

ConsensusDocs™

BUILDING A BETTER WAY

## Better Contracts to Get Better Results



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[www.ConsensusDOCS.org](http://www.ConsensusDOCS.org)



## Question ?

What is the most important provisions in a contract?



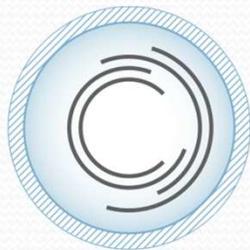
# Contract Formation

- Memorial a Business Relationship, not Gamesmanship
- Handshake vs. Written agreement
- Best Team vs. Best Contracts

# Does Your Contract Facilitate Success?

“It is ironic that the one industry in the country which more than all others depends upon coordination, cooperation and teamwork among multiple participants should be the country’s most adversarial industry.”

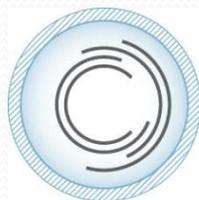
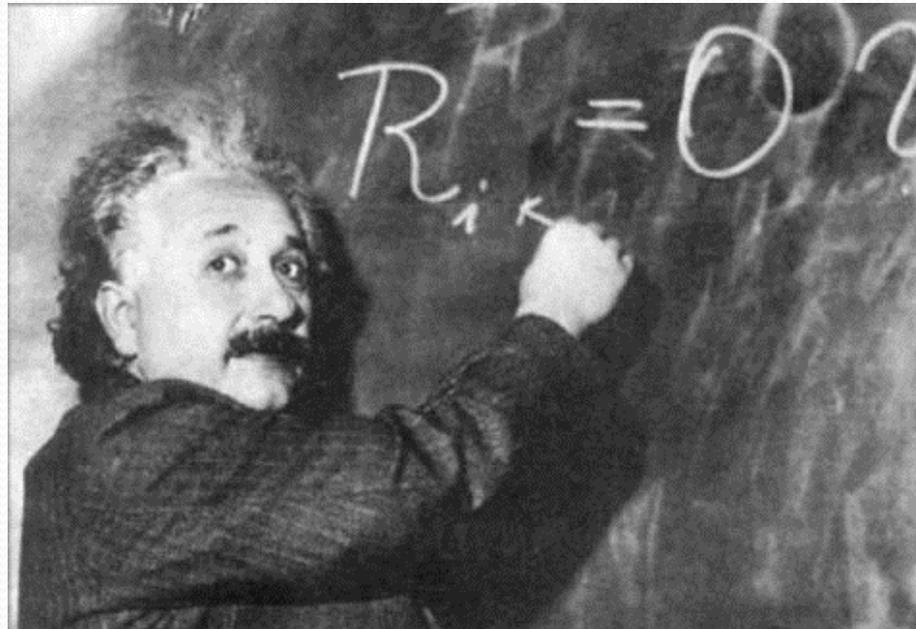
- Construction Industry Institute



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# Einstein's Rule for Construction Contracts

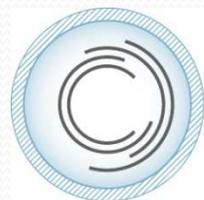
“...the definition of INSANITY is doing the same thing, over and over again, and expecting different results.”



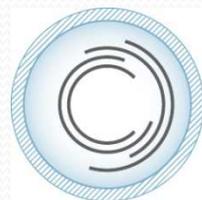
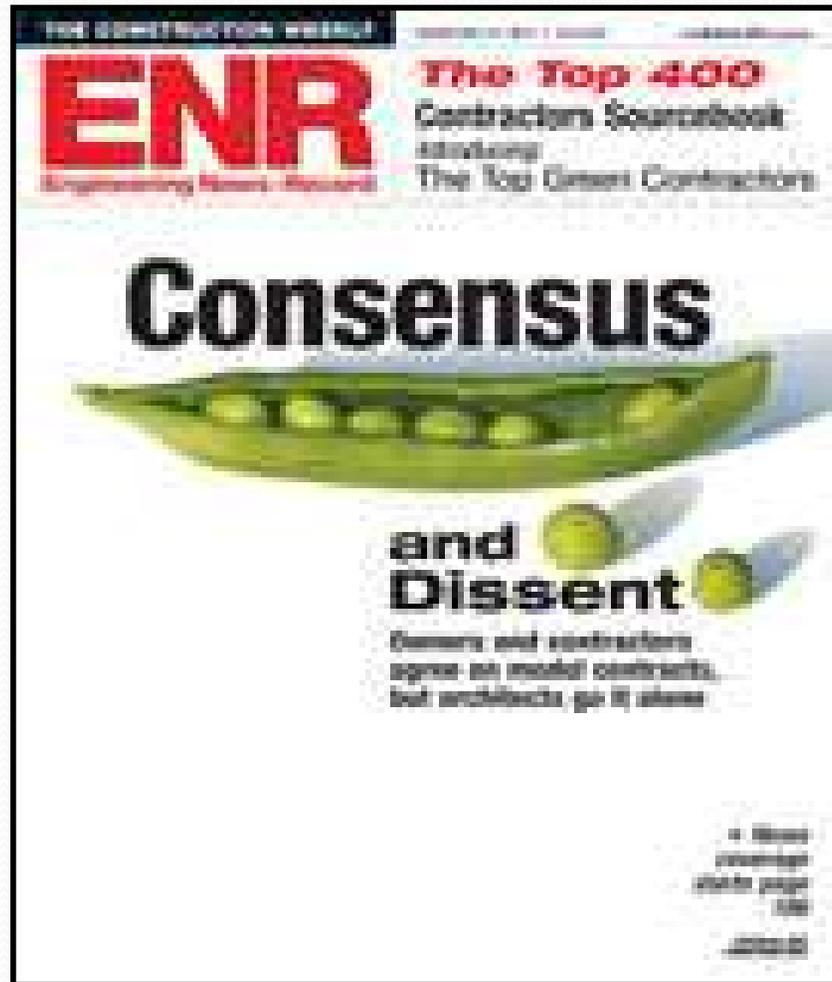
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# Why Consensus is Needed in Construction Contracts

- **Perception of Bias**
  - Favors interests of individual drafting association
- Modifications exceed the original “standard”
- Parties try to push risk away rather manage
- **Industry trending towards collaboration**



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# The ConsensusDocs Coalition

## 40 Leading Construction Industry Associations





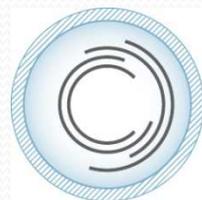
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ConsensusDOCS™ proudly endorsed by the following:

ALL

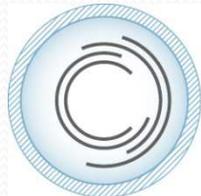
# How Consensus was Reached



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# Contract Drafting Principles

- Best Practices + Fair Risk = Better Projects
- Reduce transactional costs & inefficiencies
- Change Zero-Sum to Win-Win
- Empower Owners
- Written in plain English



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# 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 \$400 M in construction

See *Constructor* Jan/Feb issue 2014.

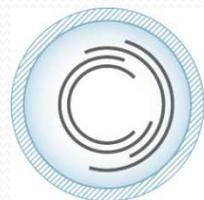


# Why Contract Documents Matter For Projects Results

- Canadian Study 8 BAD CLAUSES INCREASES PRICE 20%
- CII Study on contracts
  - Unnecessary Risk Contingencies
  - Best Contractors Seek the Best Owners
  - Worst contracts get worse results.

# ConsensusDocs Library of 100+ Documents

- 200 Series: General Contracting
  - 200, 240
- 300 Series: IPD/Collaborative
- 400 Series: Design-Build
  - 410, 420, 450
- 500 Series: Construction Management
  - 500
- 700 Series: Subcontracting
  - 750, 751
- 800 Series: Program Management

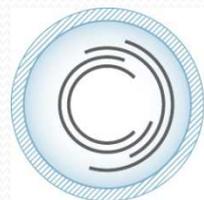


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# ConsensusDocs 200 Highlights

## Owner/Constructor Agreement & General Conditions

- Active Owner
- A/E is NOT the funnel for decisions/communications
- Limited consequential damages
- Project financial information
- Electronic communications protocol.



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# Agreement Structure

## ConsensDocs

- One integrated document – GCs and Agreement
- Written in a understandable and precise language

## AIA

- A201 is separate general conditions document.
- Same general conditions are used for design-build, design-bid, build, and CM/GC.

# Agreement Terms

## ConsensusDocs

- Construction = General Contractor that adds value
- A/Es = Design Professional
- Owner is actively involved

## AIA

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







## Ethics (2.2.1)

- Avoidance of conflicts
- No Contingent Fees or Gratuities to or from either Party
- Flows to agents, officers and employees

# Defining the Parties' Relationship

## ConsensusDOCS

## AIA

- Perform with Integrity, Avoiding Conflicts (*Art. 2.4*)
- Work Together on Basis of Mutual Trust, Good Faith & Fair Dealing
- Take Actions Reasonably Necessary to Enable Each to Perform Timely, Efficiently & Economically
- Promote Harmony & Cooperation (*Art. 2.2*)

- Architect May not Accept Employment, Interest or Contribution That Would Appear to Compromise Architect's Judgment (*B101 . 2.4*)

# LIQUIDATED DAMAGES

## ConsensusDocs 200

- Allows parties to choose if they want to use liquidated damages (“LDs”) or not. (6.5)
  - Allows parties to set up LDs for both Substantial Completion and Final Completion
  - Subcontracts flow applicable LDs from general contractors to subcontractors

## AIA A201

- Does not contain a provision authorizing or disallowing LDs

# CONSEQUENTIAL DAMAGES

## ConsensusDOCS 200

- Exclude LDs.
- Waiver shall not affect losses covered by contractually-required insurance
- Fuller definition of conseq. damages.

## AIA A201

- Excludes LDs (Sec. 15.1.6)

# Order of Precedence

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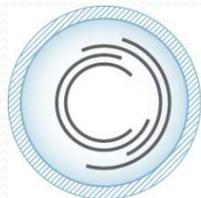
- Provides an order for interpreting conflicting contract documents
- Avoids unneeded litigation costs
- Most recent contract documents govern
- Change Orders = highest precedence.

## AIA

- Golden Rule. He who has the gold, makes the rules.

# Dispute Mitigation and Resolution

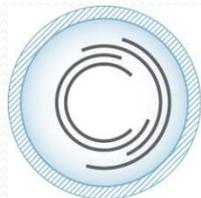
- Mitigate through mandatory direct Party communications
  - Project Level
  - Management Level
- Optional Project Neutral or Dispute Review Board (DRB)
  - Must visit the site and make finding w/in 5 days
- Mediation is required
- Parties decide - Arbitrate or Litigate
  - Current AAA rules for arbitration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



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## Indemnification 10.1.1-.2 “Hold Harmless” Provision

- Contractors and Owners are responsible for their actions but not others’
- Parties can recoup defense costs beyond one’s negligence (no duty to defend)



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# CHANGES

## ConsensusDOCS 200

- Time Provision: “Acceptance of the Change Order and any adjustments in the Contract Price or Contract Time shall not be unreasonably withheld.” (8.1.2)
- Provides methods for adjusting the Contract Sum for both Change Orders and Interim Directive Changes (8.3)

## AIA A201

- Time Provision: No requirement under A201 2007 that the parties expeditiously negotiate a Change Order
- Does not require the Owner to pay the Contractor a stipulated percentage of its actual costs for performing changed work before the adjustment to the Contract Sum has been agreed (7.3.9)

# CHANGES

## ConsensusDOCS

- Mandates including Interim Directive Changes agreed upon since last Change Order (8.2.3)
- Recognizes and provides for dispute whether an instruction constitutes a change (8.3.3)
- Constructor must do the work but is paid 50% of estimate of disputed work.

## AIA A201

- Envisages Change Orders made on an individual basis
- Contractor's right to seek payment for Work performed under a "Construction Change Directive" no longer limited to "amount not in dispute." (7.3.9)
- Change Orders may be issued for part of Construction Change Directive (7.3.10), but do not have to be issued in respect of partial payments for Construction Change Directive. (7.3.9)

# RETAINAGE

## ConsensusDOCS 200

- Once the entire work is 50% complete, Owner may not withhold additional retainage and shall pay Contractor the full amount of what is due on account of progress payments (9.2.4.1)
- Owner may release retainage for work of early finishing trades and subcontractors upon Owner's acceptance of their work (9.2.4.3)

## AIA A201

- 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)
- 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

# Mechanic's Liens/Waivers

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§§9.2.3.1 and 9.2.3.2

Contractor shall provide conditional lien and claim waivers in the amount of the application.

The Contractor shall not be required to sign unconditional waivers, prior to receiving payment for more than it has been paid . . . .

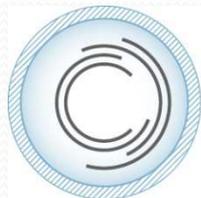
AIA

- No comparable provision

# ConsensusDocs 240

## Owner/Design Professional Agreement & Gen. Conditions

- Limited waiver of conseq. damages
- Detailed insurance requirements
- Detailed basic and add't services
- Copyright permission or ownership
- Relationship of trust and confidence
- Schinnerer “finds ConsensusDocs agreement is fair and insurable.”



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## INSTRUMENTS OF SERVICE / COPYRIGHT OWNERSHIP

### ConsensusDOCS

#### 240

- Owner may use Instruments for “maintaining, renovating, remodeling, constructing, using, maintaining, expanding” project (10.3.3)
- If Agreement Terminated, Owner may continue to use Instruments upon payment of amounts then due under the Agreement (10.1.2)
- Copyright transfer can be negotiated(10.1.1)

### AIA B-101

- Architect owns copyright (7.2)
- Owner gives license for construction, using or altering adding to project (7.3)
- If Agreement Terminated for Owner Default or Convenience, Owner’s license to use Instruments ceases unless additional licensing fee paid (7.3, 11.9)



# Joinder of Design Professional

## ConsensusDOCS 240

- Joinder of all parties allowed (9.6)

## AIA B-101

- Consolidation of Actions Allowed (8.3.4.1)
- Joinder of Contractor into Owner/Architect Dispute Allowed (8.3.4.2)
- No Advance consent to Join Architect in Owner-Contractor Dispute



# Standard of Care

ConsusDocs 240

- Based on national standards

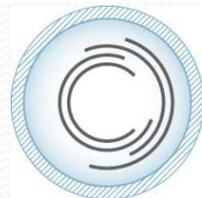
AIA B101

- Based on local standards.

# ConsensusDocs 750

## Constructor/Subcontractor Agreement (Contractor At-Risk)

- Pay-when-Paid
- Prompt pay
- No unconditional lien waivers
- Balanced indemnity provision
- If conflicts arise Subcontract Documents govern
- Optional AI or OCP.

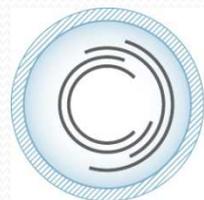


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# ConsensusDocs 410

## Owner/Design-Builder Agreement & Gen. Conditions

- Most Design-Build Contracts in the industry
- D-Ber/Builder or Design Lead
- Lump Sum or GMP
- Can Start Agreement with very Preliminary Design.

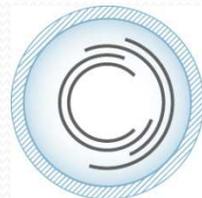


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# ConsensusDocs 500

## Owner/Construction Manager Agreement & Gen. Conditions

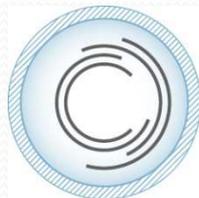
- Cost of Work with GMP
  - pre-con services not in GMP
  - CM At-Risk



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# ConsensusDocs 300- A Different Way

Owner, Constructor & Designer All Sign the Same Contract  
and share risk to eliminate waste



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# Contractually Incorporating BIM in IPD

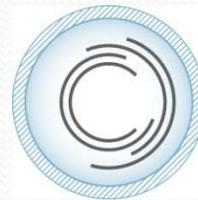
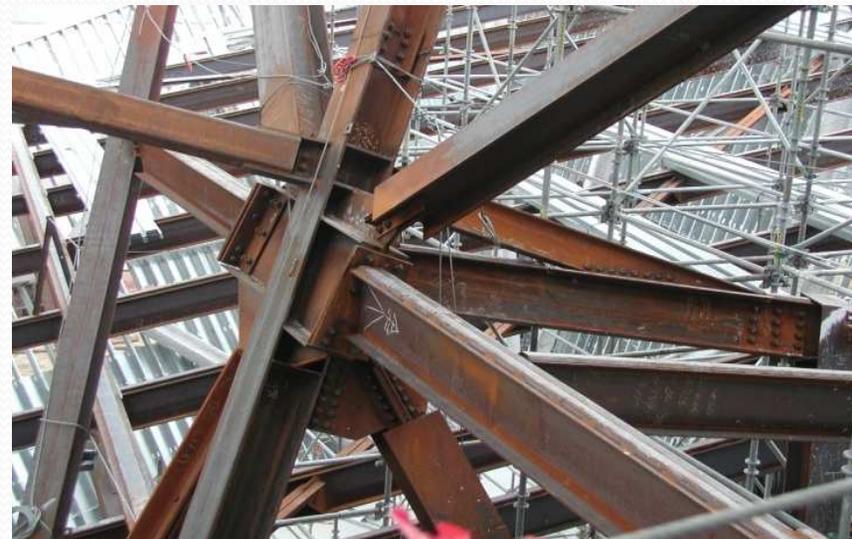
## ConsensusDocs 301

### BUILDING INFORMATION MODELING (BIM) ADDENDUM



#### GENERAL PRINCIPLES

- 1.1. This Addendum does not effectuate or require a restructuring of contractual relationships or shifting of risks between or among the Project Participants other than as specifically required per the Addendum and its Attachments.
- 1.2. This Addendum is not intended to create privity of contract among any Project Participants beyond that which otherwise exists at law or by the terms of the Governing Contract.
- 1.3. Each Party to the Governing Contract shall append or incorporate, and shall cause each Project Participant with which it is in privity to append or incorporate, this identical Addendum in all contracts for which any other Project Participants are to perform obligations to be modeled. All such contracts shall contain flow-down provisions requiring that the provisions of this Addendum be passed downstream to subconsultants and subcontractors, as applicable.
- 1.4. Nothing in this Addendum shall relieve the Design Professional from its obligation, nor diminish the role of the Design Professional, as the person responsible for and in charge of the design of the Project.



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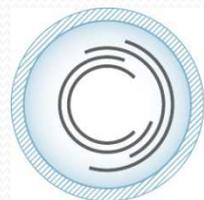


ConsensusDocs™ 301 - Building Information Modeling (BIM) Addendum - © 2006, Revised 2011. THIS DOCUMENT MAY HAVE BEEN MODIFIED FROM THE STANDARD LANGUAGE, and a report of modifications can be generated through the ConsensusDocs platform. Consultation with legal and insurance counsel and careful review of the entire documents are strongly encouraged. Purchase of the document permits the user to print one contract for each party to the contract within one project only. You may only make copies of finalized documents for distribution to parties in direct connection with this contract. Any other uses are strictly prohibited.

# ConsensusDocs 410

## Owner/Design-Builder Agreement & Gen. Conditions

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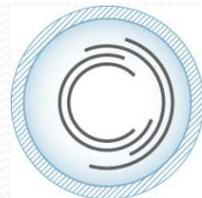


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# ConsensusDocs 500

## Owner/Construction Manager Agreement & Gen. Conditions

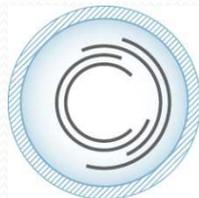
- Cost of Work with GMP
  - pre-con services not in GMP
  - CM At-Risk



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# ConsensusDocs Guidebook

- Highlights issues + innovative clauses
- Associations' comments give members particular perspective
- Free download at:  
[http://consensusdocs.org/FooterSection\\_Resources/Guidebook](http://consensusdocs.org/FooterSection_Resources/Guidebook)



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CONTRACTS CATALOG

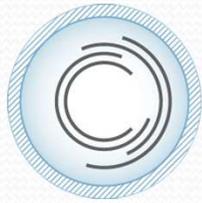


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See What's New at  
[ConsensusDocs.org](http://ConsensusDocs.org)

## New Documents for 2012:

- Joint Venture Agreement
- Purchase Order and General Conditions
- Owner and Geotechnical Consultant Agreement
- Revised Cost of the Work Agreement with Exhibits
- 22 total new and revised contract documents in 2012

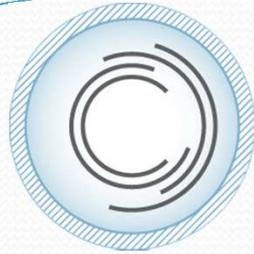


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## 2012 New Technology Platform: A New Look





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Arlington Metrorail Project > Metrorail 200 contract

Upload Compare Selected

Documents	Share	Uploaded	Comment	Compare Documents	Actions
<input type="checkbox"/> Download Finalized	Share	Brian P. 10:31 AM	Comment 0	1.2 to Standard (Pdf) 1.2 to 1.1 (Pdf)	Share
<input type="checkbox"/> Download 1.1	Share	Brian P. 10:29 AM	Comment 0	1.1 to 1.0 (Word) / (Pdf)	Share More
Sharing with... Brian P. <doctester6@agc.org>					
<input type="checkbox"/> Download 1.0	Share	Erin Santiago 10:25 AM	Comment 0	1.0 to Standard (Word) / (Pdf)	Share
Sharing with... Brian P. <doctester6@agc.org>					
<input type="checkbox"/> Download Standard		Erin Santiago 10:23 AM			More

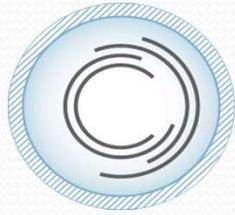
Supporting Documents

Add document

Supporting Documents	Creation Date	Share Documents
No supporting documents		

## Project Dashboard:

- Share contracts
- Version control
- Document Comparison
- Make Favorites
- Finalize Documents
- Add Supporting Documents



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## BUILDING A BETTER WAY

# Finalized

# vs.

# Standard

### ARTICLE 1 AGREEMENT

Job Number: 12345

Account Code: [ ]

This Agreement is made this 9th day of March in the year 2012,

by and between the

OWNER, VDOT

and the

CONSTRUCTOR, ABC Contractors

Tax identification number (TIN) [ ]  
Contractor License No., if applicable [ ]

for construction and services in connection with the following

PROJECT Arlington Metrorail Project

Notice to the Parties shall be given at the above addresses.

The Design Professional is [ ].

### ARTICLE 2 GENERAL PROVISIONS

2.1.1 The Constructor shall furnish construction administration and management services and use the Constructor's diligent efforts to perform the Work in an expeditious manner consistent with the Contract Documents. The Parties shall each endeavor to promote harmony and cooperation among all Project participants.

2.1.1.1 The Constructor represents that it is an independent contractor and that in its performance of the Work it shall act as an independent contractor.

2.1.2 Neither the Constructor nor any of its agents or employees shall act on behalf of or in the name of the Owner except as provided in this Agreement or unless authorized in writing by the Owner's Representative.

2.2 ETHICS The Parties shall perform their obligations with integrity, ensuring at a minimum that each: (a) avoids conflicts of interest and promptly discloses any to the other Party; and (b) warrants that it has not



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The Design Professional is [ ].

### ARTICLE 2 GENERAL PROVISIONS

~~2.1 PARTIES' RELATIONSHIP AND ETHICS The Parties each agree to proceed with the Project on the basis of mutual trust, good faith, and fair dealing.~~

2.1.1 The Constructor shall furnish construction administration and management services and use the Constructor's diligent efforts to perform the Work in an expeditious manner consistent with the Contract Documents. The Parties shall each endeavor to promote harmony and cooperation among all Project participants.

2.1.1.1 ~~2.1.2~~ The Constructor represents that it is an independent contractor and that in its performance of the Work it shall act as an independent contractor.

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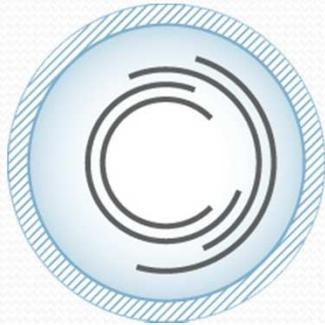
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## Comparison of Project Delivery Methods (CII/Penn State Study)

Metric	DB vs. DBB	CM@R vs. DBB	DB vs. CM@R
Unit Cost	6.1% lower	1.6% lower	4.5% lower
Construction Speed	12% faster	5.8% faster	7% faster
Delivery Speed	33.5% faster	13.3% faster	23.5% faster
Cost Growth	5.2% less	7.8% more	12.6% less
Schedule Growth	11.4% less	9.2% less	2.2% less

“Comparison of U.S. Project Delivery Systems,” Mark Konchar & Victor Sanvido, Journal of Construction Engineering and Management, Vol. 124, No. 6 (1998), pp. 435-444.



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## **Contracts for Today's Design and Construction Industry**

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