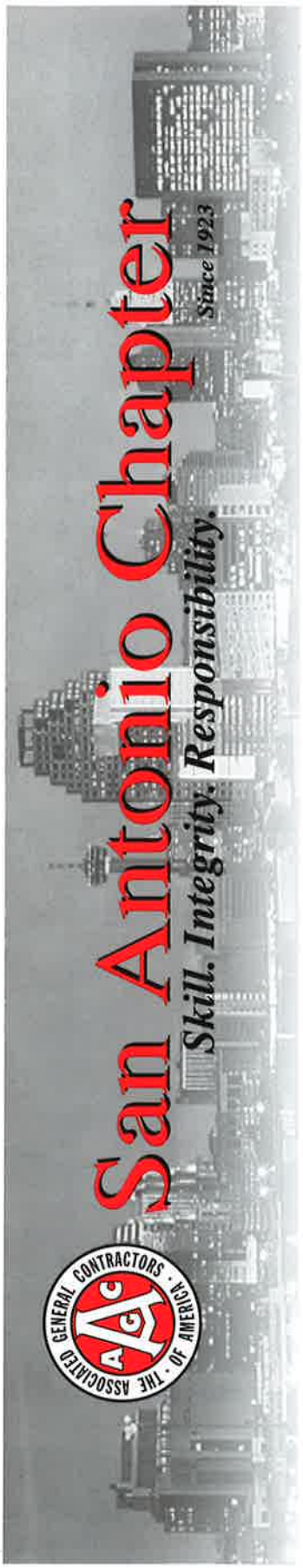
Construction Leader

Sept/Oct 2008



ConsensusDOCS: There's a New Kid in Town by Rick Reed

They're here! ConsensusDOCS is a new, comprehensive family of standard construction contract forms being hailed by many as the construction industry preferred alternative to the contract forms of the American Institute of Architects (AIA). But are they?

ConsensusDOCS were developed in 2007 with strong support of the Associated General Contractors (AGC), Construction Owners Association of America (COAA), and about twenty other endorsing construction industry trade associations, including the American Subcontractors Association ("ASA"), Associated Builders and Contractors ("ABC"), the Construction Industry Round Table, the Surety and Fidelity Association of America ("SFAA"), and a slew of subcontractor specialty trade associations. Software costs are comparable to the costs of the AIA contract forms. ConsensusDOCS sales will compete with AIA form sales, so it's no surprise that neither AIA nor AGC endorse the other's forms.

ConsensusDOCS were developed with several worthy objectives in mind. The drafters wanted ConsensusDOCS to emphasize good faith, collaboration, and project results. The drafters also wanted ConsensusDOCS to allocate risk fairly, and encourage the parties to address contractual issues, not avoid them. ConsensusDOCS endorsers hope for a high level of industry acceptance to significantly reduce construction contract transaction costs. Will they? Time will tell. In part, this depends on the willingness of industry participants to consider ConsensusDOCS with an open mind, and overcome the inertia of continuing to do business the same old way.

ConsensusDOCS include a host of contract forms, including owner-contractor, owner-designer, design-build, construction management, and subcontract forms. Unlike AIA forms, the ConsensusDOCS include all terms and conditions in a single contract document without separate general conditions. A rapid dispute resolution process is a particularly attractive feature of the ConsensusDOCS.

ConsensusDOCS emphasize the importance of a direct relationship between contractor and owner. So, a rather unique distinction for ConsensusDOCS is that the architect does not generally administer the owner's contract with the contractor. Thus, a sophisticated owner experienced in managing its construction projects, or an owner who has a longstanding and successful relationship with a contractor or design professional, may find ConsensusDOCS to be a particularly good platform for agreement. Significantly, ConsensusDOCS do have wide industry support, hence the name *Consensus*DOCS. But, what does "consensus" really mean? In this context, it means that major industry stakeholders have accepted and endorsed ConsensusDOCS as fair and appropriate to achieve reasonable compromise and harmony. Interestingly, the American College of Construction Lawyers, after a "lively debate," voted on whether they preferred ConsensusDOCS or AIA forms for Owner-Contractor and Owner-Architect/Engineer agreements. ConsensusDOCS outscored the AIA forms in each category by a slight majority.

The ConsensusDOCS 300 Tri-Party Agreement for Collaborative Project Delivery is the most unique of these new forms. It has owner, contractor and designer make strong "reliable" commitments of the ability to perform and willingness to be accountable for their responsibilities in the best interest of the project, and to form a "Collaborative Project Team." The team manages the project much like a joint venture, sharing responsibility for the outcome of their joint decisions, but with the Owner on the management team. The ConsensusDOCS 300 form boldly states:

> ". . . 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."

ConsensusDOCS are models of clarity and fairness, but don't expect them to replace AIA or other standard industry forms. As with any standardized form, however, the parties may still want to negotiate and modify various terms to fit their particular needs.

If you want to learn more about ConsensusDOCS, contact AGC's local San Antonio Chapter office for information about several upcoming presentations over the next several months as a part of the *2008 AGC/AIA Contract Series: A Comparison Of The 2007 AIA Contract Documents & ConsensusDOCS.*

Rick Reed *is a past Chair of the Texas State Bar Construction Law Section and a lawyer and a Director in the law firm of Coats, Rose, Yale, Ryman & Lee, P.C., which concentrates its practice in construction law and real estate.*