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THE OFFICIAL EDUCATIONAL JOURNAL OF THE AMERICAN SUBCONTRACTORS ASSOCIATION

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DECEMBER 2019

- ◆ The Key to More Efficient Construction Projects Is Collaborative Contracts
by Brian Perlberg, AGC Senior Counsel & ConsensusDocs Executive Director
- ◆ AIA or ConsensusDocs Contracts: Which Standard Construction Contracts Are Best For Your Project?
by Brian Perlberg, AGC Senior Counsel & ConsensusDocs Executive Director
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EDITORIAL PURPOSE

The Contractor's Compass is the monthly educational journal of the Foundation of the American Subcontractors Association, Inc. (FASA) and part of FASA's Contractors' Knowledge Network. The journal is designed to equip construction subcontractors with the ideas, tools and tactics they need to thrive.

The views expressed by contributors to *The Contractor's Compass* do not necessarily represent the opinions of FASA or the American Subcontractors Association, Inc. (ASA).

MISSION

FASA was established in 1987 as a 501(c)(3) tax-exempt entity to support research, education and public awareness. Through its Contractors' Knowledge Network, FASA is committed to forging and exploring the critical issues shaping subcontractors and specialty trade contractors in the construction industry. FASA provides subcontractors and specialty trade contractors with the tools, techniques, practices, attitude and confidence they need to thrive and excel in the construction industry.

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ABOUT ASA

ASA is a nonprofit trade association of union and non-union subcontractors and suppliers. Through a nationwide network of local and state ASA associations, members receive information and education on relevant business issues and work together to protect their rights as an integral part of the construction team. For more information about becoming an ASA member, contact ASA at 1004 Duke St., Alexandria, VA 22314-3588, (703) 684-3450, membership@asa-hq.com, or visit the ASA Web site, www.asaonline.com.

LAYOUT

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PRESIDENT'S LETTER



Dear ASA Members,

As 2019 comes to a close, I can simply say this; what a wonderful year it has been! We've shared SUBExcel in Nashville, TN, held chapter events, met during the Legislative Fly-In in DC, and shared countless newsletters, stories, and webinars that truly show just how strong the American Subcontractors Association is. We would not be the organization we are without each and every one of you.

As we look to 2020, I want to encourage you all to keep working hard for the subcontracting community. We are stronger together, and if we keep working and fighting together for the issues important to all of us, I can only imagine where we will be at the end of 2020.

I look forward to seeing all of you in Las Vegas, NV for SUBExcel! If you have not attended before, I must say that attending SUBExcel and taking the opportunity to learn from and network with all of your fellow industry leaders is immensely worthwhile, not only for you but for your company. There will be top-notch speakers, engaging education sessions, and some really fun events planned during the national convention. I truly hope to see all of you there on March 4-7, 2020!

As President of ASA, I wish you, the members, abundance, happiness, and most of all, peace. Best wishes for a happy holiday season, and my heartfelt appreciation for your past, present, and future loyalty to ASA. Best wishes for a wonderful and successful 2020!

Sincerely,

Anthony Brooks

2019-2020 ASA President



Dodge Momentum Index Increases in November

The Dodge Momentum Index moved 2.9% higher in November to 155.3 (2000=100) from the revised October reading of 150.9. The Momentum Index, issued by [Dodge Data & Analytics](#), is a monthly measure of the first (or initial) report for nonresidential building projects in planning, which have been shown to lead construction spending for nonresidential buildings by a full year. The increase in November was the result of a 6.5% increase in the institutional component, while the commercial component moved 0.7% higher.

The overall Momentum Index has staged somewhat of a resurgence over the last few months increasing nearly 15% from its lowest point earlier in the year. In fact, it is currently flirting with a new cyclical high. The month-to-month planning data continues to be lumpy in nature as the presence or absence of large projects leads to greater volatility. Nevertheless, the underlying trend of the Momentum Index continues to suggest that construction activity in 2020 will not crater but will moderately ease relative to this year's level.

In November, six projects each with a value of \$100 million or more entered planning. The leading institutional projects were the \$208 million first phase of Virginia Tech's Innovation Campus in Alexandria VA and the \$144 million ThedaCare Orthopedic Center Hospital in Appleton WI. The leading commercial projects were a \$180 million office building in Los Angeles CA and a \$125 million JW Marriott Hotel in Dallas TX.

Small Business Growth in First Half of 2019

The Kabbage Small Business Revenue Index reports small businesses in the U.S. achieved revenue growth across every state and industry in the first half (1H) of the calendar year 2019. The Kabbage Index Value (KIV), a value used to track revenue growth of small businesses, increased almost 22 points, from 136.8 to 158.4, indicating U.S. small businesses' median revenue grew 15.7% in the first six months of the year. This represents a 22% point increase compared to the same time period in 2018 and a large contrast from the second half of 2018 when small business revenue only grew 1.8%.

Drawing from real-time revenue data of more than 200,000 small businesses throughout the U.S., the Kabbage Small Business Revenue Index is an aggregated and anonymized analysis of small business performance. To measure ongoing revenue growth, the KIV adjusts accordingly to the monthly median-revenue growth of small businesses. With an initial Kabbage Index Value of 100 in January 2017, small businesses' median revenue has grown a total of 58% through June 30, 2019.

Set apart from other small business research tools, the Kabbage Small Business Revenue Index tracks truly small businesses. Of all businesses evaluated, 83% have fewer than 10 employees with median annual revenues of \$280,000.

[Click here to read the full article.](#)

Changes to Crane Operator Testing Eligibility

The National Commission for Certification of Crane Operators (NCCCO) no longer will require a physical evaluation for workers to be eligible to take its certification exams. Per a Monday, November 18, 2019 press release, NCCCO will be relying on employers to determine whether their workers are physically qualified to operate the equipment as of January 1, 2020. NCCCO notes that physical demands on a crane operator can change depending on the type and configuration of a crane, along with the work environment. NCCCO states that these are "facts known only to an employer rather than the certification body."

Are You Working To Engage Young People in the Trades? Tell ASA About It!

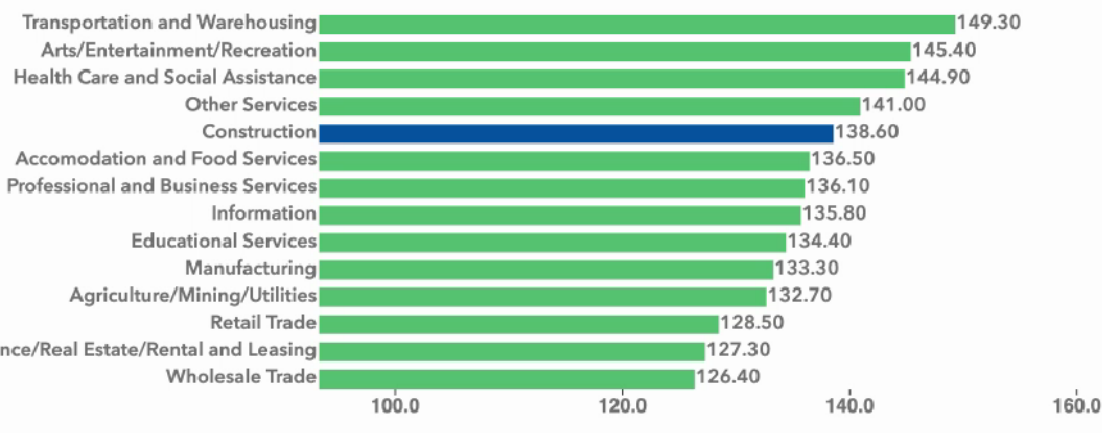
We want to hear from you! Tell us how you are working to engage young people and new employees in the trades. Are you working with programs like [Helmets to Hardhats?](#) Does your company have a partnership with a local community college, university or apprenticeship program?? How do you connect with your local community?

The American Subcontractors Association is currently working to gather all of your amazing ideas to be able to share with other ASA chapters around the country. Let us know how you reach out to young, new talent, as well as your best practices in each initiative.

Have something exciting to share? Email us your ideas at communications@asa-hq.com. Call us today!

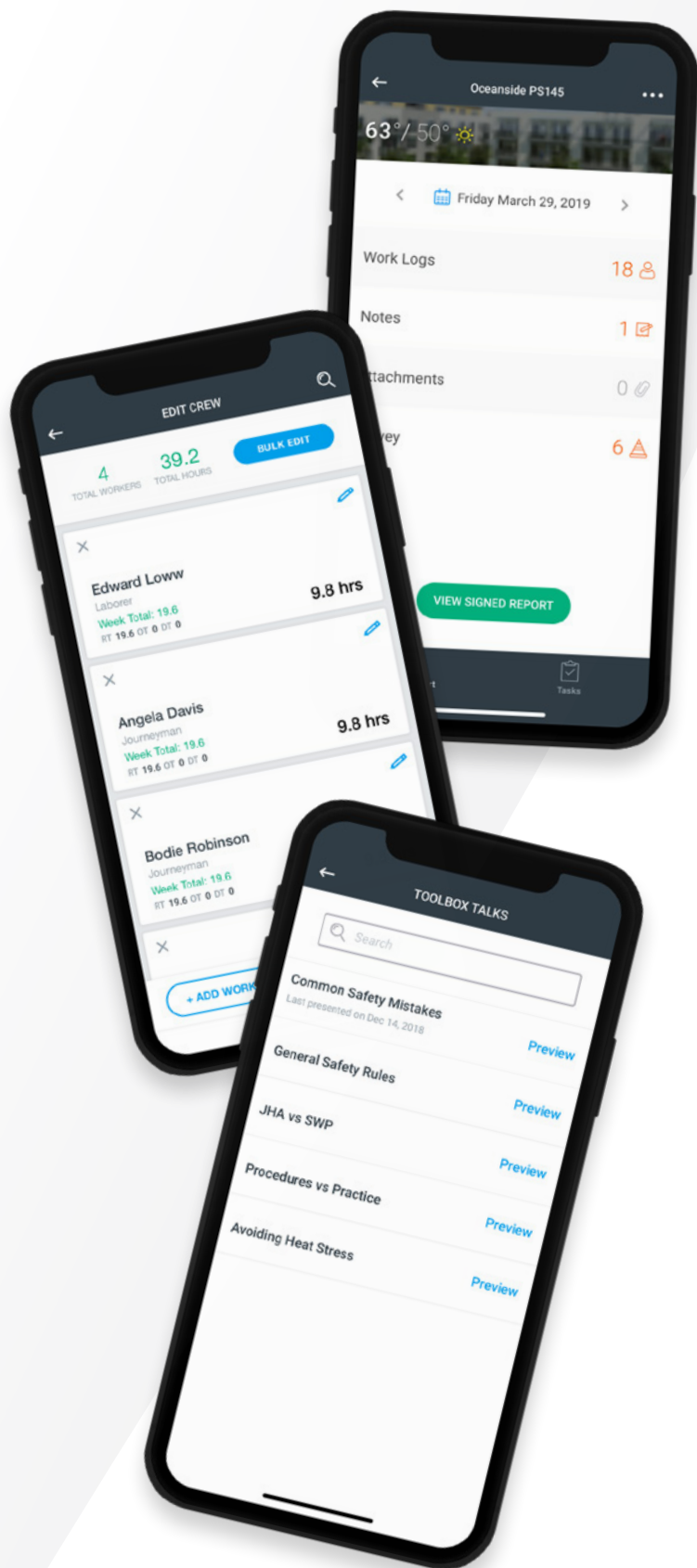
U.S. Small Business Revenue Growth By Industry for 1H 2019

January 2019



Industry with highest rate of revenue growth
Construction (23.27%)

Kabbage Index Value



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The Key to More Efficient Construction Projects Is Collaborative Contracts

by Brian Perlberg, AGC Senior Counsel & ConsensusDocs Executive Director



According to the United States Bureau of Labor Statistics, the architecture, engineering and construction (AEC) industry is the only industry that has become less efficient and productive since 1964.

Albert Einstein said that doing the same thing repeatedly and expecting different results is the very definition of insanity. The way we traditionally contract, design and interact in the AEC industry fits this definition.

The AEC industry is one of the most important drivers of current and future success of the U.S. economy. It's a homegrown industry and probably still the best way for someone to start their own business. Construction jobs have a great home field advantage to create the infrastructure foundation we need for future success. But, if we don't get out of the old ways of doing things we will lose a golden opportunity.

Creating change

The AEC industry is fragmented and slow moving. The legal industry, which drives the structural relationships in construction contracts, is even slower to change. The combination has us stuck in the morass of contractual silos that create confrontation.

Some wear this as a badge of honor. They follow a similar pathway that has been around for over a hundred years and have a mountain of case law dissecting the corpses of dead projects gone wrong interpreting this approach. A siloed approach is done in the name of protecting one party over another. But the studies demonstrate that this leads to busted schedules and costly overruns, followed by claims and litigation. Success in today's world requires communication and collaboration; fortunately, things are changing.

However, they're changing too slowly.

Fueled by a combination of frustration with current results, a desire to improve and a technological revolution, the industry is trying new things. The most expensive and complicated construction per square foot, the hospital market, has been a market leader for change. The change comes from searching for a better way of doing things. And that better way is through collaborating... really collaborating.

Improving the foundation

A better foundation to build requires three things: trust, collaboration and innovation. If you don't have trust, you don't have anything. To build trust you need to be understood and act in accordance to what you've agreed to in letter and spirit. You can't say "general contractor" without saying "contract." The words that bind you matter, so use them wisely. Good legal writing is simply good writing. Don't try to address all contingencies up front, you are more likely to muddy the water. Vague and broad responsibilities that place all the risk on parties that are not able to control or mitigate the risk is the antithesis to trust. Ambiguities will naturally arise. Don't hide in your turtle shell when they do. Communicate constructively and avoid the blame game.

The common thread of failed projects is a lack of communication. Parties in a construction project often meet as strangers and leave as enemies. That's not a recipe for

repeat business. Traditionally, contract structures funnel all information and most decisions to the architect. A better approach is to encourage parties to communicate directly and positively. Empowering people in the field who are most familiar with the information can be transformational. Creating a communication structure in which parties must talk to one another about timely issues before claims become intractable leads to less litigation. Early involvement by builders incorporates a practical constructability analysis that enhances overall project value. A race to the bottom to slash an impractical budget that becomes bloated with what might be labeling value-engineering (but is anything but) should be avoided.

The key is innovation

Innovation is what is really driving a great opportunity to change. There has never been a time when there was a greater incentive to build more efficiently. Execution is so much better, safer and more valuable to the end-user when you maximize the impact of technology. To deploy these technology tools, it is necessary to build better teams early. Treat a project as an opportunity to learn and gain efficiency each step of the way, rather than to simply avoid the blame game. Then, and only then, can you yield the most out of today's wave of incredibly powerful and time-saving construction technology devices.

Today, the technology has arrived, is proven and is very powerful. To build a better way, you must try something new. Structure your next project to truly collaborate by building trust, encourage the flow of timely information and embracing the maximum power of technology. Don't just pull out the same contract from the drawer and sign it without thought. Use the contract as opportunity to memorialize a business relationship that gets better results.

This article by Brian Perlberg, AGC Senior Counsel & ConsensusDocs Executive Director, was originally published in Media Planet on January 3, 2018. This article is republished with his permission.

ConsensusDocs 12 Years & Growing



1 Goal

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



12

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40

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LEGALLY SPEAKING

Looking Back, Going Forward: AGC Forms Are the Building Blocks for ConsensusDocs

by Sean Calvert, Esq., Partner, Calvert Menicucci, P.C.

It always amazes me the changes a mere decade can bring in an industry that has been going strong for so long.

This past year I was working on the group that was drafting the new ConsensusDocs 755 master subcontract form released this past July. The ConsensusDocs 755, like the standard ConsensusDocs 750, is at base an outgrowth of the old AGC 650 subcontract form. It has obviously been heavily modified since the days of the AGC 650 and 655 subcontracts to create the more balanced subcontract forms that ConsensusDocs now publishes. Significant portions of the language and structure of the documents however come from those original AGC subcontract forms.

Working through the changes to the new ConsensusDocs subcontract forms made me recall back to 2007. Anyone who was reviewing construction subcontracts from that time will remember the old AGC forms, in particular the AGC 655 form. ASA actually had a form addendum specifically designed for use with the AGC subcontract forms. The ASA bid proposal forms also used to advocate and call for the use of the AIA A401 form subcontract as the basis for all subcontract terms.

With the issuance of AIA's 2007 forms and the lack of inclusion of other contracting industry input into those forms ASA elected to change the recommended subcontract from the 401 to the ConsensusDocs 750. I believe the first revision of the ASA bid proposal and ASA short form and long form addenda was issued in 2009 to move to favoring the ConsensusDocs forms. They still form the basis of the current ASA documents, which remain available through asaonline.com - Member Resources.

It is useful when negotiating subcontracts to remember this history. The AGC 650 and 655 subcontracts may be gone, but at the time they were the preferred form for use by contractors when they weren't using their own even more onerous in-house contracts. While I don't remember anyone ever advocating as a negotiating tactic at the time, proposing the use of an AGC 650 or 655 subcontract as an alternative to the contractor's personal subcontract forms, that currently isn't a bad option. Consider reminding the contractor that you are negotiating with, particularly if they are an AGC contractor member, that the ConsensusDocs subcontracts are just the current modified versions of the old AGC forms. Many a general contractor's contracting staff will

remember the old forms and may have used them or based sections of their company forms off of the language from those documents. A trip down memory lane may just be the opening you need to discuss accepting more moderate contract language.

Even if you can't convince your negotiating partner into using the ConsensusDocs forms wholesale, consider looking to them for contract language that may be a more moderate approach where you are at a deadlock in negotiating language for a particular clause.

Sean Calvert, Esq., is a partner at Calvert Menicucci, P.C. in New Mexico. They provide services relating to contract documents, construction risk analysis and insurance coverage issues, procurement, bid/RFP protests, licensing and licensing disputes, copyright and intellectual property issues, project management advice and documentation, construction claim preparation, mechanics' and materialmen's liens, performance and payment bond claims and defense, as well as representing clients in dispute avoidance, administrative hearings, mediations, arbitrations and litigation in state and federal court. For more information, visit www.hardhatlaw.net.



Todd Hess Building Company used ConsensusDocs to facilitate the build of the Upshur Building project located in Portland, Oregon. The company stated, "The size and magnitude of a \$1.5 million project, with 20 subcontractors and a very aggressive schedule, broadcasts the need for organization and a speedy method in getting contracts out the door to the owner and subcontractors."

SCOTT JENNINGS, P.E. of SJ Construction Consulting, LLC, Honolulu, Hawaii



FEATURE

AIA or ConsensusDocs Contracts: Which Standard Construction Contracts Are Best For Your Project?

by Brian Perlberg, Executive Director and Senior Counsel, ConsensusDocs

Success on a construction project can rise or fall on the contract you choose. Remember, financial solvency often depends on it. If just one contract out of 10 goes bad, this might lead to a general contractor shutting its doors. I'm often asked, "Why should I choose ConsensusDocs over American Institute of Architects (AIA) standard construction contract documents?" While many express dissatisfaction with AIA contracts to me, they often say it's the devil they know (and make extensive changes). This article points out the fundamental differences between ConsensusDocs versus AIA contracts and how making a few word changes might not address the fundamental differences.

Mission

The American Institute of Architect's (AIA's) mission includes "to organize and unite" and "promote" the architectural profession. The AIA's contracts show a bias towards architects. AIA contracts give architects a disproportionate share of decision-making authority without the same level of responsibility.

ConsensusDocs' goal is to write fair contracts that advance better project results. Fairness stems from neutralizing bias by giving all the stakeholders to the A/E/C industry an equal voice to the drafting table.

Communications

Historically, AIA contract documents funnel all communications through the architect. The AIA A201 General Conditions is for a contract between an owner and contractor, and yet the most prevalent word is "architect." When coupled with an AIA agreement, the word architect appears 400 times. Historically, the owner and contractor were NOT supposed to communicate directly with one another, but ONLY through the architect. Thankfully this obstacle has

finally been removed in 2017, but the basic structure remains.

ConsensusDocs emphasizes positive and direct party communication. Parties are encouraged to speak directly to one another, early and often in the project to facilitate a positive relationship. Electronic communications are recognized as an effective means of communication in notice provisions as well as for use in project administration though documents such as the ConsensusDocs Electronic Communications Protocol.

Role of the Owner, Passive Check-Payer or Decider

AIA documents demote the owner into a passive project role. An owner's main function is to do one thing – write checks. Beyond that, the message in the AIA B101 Owner/Architect agreement and AIA A201 General Conditions Document, is the architect knows best. And owners need protection from the contractor, who should be kept at arm's-length.

ConsensusDocs gives Owners an active role. After all, an Owner has the most to gain or lose in the success of the construction project, which ultimately is the Owner's capital asset. An Owner may delegate its authority to an outside architect, such as approving change orders, but decision-making authority defaults to the owner. All decision making doesn't default to the architect. Keep in mind that an owner might have an internal construction manager or hire a construction manager externally, which would certainly change the equation.

Project Financial Information and Sharing Information

ConsensusDocs allows a builder to request and receive project financial information before and during construction. ConsensusDocs provide the industry's only standard questionnaire

and guidelines to help ask reasonable questions about project financing.

AIA restricts access to receive financial information once the project commences. Under AIA, the default for commencement of the project is the date of contract signing, which is before dirt is even moved. Thereafter, a contractor must show a reason (as determined by the architect) to receive financial information. The consequences for not receiving reasonably requested information is not clear because new AIA language in this section is vague.

Writing Style

The ConsensusDocs are written from the perspective that good legal writing is simply good writing. Contract language with a clear and concise language helps the parties understand, administer, and interpret the contract. A distinguishing feature in ConsensusDocs is the integration of the general terms and conditions and the agreement into one document. This avoids the two documents from conflicting and avoids confusion. Provisions are written so that the responsibilities and obligations, such as indemnification, are reciprocal on both parties in a consistent fashion. What is good for the goose should be good for the gander.

Over ConsensusDocs' 10-year history a great deal of effort has been made to refine the language and make sure it is consistent in style and even placement throughout the family of 100+ contract documents. ConsensusDocs comprehensively revises its documents once every 5 years but also allow the flexibility for discrete revisions typically based on changes to caselaw or the insurance market. Timely updates keep users from being out of date and exposed.

AIA contract documents are updated once every ten years. Given their long history, AIA's substance and language

style is slower to change. The substantive terms are not always consistent when comparing an architect's responsibilities and a contractor's. An architect's services are at times aspirational or silent in regard to clear consequences for not performing completely or in a timely fashion. Conversely, obligations falling on the contractor come with hard deadlines and broad consequences, especially when such obligations coordinate with an architect's responsibility. One example is a contractor's obligations to provide a submittal schedule, and unclear consequences for not processing submittals in a timely fashion.

Case Law and Litigation

AIA has published contract documents since 1888. AIA documents, old and new revisions, generate a great deal of caselaw and decisions interpreting the language in the documents. There are entire caselaw books devoted to the cases generated by litigated projects using the AIA contract documents. AIA touts the breadth of caselaw associated with AIA contract documents.

ConsensusDocs has been around for more than 10 years. Billions of dollars have been put in place using the documents. Not one reported case has been generated using ConsensusDocs. ConsensusDocs touts the infrequency of projects that fall into litigation using their documents.

Dispute Mitigation vs Dispute Escalation

AIA's first line for disputes is through an initial decision maker (IDM), which defaults to the architect. Architects are not trained to serve in a quasi-judicial role, but the AIA contracts thrust an architect in the role of judge, jury, and executioner, even if they are not interested in many small decisions monitoring contract administration. According to the AIA, the architect serves as the IDM on almost all projects. And even if the architect isn't the IDM, architects retain authority to make certain decisions regarding design intent. Moreover, the IDM process is complex with technical timing requirements to finalize IDM decisions that have important consequences that might get

easily overlooked by some parties.

ConsensusDocs utilizes an innovative tier approach that requires the parties to talk with each other at the project and senior project level to mitigate claims before they are escalated to a formal claim. ConsensusDocs also employs innovative dispute mitigation techniques in calling out options for a project neutral or a dispute review board (DRB) which have proven to be effective on projects that can afford to carry the cost. ConsensusDocs even publishes two standard DRB agreements to implement DRBs.

Design Documents

The AIA B101 Owner/Architect Agreement strongly protects architects' interests in their intellectual property in design documents. If there are any disputes or potential disputes between the architect and the owner, the architect can stop the project in its tracks from advancing, unless and until full payment for services are rendered and a blanket waiver favoring the architect is given. Protecting an architect's IP rights takes precedence over advancing a project forward. AIA forbids an owner from using design documents on a future project, even renovations, unless the architect is involved.

An architect is "entitled to rely on, and not be responsible for the accuracy, completeness, and timeliness of services and information furnished by Owner." The owner may not rely upon the design professionals provided information in a reciprocal manner. An owner's protection rests upon the architect's standard of care, which is a different and lower standard. Commenters have cautioned owners from basing their Owner/Architect agreement on an AIA document because AIA's mission is to protect and promote the architectural professional. The view that AIA documents are owner-friendly is considered a myth.

ConsensusDocs 240 Owner/Design Professional Agreement takes a balanced approach regarding a design professional's IP rights and an owner's need to build or renovate a project. An owner is allowed to continue a project if there is a dispute between the owner and architect provided payment for services

performed have been paid. An architect retains their claim rights. Additionally, there is an option (although it is not the default) for an Owner and architect to mutually agree for an Owner to use the design documents for future projects along with a waiver of claims to the architect, if the architect is not involved in that future work.

The ConsensusDocs architect agreements provide the owner with construction phase design documents that are sufficient "to bid and build the work." Reciprocally, the design professional may rely upon the design services provided by others. Unbuildable design documents are the equivalent of pretty pictures. ConsensusDocs provides owners a balanced architectural agreement that isn't written by an architectural association.

Conclusion

Now with a 10-year track record, ConsensusDocs provides an industry-wide developed choice for standard design and construction contracts. ConsensusDocs takes a plain English and fair to all parties' approach. ConsensusDocs encourages direct party communications to build positive collaboration. Owners gain more control and an active say in their projects. Constructors are viewed as problem solvers rather than problem makers. In comparison AIA provides a more traditional approach that gives architects more control. Architects make most decisions and protect owners from potential contractors' abuses. AIA contracts' long history and usage is well known with a history of litigation and case law.

Brian Perlberg is a nationally recognized construction law attorney who serves as Executive Director and Senior Counsel for ConsensusDocs, a unique, industry-wide coalition of leading construction associations producing best practice standard construction contracts. As CEO and Chief Advocate from creation of ConsensusDocs to its 11-year milestone, Brian leads efforts to facilitate the A/E/C industry to contractually and legally address emerging issues such as Building Information Modeling (BIM), Integrated Project Delivery (IPD), Lean, Green Building, and federal contracting.

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FEATURE

An Assist with Design-Assist and Lean Construction: Closing Design Gaps Through Collaboration

by Brian Perlberg, Executive Director and Senior Counsel, ConsensusDocs

Brian Perlberg, Esq., delves into the background, creation and use of the ConsensusDocs 541 Design-Assist Addendum, which is the construction industry's first design-assist contract document to help close the gaps between people's common practice, what they contract to perform, and what is meant by "design-assist."

The structure of the 541 Design-Assist is NOT intended to be a stand-alone agreement, but used with any project delivery method that involves close collaboration between the owner, design, and build teams. One of the key benefits of this document is getting key trade contractors involved early in the process to provide their expertise and select these contractors based on their qualifications and price, rather than on price alone.

The Addendum Agreement should be prepared when design development begins. It is broad in scope and flexible in its implementation.

The Responsibilities of the Parties - While the design professional retains overall responsibility for the project design, all parties are still responsible for the risks they assume in their underlying agreements.

the Design-Assist Addendum contains a list of optional services to be provided by the Construction

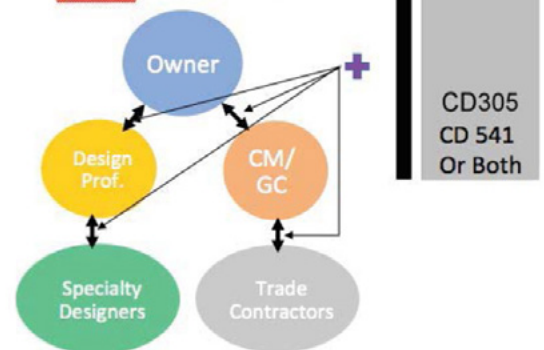
Manager if requested by the Owner. These services include Life Cycle Cost Analysis, Sustainable Design Recommendations, Risk Analysis, and Design for Production Planning.

The 305 Lean Construction Addendum is interconnected to the 541 and is rightfully discussed in the context of the design-assist. The goal of the 305 is to empower parties to gain the maximum benefits that lean methods, tools and techniques in design and construction offer.

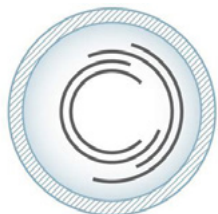
For an in-depth explanation of the Design-Assist Documentation and Lean Construction, with templates and sample agreements, click [here](#).

Brian Perlberg is a nationally recognized construction law attorney who serves as Executive Director and Senior Counsel for ConsensusDocs, a unique, industry-wide coalition of leading construction associations producing best practice standard construction contracts. As CEO

Contract structure of IPDish CD 541 & 305



and Chief Advocate from creation of ConsensusDocs to its 11-year milestone, Brian leads efforts to facilitate the A/E/C industry to contractually and legally address emerging issues such as Building Information Modeling (BIM); Integrated Project Delivery (IPD); Lean, Green Building; and federal contracting.



ConsensusDocs®
Keeping You Ahead of the Curve

Standardized contracts benefit construction firms that cannot afford to hire an entire legal team to continuously review contracts throughout the design build process. Further, because they re examined by multiple industry experts, these contracts are designed to be fair and balanced for all parties involved in the project.

KEEPING YOU AHEAD OF THE CURVE™

ConsensusDocs Publishes a New Standard Public-Private Partnership Agreement

ConsensusDocs announced in December 2019 the publication of a new industry standard public-private partnership (P3) agreement. The ConsensusDocs 900 Standard P3 Agreement and General Conditions is a pioneering document from ConsensusDocs that represents a vast improvement of P3 agreements.

Consistent with the ConsensusDocs philosophy, the document provides a fair and balanced standard for a P3 project to design, build, finance, operate, and maintain (DBFOM) between an Owner and Concessionaire. This new agreement is part of the ConsensusDocs Public-Private Partnership (P3) 900-series.

P3 contracts typically involve complex 200-plus page contracts that obfuscate and inappropriately shift risk. The new ConsensusDocs Standard P3 Agreement provides a fair off-the-shelf solution for P3 projects that

can be modified to meet specific project needs. This will significantly lower the transactional costs for small and medium sized P3 projects to both create a contract as well as assess the risk involved for pursuing potential P3 projects.

Ernest C Brown, a San Francisco-based Construction lawyer, mediator and arbitrator, who chaired the ConsensusDocs P3 Working Group commented "Rather than create a P3 agreement from scratch, the new ConsensusDocs 900 P3 Standard Agreement provides a sophisticated and flexible contractual solution that users can modify based upon the specific needs." The P3 is an innovative contracting vehicle that offers a better mechanism to consider a project's life-cycle costs and flexibility in financing for the project." Brian Perlberg, Executive Director and Senior Counsel of ConsensusDocs added, "P3 projects are often clouded by rampant risk

shifting that ultimately hurts project outcomes. At the very least, the new ConsensusDocs P3 agreement creates a fair baseline for owners, financiers, builders, and designers alike to begin a real conversation to contract utilizing public-private partnerships."

ConsensusDocs are the only contracts written by 40 leading design and construction industry organizations. With a catalog of 100+ contract documents addressing all methods of project delivery, ConsensusDocs contracts incorporate fair risk allocation and best practices to represent the project's best interests. The Coalition collectively represents over 300,000 design professionals, owners, contractors, subcontractors and sureties (DOCS). For more information, please visit www.ConsensusDocs.org or call 866-925-DOCS (3627).



"We like to use standardized contracts because the risk is allocated more evenly, where it's not weighted towards the contractor, owner or architect. The advantages are continuity and efficiency, and we don't end up with any loopholes where there could be a claim that wasn't covered in the contract."

Mark Lancaster, vice president/project manager for WAR Construction in Tuscaloosa, Alabama

The ASA-endorsed ConsensusDocs family of documents includes contract documents for different project delivery methods, as well as supplemental documents/forms to help subcontractors define and manage the risks and responsibilities of electronic communications, financial disclosure, surety bonding and more. ConsensusDocs users have 24/7 access to contracts from anywhere via a secure, cloud-based system. The system allows users to electronically review and propose changes to ConsensusDocs documents and makes it easy for users to electronically collaborate on document

changes with other people in their company and electronically negotiate contract changes with clients.

These document subscription packages are available:

- **Full Package**—Unlimited use of all 100+ documents for one full year: \$879 (ASA member)/\$1,099 (nonmember).
- **Subcontracting Package**—Unlimited use of subcontracting and select other documents (same as previous subcontracting package) for one full year: \$539 (ASA member)/\$679 (nonmember).

- **Express Package Unlimited**—Unlimited use of select short form and administrative documents for one full year: \$399 (ASA member)/\$499 (nonmember).

- **Express Package Per Document**—Access to select short forms and administrative documents for one full year, plus a per document usage fee: \$319 (ASA member)/\$399 (nonmember).

- **Prequalification & Bond Forms Package**—ConsensusDocs Prequalification & Bond Forms Package. Unlimited use of Prequalification & Bond Forms for one year—FREE: \$0 (ASA member)/\$0 (nonmember).

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Effective Risk Management: Using the Construction Contract to Minimize Risk

by Patrick Hogan, CEO, Handle.com

All construction projects carry a certain level of risk, and their success depends on how well participants manage these risks. The inherent risk in construction projects has multiplied over the years due to the rise of multiple factors. A construction project manager is expected to manage the risk of safety issues, weather conditions, and change orders, while also dealing with labor shortages and new government regulations.

Making sure that every risk is properly identified and mitigated is always a good practice in any construction project, and it requires considerable skill, careful planning, and swift decision-making.

Types of Risks in Construction Projects

Risks in construction projects can be grouped into the following categories.

Particular risks

This type of risk is the result of the actions of individuals or groups of individuals, such as negligence, carelessness, errors in judgment, and disregard for the law. It includes fire, theft, machinery breakdown, and structural collapse.

Fundamental risks

This type of risk mainly comes from nature and other causes beyond the stakeholders' control. It includes natural disasters such as flooding, hurricane damage, earthquakes, and famine. Wars, terrorism, riots, and other political activities are also included.

Speculative risks

This type of risk can either result in a profit or loss and usually includes pricing, forecasting, and credit sales. Fluctuations of market pricing, exchange rates, and interest rates are all speculative risks.



Aside from these main categories, there are other risks that emanate from delays, poor communication and supervision, the bankruptcy of business partners, delinquent clients, and delays in resolving disputes.

Best Practices for Minimizing Risks

The construction contract is a contractor's best weapon in dealing with the many risks in a construction project. Here are things you need to keep in mind to minimize risk when entering into a construction contract.

1. Set clear guidelines on which party will handle risk.

During the initial stage of a project, the first thing that the property owner and the stakeholders need to do is to identify risks. They should then analyze each risk and determine the probability of occurrence and its level of impact on the project. Afterwards, the stakeholders need to agree on how to respond to the risks. Using the construction contract, stakeholders allocate each risk to the party that is best prepared to manage it.

Consider a typical construction project with an owner entering into a contract with a general contractor. In this example, the owner of the project will have responsibility for errors in the building design as they work closely with the project designer and are better suited to handle the mitigation of this risk. On the other hand, the contractor will handle the responsibility for property damage or injuries arising from their operation since they are better suited to make the construction site a safe place.

2. Include indemnity provisions in your construction contract.

Indemnity provisions are contractual clauses that shift the risk by holding one party accountable for the losses incurred by another party arising from claims made by a third party. Considering our previous example, the contractor needs to ensure that the contract has the provision that indemnifies them against damages that result from negligence on the part of the owner with respect to the project design.

The importance of indemnity clauses cannot be stressed enough. Construction contracts without these

provisions are all too common in the industry, which, of course, produces unnecessary risks for the contracting parties. Without properly drafted contracts with indemnities, it may not be possible for one party to claim for the losses they incurred.

3. Cover indemnity provisions with insurance.

After setting a clear language that defines the extent of the losses covered by the indemnity provisions, parties of the contract should then obtain the appropriate insurance policies to support these indemnities.

In general, contractors should secure general liability insurance, automobile liability insurance, and workers' compensation coverage. On the other

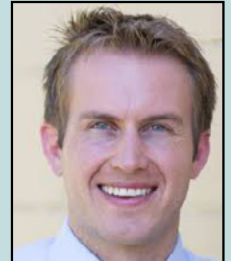
hand, the owner should have a builder's risk insurance to cover the damage to materials, fixtures, and equipment resulting from natural disasters and other unforeseen site conditions. Requiring insurance coverage for indemnities will ensure that all contracting parties will be able to satisfy their indemnity obligations.

As construction projects grow in scope and complexity, it is more important now more than ever for contractors to use every tool at their disposal to manage risks. The construction contract has a huge role in minimizing the risks assumed by a contracting party. It is crucial for construction firms to be proactive in setting clear guidelines on how

to handle risk in the construction contract, adding indemnity provisions and supporting them with insurance to reduce their assumed risk to a manageable level.

Patrick Hogan is the CEO of Handle.com, where they build software that helps contractors, subcontractors, and material suppliers with late payments.

Handle.com also provides funding for construction businesses in the form of invoice factoring, material supply trade credit, and mechanics lien purchasing.



New Standard Master Subcontract by ConsensusDocs Facilitates Best Practice Subcontracting Practices

In July, 2019, ConsensusDocs published the new Standard Master Subcontract Agreement Between Constructor and Subcontractor, as well as the Standard Project Work Order. The new standard master agreement (ConsensusDocs 755) allows parties to negotiate the standard terms and conditions of their working relationship once, and then issue multiple project work orders (ConsensusDocs 756) without having to negotiate specific legal terms. General terms and conditions addressing such terms as indemnification, notice requirements, and dispute resolution only have to be negotiated once. Project specific terms, which are often negotiated by project field employees as

well as insurance and bonding requirements are addressed in the project work order.

Joe McAllister, General Counsel for Hughes General Contractors in Salt Lake, Utah chaired the ConsensusDocs master subcontract working group and noted, "For many reasons, including the expanded use of alternative project delivery methods and subcontractor prequalification procedures, the use of master subcontract agreements has become the prevalent practice in our market, so these new ConsensusDocs master subcontract documents will be very useful to us, and we plan to use them often." Renowned contract expert and Executive Director of ConsensusDocs, Brian Perlberg,

commented, "We are very excited for the release of the new Standard Master Subcontract. The documents will allow parties to spend less time revisiting subcontracting terms and will reduce the transactional costs of hiring outside counsel review project work orders. I expect that these two new documents will be two of the most used standard contracts within our catalog of 100 best practice contracts due to the interest and need that I see throughout the industry."

A webinar to explain these documents was recorded earlier this year and can be found by clicking [here](#).

Complimentary Webinar

Tuesday, January 7, 2020

12 p.m. to 1:00 p.m. Eastern / 9 a.m. Pacific

Payment Clauses: What to Watch For and How to Negotiate Them

Presenters: James Yand and Brian Esler

James Yand is a partner and a member of the firm's litigation practice team. Jim has more than 20 years of experience resolving disputes for business owners and individuals in construction law, products liability, e-discovery, franchise and commercial law. Clients in the Northwest and around the world know Jim as a reliable ally who practices with integrity and is focused on delivering results. Reputed for critical thinking and problem-solving, no matter the size of the case, Jim specializes in resolving high-conflict cases that often determine the continued success of the client's interest. He seeks effective resolutions with cost-efficiency. From discovery conducted in Hong Kong to local cases filed in Seattle, Jim leverages his local-national-global knowledge. Jim is a frequently requested speaker for business and legal programs, providing guidance on legal industry protocol, e-discovery, and relationship development among attorneys.

Brian Esler leads Miller Nash Graham & Dunn's Washington State commercial litigation team. He was recently recognized as one of the Top 100 Attorneys in Washington State by Super Lawyers magazine. His practice emphasizes intellectual property advice and litigation, construction litigation, defense of financial institutions, and appellate advocacy. Register by clicking [here](#).



The Rat Pack Is Back!

SLDF FUNDRAISER—SATURDAY, MARCH 7, 2020

With a stellar cast of some of the finest performers in the business, *The Rat Pack Is Back* has been hailed as the next best thing to seeing the original Rat Pack themselves. Unlike other tribute shows that have come and gone faster than the Nevada wind, *The Rat Pack Is Back* has been playing for 18 years to the delight of millions. This award-winning version has almost as much longevity as an Ol' Blue Eyes standard and more legs than one of Dino's favorite bar stools. The production is funny, entertaining and even old-style Vegas hip. Your contribution includes dinner at Tuscany Gardens and VIP seating for the show.



Coming Up

in the January 2020
Issue of ASA's



Theme:

Sustainability in the Works

- Looking for Your Next Employee? Go Back to High School
- Sustainable Construction and the Law

Look for your
issue in January.

To access past issues
of The Contractor's Compass,
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For questions about
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2020 SUBExcel

Subcontractors Building Excellence

"The Economy Moving Forward"

WEDNESDAY, MARCH 4

- President's Welcome Reception with Exhibitors

THURSDAY, MARCH 5

- Keynote Speaker: Martha Ann Marley "Economic Update"
- Networking Activity: Top Golf

FRIDAY, MARCH 6

EDUCATION SESSIONS:

- Government Relations Committee Update
- Downstream Trend of Risk Transfer
- Effective Change Order Management
- The Industrialization of Construction
- Negotiating Better Contracts Panel Discussion

SATURDAY, MARCH 7

- SLDF Fundraiser Dinner
- "The Rat Pack Is Back" Show

By exhibiting and/or sponsoring at SUBExcel 2020, your company can take advantage of opportunities to interact with registrants and promote your products and services!

- Meet more than 200 of the larger commercial subcontractors in the United States—the decision makers and your prospective customers.
- Generate valuable sales leads.
- Introduce and demo your products.
- Promote your services.
- Promote company awareness and brand image.
- Network with industry leaders.



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Applications are now being accepted for many of the awards offered by ASA.

Certificate of Excellence in Ethics

This award recognizes subcontractors for their commitment to ASA values, such as quality construction and a safe and healthy work environment. Each applicant is required to respond to questions concerning the firm's corporate ethics policies and procedures, its construction practices, and its general business practices. Each applicant also is required to submit detailed documentation, including sealed letters of recommendation from a customer, a competitor, and a supplier.

National Construction Best Practices Award

This award recognizes prime contractors that exemplify the values of subcontractors, treat subcontractors fairly through use of level-playing-field contract terms, and consider subcontractors part of their core project teams. The program's rigorous criteria include the use of a standard subcontract whose provisions substantially reflect the best practices incorporated into the ASA-endorsed ConsensusDocs 750 Standard Agreement Between Constructor and Subcontractor, as well as highly favorable evaluations from three specialty trade contractors, based on 20 project management factors.

There are many more awards available through ASA, and more information about all of them can be found by clicking [here](#). All award winners will be recognized during the 2020 SUBExcel conference on March 4-7, 2020, in Las Vegas, Nevada. We highly encourage all ASA members to get involved in our awards program. These valuable recognition opportunities are only available to ASA members.





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ASA's SLDF supports critical legal activities in precedent-setting cases to protect the interests of all subcontractors.

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CONSTRUCTION SUBCONTRACTOR
COMMUNITY NATIONWIDE**

ASA underwrites the legal costs of filing "friend-of-the-court" briefs to inform the Court regarding the broader impact of relevant cases throughout the country. We have won dozens of these cases since 1997, vindicating subcontractor rights today and into the future!

WE NEED YOUR SUPPORT

Funding YOUR Legal Defense

Each year, courts across the country hand down hundreds of decisions on federal and state laws, as well as court-made or "case" law, that apply to subcontractors' businesses. Many of the decisions impacting subcontractors interpret the contract provisions of subcontract agreements—provisions like pay-if-paid, hold-harmless, duty-to-defend, and no-damages-for-delay. Some of these decisions are precedent-setting and carry significance for subcontractors across state lines.

ASA's Subcontractors Legal Defense Fund supports ASA's critical legal activities in precedent-setting cases to protect the interests of all subcontractors. ASA taps the SLDF to fund amicus curiae, or "friend-of-the-court," briefs in appellate-level cases that would have a significant impact on subcontractor rights.

From its inception, the SLDF has been involved in many landmark decisions, starting with its first case in 1997, Wm. R. Clarke Corporation v. Safeco Ins., which prohibited pay-if-paid clauses in California.

Your financial support keeps the SLDF in operation - PLEASE DONATE TODAY

To make a contribution to this vital fund, visit <http://www.sldf.net> or send an email to soscar@asa-hq.com for more information!

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