConsensusDOCS Drafters and Endorsers?
Transforming the Industry
Importance of Standard Agreements

- Consistent and coordinated terms
- Reduced transactional costs
- Reference point for negotiations and manuscripted "original" contracts
- Familiarity – terms, philosophy, location
- Reference point for negotiations
How Consensus was Reached Among 21 Leading Associations?

A sneak peak into a ConsensusDOCS Drafting Session . . .
Herding Cats
How Consensus was Reached

- Active Listening
- Shared Vision = “Best Interests of the Project” & Balanced Risk Allocation
- Industry trend towards collaboration and integration
- Begin negotiations with a better foundation
How Consensus was Reached?

- Shared Responsibilities and Benefits:
  - Education, Communication, Marketing
- Different Levels of Participation:
  - AGC & COAA contributed contracts programs
- Contract-by-Contract Endorsement
- Supplementary “Guidebook”
Comprehensive Catalog
72 Contract Documents

- Consensus 200 Series: General Contracting
- Consensus 300 Series: Tri-Party Collaborative Agrm’t
- Consensus 400 Series: Design-Build
- Consensus 500 Series: CM At-Risk
- Consensus 700 Series: Subcontracting
- Consensus 800 Series: CM, Agency & Program Management
Some Highlights
General Conditions

- Owner is encouraged to be an active participant
  - A/E’s role does not default as final administrator

- Parties communicate directly and establish positive relationships

- Insurance coverage is utilized to cover uncontrollable risk

ConsensusDOCS
Less is More

- One integrated document – GCs and Agreement
- Written in a understandable and precise language
Relationship between the Parties

First provision in all agreements:

“The Owner and the Contractor agree to proceed with the Project on the basis of mutual trust, good faith and fair dealing.”
Ethics (2.2.1)

- Avoidance of conflicts
- Affirmatively states there are no contingent fees or gratuities to or from either Party
- Flows to agents, officers and employees
Correction of Discovered Defective Work (3.9)

Affords Contractor the opportunity to correct defective work
  o (Contractor’s option)
Retainage (9.2.4)

- Retainage is an optional Owner election

- After 50% of the Work is complete, the Owner shall not withhold additional retainage (Section 9.2.4.1)

- Owner may elect to withhold less retainage or accept retainage bond in lieu of retainage
Retainage

Upon substantial completion, the Owner shall pay all monies owed under the contract, including remaining retainage, and withhold a sum equal to 200% of the estimate of the cost to reach final completion.
Dispute Resolution

- Parties must attempt to mitigate claims by communicating directly before escalation claims
  - Project Level
  - Management Level

- Optional Project Neutral or Dispute Review Board
  - Must visit the site and make finding w/i 5 days

- Mediation is required

- Parties decide - Arbitrate or Litigate
  - Current AAA rules for arbitration
  - Non-Prevailing party pays
Consequential Damages and Liquidated Damages

- Limited waiver of consequential damages (Sections 6.5 and 6.6)

- Owners may specify liquidated damages and other provisions that are excluded

- Insured items are excluded

- Liquidated damages may be measured from substantial completion or final completion
Indemnification (10.1.1-.2)

- Contractors and Owners are responsible for their actions but not others’
- Parties can recoup defense costs beyond one’s negligence (no duty to defend)
- Encourages proper level of insurance
Additional Insured/OCP
Section 10.5

- Owner decides applicable insurance coverage
- Owner pays documented additional costs, if any
- Additional Insured for “the extent caused by” Contractor’s negligence, or
- OCP.
Mechanic’s Liens/Waivers

§§ 9.2.3.1 and 9.2.3.2

Contractor shall provide conditional lien and claim waivers in the amount of the application. The Contractor shall not be required to sign unconditional waivers, prior to receiving payment for more than it has been paid . . . .
Order of Precedence
Section 14.2

- Provides an order for interpreting contract documents
- Avoids unneeded litigation costs
- Most recent contract documents govern
- Change Orders = highest precedence
Schedule

ConsensusDOCS contemplate Owner approval of the schedule.

ConsensusDOCS allows the Owner to determine the sequence of work provided it does not “unreasonably” interfere with the Schedule.
Change Order Payment

If there is a dispute in the cost of changed work the ConsensusDOCS call for the Owner to pay 50% of the estimated cost pending resolution of the dispute.

This 50% payment concept in the ConsensusDOCS also applies to disputes over changes in scope.
ConsensusDOCS Bond Forms

- AIA A312, 45-day provision hard deadline to complete investigation and respond

- ConsensusDOCS 260 more reasonable timeframe

- ConsensusDOCS = 9 different bond forms.
Owner-A/E Agreement 240

- ConsensusDOCS catalog is complete

- Contracts presume that the architect is the lead designer
Ownership of the Documents

- Owner may use plans for renovation or upon early termination
- A/E receives full indemnification
- Parties can negotiate full transfer of copyright in the documents for an additional cost.
Electronic Communications Protocol
ConsensusDOCS 200.2

IT Management Team

Owner IT Administrator
Contractor IT Administrator
Architect/Engineer IT Administrator
Electronic Communications Protocol
ConsensusDOCS 200.2

- Comprehensively addresses the use of electronic communications, including BIM
- Flexible Agreement
  - Stand Alone
  - Addendum to Any Contractual Relationship
- Allows reliance on faxes or emails
- Determines acceptable formats and technology
- Parties select only applicable technologies
ConsensusDOCS 300
The Contact that Breaks the Mold

- Owner, Designer & “Constructor” all sign the same agreement
- Shared gain and Shared Pain
- Strive towards consensus decisions
- Successfully implemented abroad and now in the U.S.
“... A relational contract that... recognizes that each party’s success is tied directly to the success of all other members of the Collaborative Project Team and encourages and requires the parties to organize and integrate their respective roles, responsibilities and expertise, to identify and align their respective expectations and objectives, to commit to open communications, transparent decision-making, proactive and non-adversarial interaction, problem-solving, the sharing of ideas, to continuously seek to improve the Project planning, design, and construction processes, and to share both the risks and rewards associated with achieving the Project objectives (Section 3.2)
“… 3.8.1 INTENT: The purpose of the Collaborative Project Delivery approach is to minimize the risk of delay, conflict and increased cost typically experienced by project participants in non-integrated project delivery.
Tri-Party Agreement
Should you “Tri” it?

- Based upon mutual trust
- More carrots than sticks
- Share in success and failure together
- Limitation of liability
Tri-Party Agreement

- No GMP
- Cost + fixed fee
- Incentives
  - shared savings and contingency preservation
  - safety and quality are factors
- Disincentives
  - All Parties can share in losses above PTCE
Planning for Success
ConsensusDOCS 300

- Project Target Cost Estimate (PTCE)

- Target Value Design
  - value, cost, schedule & constructability are design components

- Meetings and Communication Checklist
Innovative Risk Allocation

ConsensusDOCS 300

- Optional Safe Harbor Provision, or
- Traditional Risk Allocation
Subcontract Agreement
ConsensusDOCS 750

- Consistent with ConsensusDOCS 200
- Can be used with other agreements
- Subcontract governs if conflict with O-C Agreement
- Pay-when-Paid payment provision (8.3.4)
Now Available at www.ConsensusDOCS.org
ConsensusDOCS Commentary
Using DocuBuilder® Software

Construction Management Documents and
Program Management Documents
Modify standard contract text as needed for specific project conditions.
How Does DocuBuilder® Work?

Green text in the document panel indicates a global term that can be modified in one place for the whole project.
Questions?

To Purchase or Get Additional Info

www.consensusdocs.org or www.agc.org/contracts
Design Delegation 3.3

- Contractor shall examine Contract Documents and promptly report errors.
- Liability only if Contractor “knowingly fails to report a recognized problem”.
- Contractor is not acting as a design professional.
- Only liable for failure to report a known error.
Payment Terms

ConsensusDOCS: If payment is 7 days late, Contractor may stop work on 7 days written notice until full payment is made.

Work stopped under this provision will entitle the contractor to an equitable adjustment in time and cost resulting from the shutdown, delay and start-up.
Termination by Contractor

ConsensusDOCS: If the Contractor terminates for cause the Contractor can recover for: 1) payment for work performed; 2) any losses incurred, including demobilization; and 4) reasonable overhead and profit on work not performed.
Termination by Owner for Convenience

ConsensusDOCS: Contractor is entitled to:
- compensation for work performed,
- demobilization costs but not overhead and profit on work not performed; and
- an agreed premium.
Termination for Default

ConsensusDOCS: Notice to cure required followed by a 7 day cure period. If the default is not cured in 7 day period, then Owner must give notice of intent to terminate absent appropriate corrective action within 14 days. Total cure period of 14 days is prerequisite to termination for default.
Submittals

- ConsensusDOCS: All approved submittals become part of contract documents
ConsensusDOCS & AIA Contrasts

- Drafting Approach and Style
- Role of Owner and A/E
- Communications & Integration
- Party Relationships
- Underlying Philosophy
ConsensusDOCS & AIA Contrasts

- Use of Technology
- Risk Allocation
- Consequential Damages
- Dispute Avoidance and Mitigation
- Requirements & Drafting style
Owner Financing
(Section 4.2)

ConsensusDOCS: Contractor entitled to receive evidence of Owner’s ability to pay at any time. Contractor may terminate upon 7 days notice if Owner fails to provide information.