How to Leverage the New 2017 ConsensusDocs Standard Contracts to Stay Ahead of the Curve

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Defining an “Unsuccessful” Construction Project

- Unsatisfied Owner
- Over Budget
- Delayed Completion
- Claims/Litigation.
Construction (In)efficiency

Construction is the only industry that has become less efficient over the past 50 years.
Construction Contracts Are Unique

Commercial Attorney Knows

• Law/litigation
• His/her own business
• Reactively solves problems
• Protects client’s interests
• Strives to shed all risk

Construction Attorney Knows

• Law/litigation
• Knows the Construction Business
• Problem solver, not a problem maker
• He/she is overhead
• Construction risk allocation
• The balance between allocating risk and project success.
The Evolution of Man to the Evolution of Construction Lawyer
The Role of the Construction Contract

• What is the goal of your contract?
  • Create silos of duties/responsibilities?
  • Protect the interests of one party over another?
  • Shift risk?
  • Immunize a party?

• If the goal of the business relationship is to create a successful project, is your contract drafted to achieve that goal?
The Role of the Construction Contract

• Traditional “form” construction contracts are prepared by trade groups (i.e. architects, engineers) with the goal of minimizing risk for those participants

• Success for one participant does not mean a successful project

• Buyer beware – not all “form” construction contracts are created equally (or fairly).
ConsensusDocs Standard Contracts provide a better foundation to build:

- Input from All Sectors
- Reduce Inefficiencies
- Use Best Practices
- Appropriate Risk Allocation
- Focus on “Project Success”.
ConsensusDocs Overview and Philosophy

• Active Owner
• Fair Contracts w/ Best Practices
• Reduce Transactional Costs & Inefficiencies.
The ConsensusDocs Coalition
40 Construction Industry Associations

[Logos of various construction industry associations]
100+ Contracts

200 Series – General Contracting
300 Series – Collaborative
400 Series – Design-Build
500 Series – Construction Management
700 Series – Subcontracting
800 Series – Program Management
900 Series – Public-Private-Partnership (P3)
Refinements addressing changes in case law, the insurance market, technological advances, and terminology refinements are being published.
Fostering Direct Communication

CD200 = **Philosophy of direct communications:**

- “Each Party agrees to act on the basis of mutual trust, good faith, and fair dealing.”

- Tiered dispute process with “Direct Discussions”

- Removes A/E from payment application process.

Other older approaches:

- “…the Owner and Contractor **shall endeavor to communicate with each other through the Architect** about matters arising out of or relating to the Contract”).
Payment

• A/E eliminated from payment application unless Owner directs (“The Constructor shall submit to the Owner, and if directed, Design Professional, a monthly application for payment…”) (§9.2.1)

Compare to other form contracts:

• “Based on the Architect’s evaluations of the Contractor’s Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.”
ConsensusDocs - Dispute Resolution

• Dispute related costs don’t put construction in place and therefore each dollar is inefficient overhead

• CD200 Dispute Resolution Process strives to have the project participants resolve disputes quickly and efficiently:
  - Direct Discussions
  - Dispute Mitigation
  - Mediation
  - Arbitration or Litigation
Other Contracts - Dispute Resolution

Compare to AIA form contracts:

- **§ 15.2.1** Claims, excluding those arising under Sections 10.3, 10.4, 11.3.9, and 11.3.10, **shall be referred to the Initial Decision Maker for initial decision**. The Architect will serve as the Initial Decision Maker, unless otherwise indicated in the Agreement. Except for those Claims excluded by this Section 15.2.1, **an initial decision shall be required as a condition precedent to mediation** of any Claim arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Initial Decision Maker with no decision having been rendered. **Unless the Initial Decision Maker and all affected parties agree, the Initial Decision Maker will not decide disputes between the Contractor and persons or entities other than the Owner.”**
ConsensusDocs Mediation

• JAMS listed as a provider
• Defaults to AAA rules and administration
• Party-selected rules + provider is now listed
• DRB language clarified not to coordinate with ConsensusDocs
  200.5 DRB addendum
• ConsensusDocs has a track record of billions of construction put in place while keeping you out of court.
Indemnification

• Now covers INTENTIONALLY wrongful acts
• Indemnification doesn’t necessarily match insurance coverage (no insurance self sabotage).
ConsensusDocs - Indemnification

10.1.3 10.1.1 To the fullest extent permitted by law, the Constructor shall indemnify and hold harmless the Owner, the Owner’s officers, directors, members, consultants, agents, and employees, the Design Professional, and Others (the Indemnitees) from all claims for bodily injury and property damage, other than to the Work itself and other property insured, including reasonable attorneys’ fees, costs and expenses, that may arise from the performance of the Work, but only to the extent caused by the negligent or intentionally wrongful acts or omissions of the Constructor, Subcontractors, Suppliers, Subsubcontractors, or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable. The Constructor shall be entitled to reimbursement of any defense costs paid above the Constructor’s percentage of liability for the underlying claim to the extent provided for by the subsection below §10.1.2.
Other Contracts - Indemnification

To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, Architect, Architect’s consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys’ fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. AIA A201 §3.18.1.
Termination for Cause

• First notice is 7 days, second notice is now 3 days

• Improper termination for cause no longer defaults to a termination for convenience

• Use of terminated Constructor’s equipment required written permission.
11.2 NOTICE TO CURE A DEFAULT If the Constructor persistently fails to supply enough qualified workers, proper materials, or equipment to maintain the approved Schedule of the Work, or fails to make prompt payment to its workers, Subcontractors, or Material Suppliers, disregards Laws or orders of any public authority having jurisdiction, or is otherwise guilty of a material breach of a provision of this Agreement, the Constructor may be deemed in default. If the Constructor fails within seven (7) Days after receipt of written notice from Owner to commence and continue satisfactory correction of such default with diligence and promptness, then the Owner shall give the Constructor a second notice to correct the default within a three (3) day period. The second notice to Constructor, and if applicable, the surety, may include that Owner intends to terminate this Agreement for default absent appropriate corrective action.
§ 14.2.2 When any of the above reasons exist, the Owner, upon certification by the Initial Decision Maker that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor’s surety, if any, seven days’ written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

1. Exclude the Contractor from the site and take possession of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;

2. Accept assignment of subcontracts pursuant to Section 5.4; and

3. Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.
Termination for Convenience

• Includes reasonable attorney’s fees for termination

• Negotiated for premium for Prime Agreement

• Limited ability to terminate Sub for convenience (CD 750, §10.4).
Builder’s Risk Insurance

• Builder now buys Builder’s Risk policy instead of Owner
  • Reflects industry norm
  • Up to 50% savings realized
  • Builder must factor this into its pricing
  • Builder is responsible for deductible and co-insurance

• Language carefully crafted to cover renovations and existing structures

• Risk of Loss is now upon the Constructor in 750 & 751 Subcontracts.
Insurance

• Owner’s Liability Insurance and Business Income Insurance are both eliminated

• Pollution Liability Insurance (PLI) is added as a check-the-box option for projects

• Owner must provide owner info if it holds PLI.
ConsensusDocs Insurance Vertical, Not Horizontal Exhaustion

“Both primary and excess of Constructor and its Subcontractors shall be primary and non-contributory to any insurance available to AI”

- Additional Insurance at §10.4.1
- Horizontal = excess policy isn’t triggered until all primary & excess is gone
- Vertical = downstream parties pay b/f upstream.
“And Now for Something Different”

ConsensusDocs Article 8 Changes

• Interim Directive Changes now = “Interim Directive”

2.4.15 “Interim Directed Change Directive” is a change to the written order containing Work instructions directed by the Owner pursuant to section §8.2.

• Includes written instructions that may not impact time or money

• Payment of 50% of disputed amount = now based on invoices (not Constructor’s estimate)

• Changes are to be memorialized in 7 days.
8.2.1 The directing Constructor to perform Work that Owner and the believes is not a change. If the Parties disagree that the Interim Directed work is within the scope of the Work, Constructor shall perform the disputed Work and furnish Owner with an estimate of the costs to perform the disputed work in accordance with Owner’s interpretations.

8.2.3 The Parties shall negotiate expeditiously and in good faith for appropriate adjustments, as applicable, to the Contract Price or the Contract Time arising out of an Interim Directed Change Directive. As the directed Work is performed, the Constructor shall submit its costs for such Work with its application for payment beginning with the next application for payment within thirty (30) Days of the issuance of the Interim Directed Change Directive. If there is a dispute as to the cost to the Owner, the Owner shall pay the Constructor fifty percent (50%) of its estimated actual (incurred or committed) cost to perform such Work. In such event, the Parties reserve their rights as to the disputed amount, subject to the requirements of ARTICLE 12. Owner’s payment does not prejudice its right to be reimbursed should it be determined that the disputed work was within the scope of the Work. Constructor’s receipt of payment for the disputed work does not prejudice its right to receive full payment for the disputed work should it be determined that the disputed work is not within the scope of the Work. Undisputed amounts may be included in applications for payment and shall be paid by Owner in accordance with this Agreement.
Stalling the Project over Change Directive Disputes

• **AIA §7.3.5** If the Contractor disagrees with the adjustment in the Contract Time, the Contractor may make a Claim in accordance with applicable provisions of Article 15.

• **AIA §7.3.6** Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect of the Contractor’s agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

• **AIA § 7.3.9** Pending final determination of the total cost of a Construction Change Directive to the Owner, the Contractor may request payment for Work completed under the Construction Change Directive in Applications for Payment. The Architect will make an interim determination for purposes of monthly certification for payment for those costs and certify for payment the amount that the Architect determines, in the Architect’s professional judgment, to be reasonably justified. The Architect’s interim determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a Claim in accordance with Article 15.
Did You Notice the Change to “Notice”?

- Notice by any effective means
  - Automatic acceptance via EMAIL

- Except for Termination → mail with receipt

- Compare w/ AIA A201 claim/non-claim bifurcation.

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§ 1.6 Notice
§ 1.6.1 Except as otherwise provided in Section 1.6.2, where the Contract Documents require one party to notify or give notice to the other party, such notice shall be provided in writing to the designated representative of the party to whom the notice is addressed and shall be deemed to have been duly served if delivered in person, by mail, by courier, or by electronic transmission if a method for electronic transmission is set forth in the Agreement.

§ 1.6.2 Notice of Claims as provided in Section 15.1.3 shall be provided in writing and shall be deemed to have been duly served only if delivered to the designated representative of the party to whom the notice is addressed by certified or registered mail, or by courier providing proof of delivery.
• Design Professional must provide construction documents necessary to bid and build the project

• Commissioning assistance = basic service.
No Fiduciary Duty ConsensusDocs 240 & 245

CD200 – Eliminates any contractually created fiduciary duty language:

• 2011 “covenants” eliminated
• 2016 “further the interests” eliminated.
Other Contracts - Fiduciary Duty

• The Construction Manager **accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner** to cooperate with the Architect and exercise the Construction Manager’s skill and judgment **in furthering the interests of the Owner**; to furnish efficient construction administration, management services and supervision; to furnish at all times an adequate supply of workers and materials; and to perform the Work in an expeditious and economical manner consistent with the Owner’s interests

• Does **NOT** flow consistently to Architect Agreement

• **Courts have found this language establishes a FIDUCIARY DUTY.**
ConsensusDocs are Written in Plain English

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QUESTIONS?
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