



Contracts Built by Consensus for the Project's Best Interest

Brian M. Perlberg

AGC Senior Counsel for Contracts and Construction Law

perlbergb@agc.org 703-837-5318

www.consensusdocs.org or www.agc.org/contracts

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

- o One Rule - Best Practices and Fair Risk Allocation
- o A CONSENSUS drafted by, Designers, Owners, Contractors, Subcontractors & Sureties (DOCS)
- o All Parties held a Seat & Equal Voice at the drafting table



Who are the ConsensusDOCS Drafters and Endorsers?



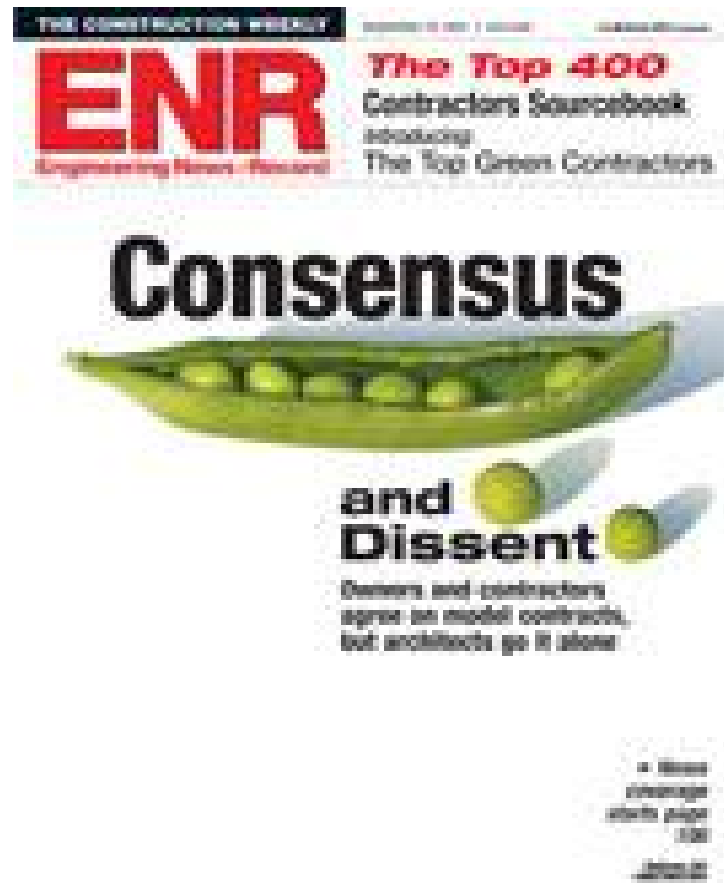
ConsensusDOCS™ proudly endorsed by the following:

ALL



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

- o Active Listening
- o Shared Vision = “Best Interests of the Project” & Balanced Risk Allocation
- o Industry trend towards collaboration and integration
- o 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

- o Consensus 200 Series: General Contracting
- o Consensus 300 Series: Tri-Party Collaborative Agrm't
- o Consensus 400 Series: Design-Build
- o Consensus 500 Series: CM At-Risk
- o Consensus 700 Series: Subcontracting
- o 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



Less is More

- o One integrated document – GCs and Agreement
- o 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

- (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

- o AIA A312, 45-day provision hard deadline to complete investigation and respond
- o ConsensusDOCS 260 more reasonable timeframe
- o ConsensusDOCS = 9 different bond forms.



Owner-A/E Agreement 240

- o ConsensusDOCS catalog is complete
- o 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

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



ConsensusDOCS 300

The Contact that Breaks the Mold

- o Owner, Designer & “Constructor” all sign the same agreement
- o Shared gain and Shared Pain
- o Strive towards consensus decisions
- o Successfully implemented abroad and now in the U.S.





300 Collaborative Agreement

"... 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)



300 Collaborative Agreement

"... 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?

- o Based upon mutual trust
- o More carrots than sticks
- o Share in success and failure together
- o 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

- o Optional Safe Harbor Provision, or
- o Traditional Risk Allocation



Subcontract Agreement ConsensusDOCS 750

- o Consistent with ConsensusDOCS 200
- o Can be used with other agreements
- o Subcontract governs if conflict with O-C Agreement
- o Pay-when-Paid payment provision (8.3.4)



Now Available at www.ConsensusDOCS.org

ConsensusDOCS

CONTACT US SITE MAP

HOME ABOUT CONSENSUSDOCS CONTRACT CATALOG CONTRACT INFORMATION NEWS & EVENTS SUPPORT

Designers
Owners
Contractors
Surety
coming together
for best practice
contract docs.

Who is ConsensusDOCS
The organizations behind
ConsensusDOCS

Why ConsensusDOCS
Reasons to use
ConsensusDOCS,
powered by DocuBuilder

How to buy ConsensusDOCS
A step-by-step guide

» PURCHASE

NASFA COAA MCAA NECA NIA

Start | Inbox - Microso... | ConDocs Purch... | Inbox - Thunde... | ConsensusDOC... | ConsensusDO... | Microsoft Power... | ConsensusDOC... | 4:22 PM



ConsensusDOCS Commentary

ConsensusDOCS - Microsoft Internet Explorer


File Edit View Favorites Tools Help

Back Forward Stop Home Search Favorites AutoFill Send to asic Settings

Address http://www.consensusdocs.org/information_product-commentary.html Go Links

Google G vasic Go Bookmarks 133 blocked Check AutoLink AutoFill Send to asic Settings

CONTACT US SITE MAP



HOME ABOUT CONSENSUSDOCS CONTRACT CATALOG CONTRACT INFORMATION NEWS & EVENTS SUPPORT

Contract Information

Home > Contract Information > Guidebook Commentary

Finding the Appropriate Contract
Meter Values
Guidebook Commentary

Guidebook Commentary

ConsensusDOCS Guidebook Commentary

[ConsensusDOCS Overview and 200](#)
[ConsensusDOCS 200.1](#)
[ConsensusDOCS 200.2](#)
[ConsensusDOCS 240](#)
[ConsensusDOCS 300](#)
[ConsensusDOCS 410](#)
[ConsensusDOCS 500](#)
[ConsensusDOCS 750](#)
[Bond Forms Guidebook](#)
[All Associations Guidebook](#)

PURCHASE

Quick Links

Looking for a list of our contracts? Find them in our [contract catalog](#).

What is [the difference between subscriptions and Meter Mode?](#)

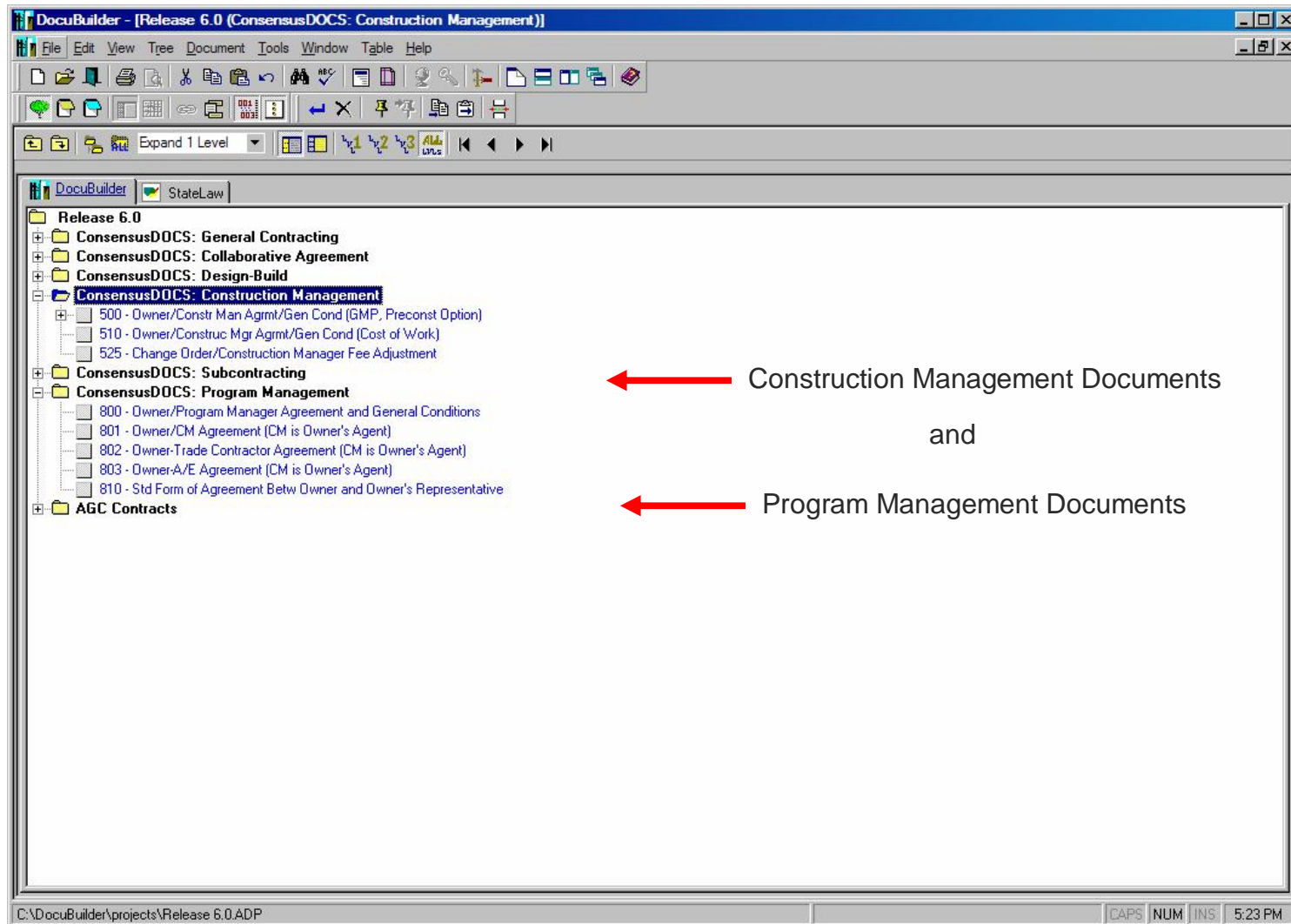
[What is DocuBuilder?](#)

© 2007, ConsensusDOCS
[Terms & Conditions](#) | [Disclaimer](#)

<http://www.consensusdocs.org/catalog.html> Internet



Using DocuBuilder® Software



DocuBuilder® Software

The screenshot displays the DocuBuilder software interface. The title bar reads "DocuBuilder - [Release 6.0 (200 - Owner/Contractor Agreement & General Conditions (Lump Sum))]". The menu bar includes "File", "Edit", "View", "Tree", "Document", "Tools", "Window", "Table", and "Help". The toolbar contains various icons for file operations and editing. The main window is divided into three panes:

- Left Pane (Tree View):** Shows a hierarchical structure under "Release 6.0". The selected item is "200 - Owner/Contractor Agreement". Other items include "200.1 - Amendment 1 Time and Price", "200.2 - Electronic Communications Pr", "202 - Change Order", "203 - Interim Directed Change", "204 - Request for Information", "205 - Owner/Contractor Agreement, S", "220 - Contractor's Qualification Staten", "221 - Contractor's Statement of Quali", "222 - A/E's Statement of Qualification", "240 - Owner/A-E Agreement", and "245 - Standard Short Form Agreement".
- Table of Contents (TOC) Pane:** A table with columns "#", "LVL", "N", "O", and "S". It lists sections like "ARTICLE 3 CONTRACTOR'S RESPONSIBILITIES", "3.1 GENERAL RESPONSIBILITIES", and "3.2 COOPERATION WITH WORK OF OWNER AND OTHERS".
- Main Text Editor:** Displays the text of the selected section, "ARTICLE 3 CONTRACTOR'S RESPONSIBILITIES". The text includes sections 3.1.1, 3.1.2, 3.1.3, 3.2, 3.2.1, 3.2.2, and 3.2.3.

A red arrow points from a text box on the left to the text editor, indicating the modification of standard contract text.

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

The screenshot displays the DocuBuilder software interface. The main window title is "DocuBuilder - [Release 6.0 (200 - Owner/Contractor Agreement & General Conditions (Lump Sum))]". The interface includes a menu bar (File, Edit, View, Tree, Document, Tools, Window, Table, Help), a toolbar, and a document panel on the left. The document panel shows a tree view with "Release 6.0" and "ConsensusDOCS: General Contract" expanded. The main document area displays a table with columns "#", "LVL", "N", "O", and "S". The table contains rows with numbers 0149 through 0155. To the right of the table, there is a text area with green text, which is highlighted by a red arrow pointing from the text box on the left. A "Summary info for Release 6.0" dialog box is open, showing fields for "File Name", "File Path", "Project Name", "Project ID", "Specific Terms", "Owner", "Design-Builder", "Design Prof", "Contractor", "Project Location", "Construction Mngr", and "Constructor". The "Project Name" field is filled with "Release 6.0". The "Specific Terms" section has a dropdown menu set to "Contractor". The "Project Location" field is filled with "the State in which the Project is located". The "Construction Mngr" and "Constructor" fields are filled with "Construction Manager" and "Constructor" respectively. The dialog box has "OK" and "Cancel" buttons. The status bar at the bottom shows "Press F1 for Help" and "CAPS NUM INS 2:54 PM".



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

- o 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

- o Use of Technology
- o Risk Allocation
- o Consequential Damages
- o Dispute Avoidance and Mitigation
- o 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.

