

ConsensusDocs Contracts:

How Better Contracts Lead to Better Results and How
ConsensusDocs Can Help.



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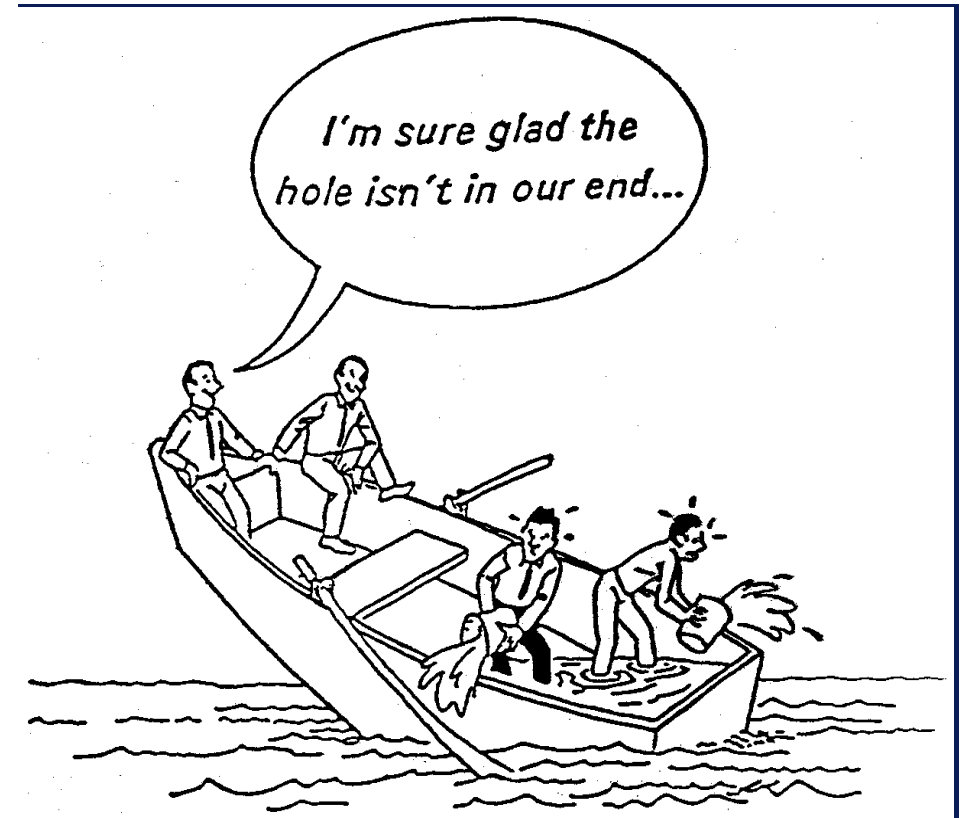
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Contracts Negotiation Strategy

- Contracts should memorialize a business relationship (not declare war)
- Win-Win vs Win-Lose
- A bad project is usually a failure for all.



Typical Construction Contracts

- **Biased and Unfair** - standard contracts are perceived to protect the members of the association who drafted the contract
- Modifications exceed the original “standard form”
- Parties push risk instead of manage or mitigate it
- Contrasts with clear industry trend towards collaboration.

What Poor Contract Forms Can Do to Project Results

- Canadian Study **5 EXCULPATORY CLAUSES INCREASES PRICE 8-20%**
 - Site Conditions
 - Delays
 - Liquidated Damages
 - Indemnification
 - Sufficiency of Contract Docs
- Construction Industry Institute Study on contracts
 - Unnecessary Risk Contingencies
 - Best Contractors Seek the Best Owners
 - Worst contracts get worse results.

The ConsensusDocs Coalition

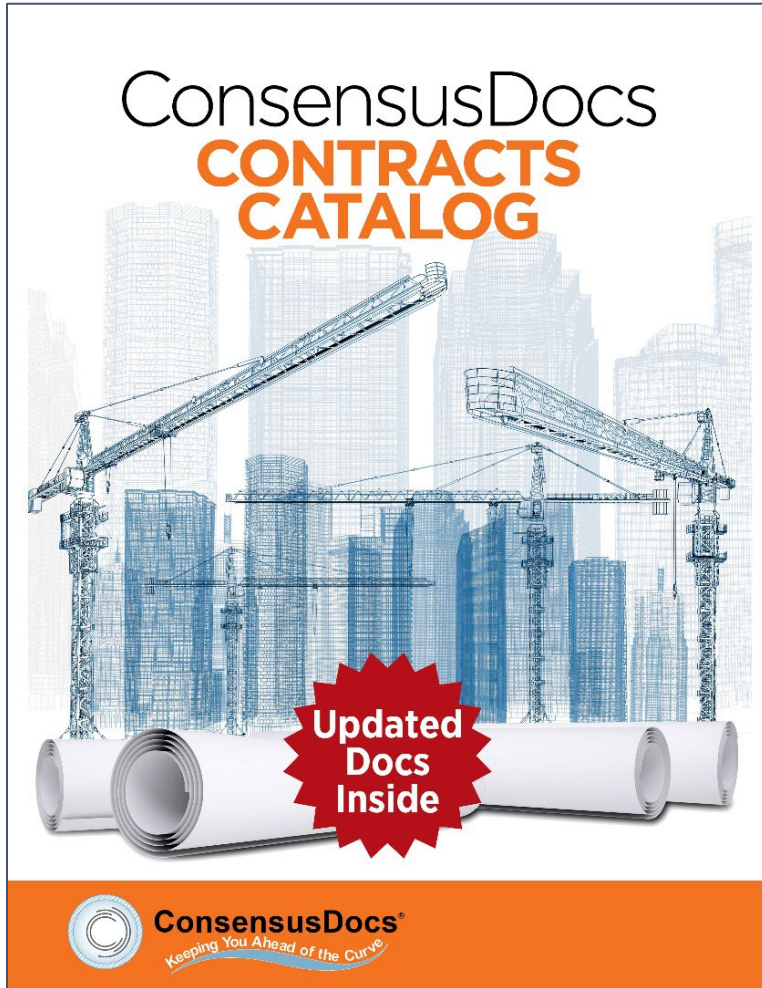
40+ Leading Construction Industry Associations



100+ Contracts



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- 200 Series – General Contracting
- 300 Series – Collaborative
- 400 Series – Design-Build
- 500 Series – Construction Management
- 700 Series – Subcontracting
- 800 Series – Program Management
- 900 Series – P3s

ConsensusDocs 14+ Years



1 Goal

Improve the design and construction industry with best practice contracts that are fair to all parties.



11

Years in business.



100+

Standard contract documents.



40

Leading construction associations participating in the Coalition.



3,000+

Subscribers.



\$1,000,000+

In donated free educational licenses.



\$40+ Billion in construction contracts



NO REPORTED LITIGATED CASES

ConsensusDocs Agreement Structure and Philosophy

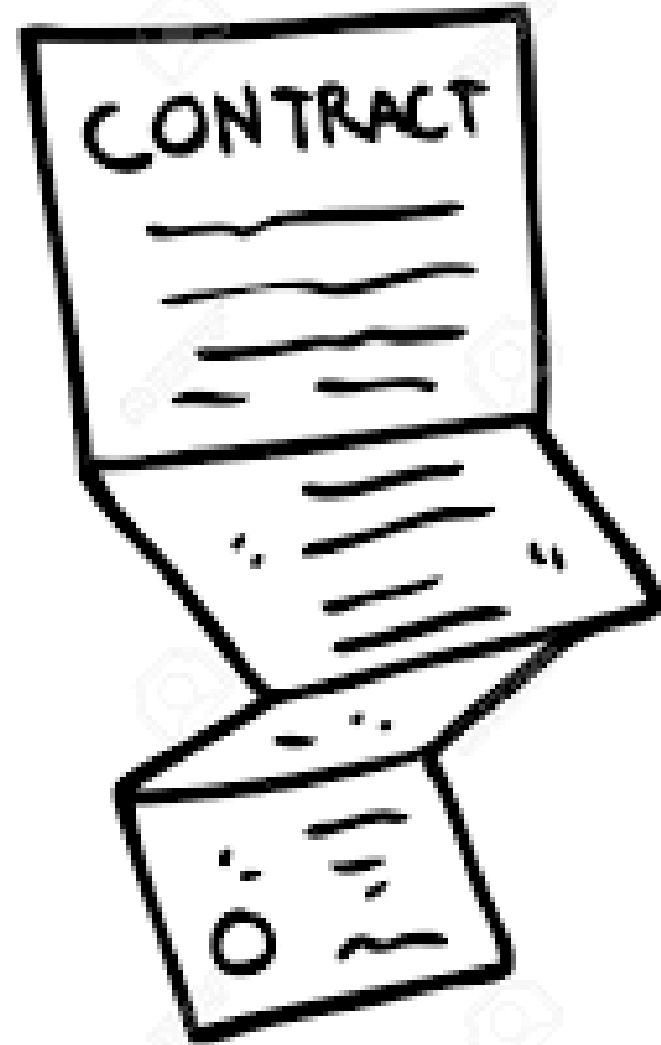
ConsensusDocs

- Integrated Terms and Cond.
- General Contractor = Constructor
- A/Es = Design Professional
- Owner is actively involved
- Constructor and Owner can actually talk to one another to Add Value.

AIA

- Separate AIA A201 Terms
- “Architect” is used almost 300X in A201 alone .

Biggest
Complaint
from
Contractors
About
Contracts is?



What is the Commonality of Failed Projects?



- **Lack of Communication**
- **Avoid Communication Silos** thru Architect – traditional contract approach
- **Direct and positive Party communications** – Owner and Builder relationship = Biggest Difference in ConsensusDocs.

ConsensusDocs

Dispute Mitigation and Resolution

- **Mitigate** through mandatory direct Party communications
 - Project Level
 - Management Level
- Optional Project Neutral or Dispute Review Board (DRB)
 - Must visit the site and make finding w/in 5 days
- Mediation is required
- Parties decide - Arbitrate or Litigate
 - Current AAA rules for arbitration
 - **Non-Prevailing party pays, including legal fees.**



ConsensusDocs®
Keeping You Ahead of the Curve



Winner! Winner!

COSTS The costs of any binding dispute resolution procedures and reasonable attorneys' fees shall be borne by the non-prevailing Party, as determined by the adjudicator of the dispute.

CD 200 §12.5.1

Project Financing Info: No Info NO Payment



- Has teeth – no info → Work can stop
- CD 290 and 290.1 financial questionnaire
- Doesn't create unclear standards to make a showing of impacted work.



Ethics, We Got E'm

2.1.1. Ethic. Each Party shall perform with integrity

- Avoid conflicts of interest
- Warrant not contingent fees or preferential treatment.

Price Escalation Clause - ConsensusDocs 200.1

- **ConsensusDocs 200.1 Potentially Time and Price-Impacted Materials Amendment**
 - Balanced document that carries the possibility that if prices fall, payment would also be decreased (Section 3.1)
 - Provides for caps on the amount of increase or decrease if mutually agreed by the parties (Section 3.3).



Retainage

ConsensusDocs 200	AIA 201
Once the entire work is 50% complete, Owner may not withhold additional retainage and shall pay Constructor the full amount of what is due on account of progress payments (9.2.4.1)	Even upon substantial completion of the entire work of the project, Owner may limit release of retainage to designated portions of work that are substantially complete(9.8.5)
Owner may release retainage for work of early finishing trades and subcontractors upon Owner's acceptance of their work (9.2.4.3)	Result: Owner may withhold retainage as to early work that has been accepted, e.g., early finishing trades and subcontractor work, until substantial completion of the entire work of the project



Payment- ConsensusDocs Improvements

- Constructor is now paid in **15 Days** instead of 20 Days (§9.2.1)
- No further retention at 50% project complete
- Retention for Final Completion is now 150% instead of 200%
- Now Owner, not A/E approves payment app.



Indemnification

- Now covers INTENTIONALLY wrongful acts
- Indemnification generally should make insurance coverage (but no insurance self sabotage, that's a business risk)
- Claw back for defense costs beyond your % of fault.



Property Insurance: Additional Insured

ADDITIONAL GENERAL LIABILITY COVERAGE Constructor shall/ shall not require Subcontractor to purchase and maintain additional liability coverage, primary to Constructor's coverage pursuant to the subsection immediately above. If required, the additional liability coverage required of Subcontractor shall be: AI or OCP

Any documented additional cost in the form of a surcharge associated with procuring additional general liability coverage in accordance with this subsection shall be paid by Constructor directly or costs may be reimbursed by Constructor to Subcontractor by increasing the Subcontract Amount to correspond to the actual cost required to purchase and maintain the coverage. Before commencing the Subcontractor shall provide a certificate of insurance for a



Force Majeure

ConsensusDocs CD 200, section 6.3.1

If Constructor is delayed at any time in the commencement or progress of the Work by any cause beyond the control of Constructor, Constructor shall be entitled to an equitable extension of the Contract Time. Examples of causes beyond the control of Constructor include, but are not limited to, the following: (a) acts or omissions of Owner, Design Professional, or Others; (b) changes in the Work or the sequencing of the Work ordered by Owner, or arising from decisions of Owner that impact the time of performance of the Work; (c) encountering Hazardous Materials, or concealed or unknown conditions; (d) delay authorized by Owner pending dispute resolution or suspension by Owner under §11.1; (e) **transportation delays not reasonably foreseeable**; (f) labor disputes not involving Constructor; (g) general labor disputes impacting the Project but not specifically related to the Worksite; (h) fire; (i) Terrorism; (j) **epidemics**; (k) **adverse governmental actions**; (l) unavoidable accidents or circumstances; (m) adverse weather conditions not reasonably anticipated.



Unconditional Lien Waivers

ConsensusDocs Explicitly Prohibits Unconditional Lien waivers

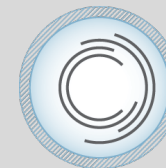
“In no event shall Subcontractor be required to provide an unconditional waiver of lien or claim, before receiving payment or in an amount in excess of what it has been paid.” **CD 750 8.8.**

Design Delegation Professional Liability Insurance

- ConsensusDocs recognizes that delegated design will be performed by more than one Sub and the General Contractor. The “in responsible architect” has some design coordination responsibility
- PL insurance contains prior acts coverage with explicit self- insured retention maximum limits.

Fuzzy Work Scope Order of Precedence

ConsensusDocs	Other Contracts
Provides an order for interpreting conflicting contract documents	Golden Rule: He who has the gold, makes all the rules.
Most recent contract documents govern.	Makes Constructors mind-readers by intuiting “intended results” . . . so they need to price that contingency into \$.



Builder's Risk Insurance

- Builder now buys Builder's Risk policy instead of Owner §10.3
 - Up to 50% cheaper
 - Procuring party is responsible for deductible and co-insurance
 - Owner can purchase and give notice
 - Now need to factor cost into hard bid price

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

“And Now for Something Different” Changes

- Interim Directive Changes now =“Interim Directives” in ConsensusDocs
 - Similar to “construction change directive (CCD)”
- Payment of **50% of disputed amount** = now based on invoices (not Constructor’s estimate)
 - Avoids turning a Builder into a Banker
- Include written instructions that don’t impact time or \$
- Changes are to be memorialized in 7 days.



Proven Results for St of Iowa

Iowa DAS' using AIA vs ConsensusDocs

Using AIA	Using CDs
68 project/year	98 projects/year
\$40M/ year	\$80M/year
Claim/s on EVERY PROJECT	NO Formal CLAIMS on over \$400M in construction



Top Advantages with ConsensusDocs Contracts

- **Active Owner** vs passive + A/E given authority w/o corresponding responsibility
- **Direct and positive communications** rather than contractual silos
- **Clear** w/ integrated general conditions vs. legalese
- Track record = less litigation case history + better project results
 - Fair works (get best contractors at their best prices)
- Best practices and industry firsts
 - IPD, BIM, Lean, Green, project financial
- **Updated** more often than once per decade.

Questions?



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