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CONTRACTS

New Standard Forms Seek Unity on Fairness



Consensus documents by owner and contractor groups focus on industry best practices

The cooperatively produced standard-form contracts written mainly by owners and contractors under the ConsensusDOCS banner contain new payment security for subcontractors among other terms. With all of the 70-plus forms due to be released Sept. 28, the effort represents three years of work by 23 industry

associations and an attempt to speed up contract negotiations and build trouble-free projects by starting from mutually agreed ideas of what is fair.

ConsensusDOCS developed agreements “in the best interest of the project” and “owner satisfaction,” says Stephen E. Sandherr, CEO of the Associated General Contractors of America. “Each of us had an equal voice at the table,” says E. Collette Nelson, executive vice president of the American Subcontractors Association.

Lynn M. Schubert, president of the the Surety & Fidelity Association of America, says her members had become concerned about the “increasing shifting of risk in contracts.” The open discussions held by the participating ConsensusDOCS associations assured her that

the documents “truly represent who best bears the risk as opposed to who will have to pay for it.”

Under the agreement reached by the coalition members, core participating associations will cease publishing their own documents as ConsensusDOCS forms become available, and the associations will invest in and share profits from the sale of ConsensusDOCS documents.

The consensus represented in the new standard-form agreements was reached with less input from designers than from other groups. Engineering associations, for example, had been invited to participate but were late in joining and limited their participation until recently. The Engineers Joint Contract Documents Committee is “the newest kid on the block” to join the effort and “is not at this

point prepared to endorse any of the Consensus DOCS” pending completion of its review, says Wilcox Dunn, a Richmond, Va.-based attorney and spokesman for EJCDC.

The American Institute of Architects represents a more nettlesome problem to ConsensusDOCS. As the industry powerhouse in standard-form agreements, AIA politely declined to participate in ConsensusDOCS.

A key AIA staff member fails to see the value of uniting behind a single set of documents. “When they first brought it up and we had a big meeting about it three years ago, they wanted everyone who was currently publishing any document to turn their intellectual property over to the new nonprofit for ConsensusDOCS,” says Suzanne Harness, AIA’s managing director and counsel for contract documents. “You could see, if you have a successful program, that is risky.” Terms of participation later were relaxed but AIA still was not interested, she says.

“We just had a fundamental question of whether there is a need for new programs,” says Harness, who notes that AIA consults all industry groups in preparing

new versions of its documents. “It seems the market is well-served and offers people a choice. It’s hard to see the value in only having one program, a monopoly, if you will.

EJCDC’s Dunn says that organization’s review of ConsensusDOCS’s design-build agreement will be critical to its decision on whether to fully participate in the program. Even so, EJCDC’s participation so far has been “pretty significant,” says Brian Perlberg, AGC’s senior counsel for construction law and contract document programs.

Updates to several 10-year-old AIA standard forms of agreement are due in November.

Standard agreements from both ConsensusDOCS and AIA have been written with changing industry technology, such as building information modeling (BIM), in mind.

ConsensusDOCS’ standard-form agreements grapple with some of the stickier aspects of risk. For example, ConsensusDOCS forms require dispute mitigation, mediation and the parties decide at the time of contract signing on whether to use arbitration or litigation as the last resort.

In AIA’s latest version of its A201 agreement, General Conditions for the Contract for Construction, all initial claims are subject to an initial decision by the architect before the parties move to mediation or arbitration.

ConsensusDOCS has another key improvement for subcontractors: the contractor-sub agreement does not require subs to indemnify the contractor, owner, architect or others for all kinds of claims but instead limits the indemnity “to the extent caused by the negligent acts of omissions” of the subcontractor and its subs. This represents “a great improvement over clauses seen in most contracts,” wrote R. Russell O’Rourke, an attorney, in an ASA journal published in early summer.

ConsensusDOCS forms also provide



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▲ Unified. ASA’s Nelson (left) says that each of the participating groups had an equal voice.



SANDHERR

One of the groundbreaking aspects of the ConsensusDOCS effort is the participation of a large number of owner associations, including the National Association of State Facilities Administrators, Construction Users Roundtable, Construction Owners Association of America, Construction Industry Round Table and Building Owners and Managers Association.

“There is a growing frustration in the industry that parties, owners in particular, are presented with heavily modified standard-form documents that hardly resemble the original text,” notes a primer from ConsensusDOCS. “Parties often perceive standard documents ultimately drafted by a singular organization as protective of that organization.” Contract chaos results.

Ricardo Aparicio, president of CURT and a contracts

manager for General Electric, says there has been a perception that it’s “easy for an owner to dictate terms of contracts because the owner has the money and can dictate and that doesn’t allow for dialogue.” Dialogue, not power, is what’s best, he says. With ConsensusDOCS, “we get a framework and parties are able to use risk-allocation formulas according to what makes the most sense.”

There apparently is concurrence between ConsensusDOCS and AIA when it comes to payment security for subcontractors. For example, the ConsensusDOCS subcontract and the

forthcoming AIA updated documents require the contractor to pay each subcontractor within seven days after payment is received from the owner. AIA already had largely eliminated the “pay-if-paid” approach to subcontractor payment in its 1997 version of its agreements, and AIA’s new documents will continue many of these concepts, reports David R. Hendrick, another attorney writing for the ASA’s journal.

ConsensusDOCS also establishes the subcontractor’s right to be paid no matter whether the owner has paid the prime contractor. In agreeing to that provision, AGC abandons the “pay-if-paid” clause in its current standard agreement, notes O’Rourke.

Hendrick writes that AIA’s forthcoming updated documents tend to heap more risk on subs than the older versions while ConsensusDOCS contract forms tend to diminish subcontractor risks.

“Engineers are the newest kids on the block in the ConsensusDOCS writing and review process.”

Adds Boyd Black, a director of the Construction Owners Association of America: “These documents force communication and dialogue and get us away from litigation.”

“The ConsensusDOCS drafting process was similar to negotiations for a specific project contract,” says the ConsensusDOCS group. “Parties with different viewpoints who have a large stake in the project each had a vote before the contract was ‘signed off.’ There was synergy gained from these various view points.” ■

By Richard Korman