

DIVISION 2: CONTRACT DOCUMENTS

D2 MISSION STATEMENT

To study, develop and improve contract documents for the benefit of the construction industry generally and the protection of the interests of all project participants.

DIVISION 2: CONTRACT DOCUMENTS | ISSUE 12, WINTER 2025

MESSAGE FROM THE CHAIR



JUSTIN WEISBERG

*Justin Weisberg,
Division 2 Chair*

Hello Friends from
Division II:

It was great to see those of you who were able to attend the Fall meeting in Louisville. Thank you to Lori Chen and Zach Jones

for coordinating a great barbeque dinner at Guy Fieri's place in Louisville. The Regional Meeting held on November 13 and 14 provided a day of the fundamentals of construction law and a day of basic training about construction. In the beginning of February we will be going to Dana Point to learn about effective ADR Strategies. Thank you to our hot topic presenters this summer and fall including Mali Richardson from AIA on Cantina, Bruce Merwin on Gold Standard Contract Forms and Zach Jones on Teaming Agreements. Finally, thank you to our liaisons to the Forum-wide Committees including, Bruce Merwin, Sara Betancourth, Michael Cortez, Nicole Lentini, Steven Hemric and Ben Buskirk for your keeping Division II represented and contributing to these important Forum committees. I am looking forward to seeing everyone in my hometown of Chicago at the Forum Annual Meeting, and 50th Anniversary of the Forum in April of 2026.

BEGIN AS YOU MEAN TO GO ON: TEAMING AGREEMENTS AS ROADMAPS FOR PROJECT SUCCESS



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*By Rachel C. John,
Faegre Drinker Biddle
& Reath LLP;
Chair, DBIA
Contracts Committee*

The Design - Build Institute of America (DBIA) recently released an update to its Standard Form of Teaming Agreement

Between Design - Builder and Team Member (Document #580, 2nd Ed. 2025). The update was the culmination of an intensive review process among multiple DBIA committees and input from practitioners in all kinds of roles and across industries. Regardless of their role or industry, practitioners had stories of teaming gone wrong (and right!) and identified pre-award teaming arrangements as both a major source of liability and a precursor for the successes and failures in later execution of the project.

In design-build and other alternative delivery projects, success starts long before the owner signs a contract. The team's first critical step is often the negotiation of a **teaming agreement**—one that is more than a mere "agreement to agree." A well-drafted teaming agreement sets the tone for collaboration, creates accountability



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during the proposal phase, and provides a roadmap for how the team will operate if awarded the project. In short: begin as you mean to go on.

The Dual Purpose of a Teaming Agreement

A teaming agreement serves two essential functions:

1. **Defining proposal-phase commitments, rights, and liabilities.** It captures the parties' binding agreements as to the roles, responsibilities, contributions, and liabilities of each during pursuit activities, including an obligation to negotiate in good faith with respect to the parties' intention to enter into a follow-on agreement. This ensures each team member knows what is expected and how risks and rewards will be allocated.
2. **Establishing the parties' intention for a subsequent agreement.** It lays out expectations for a subsequent agreement—hopefully, in a robust form such as a comprehensive term sheet or form of subcontract or joint venture agreement. This streamlines the transition from pursuit to execution and gives meaning to the parties' binding obligation to negotiate the subsequent agreement in good faith.

Why It Matters

Too often, parties misjudge enforceability or ignore how pre-award activities—with or without a formal agreement—may give rise to liability. Courts regularly enforce provisions governing pre-award conduct: standards of care, ownership of proposal work product, exclusivity, limitations of liability, and good faith negotiations. Courts will not, however, enforce a mere intention to enter into a later agreement, even if the design-builder wins and enters into a contract with the owner. Practitioners that defer a formal agreement until finalization of the subsequent agreement risk imposition of liability arising under applicable law. Failures during this phase can lead to significant financial losses, reputational damage, and litigation.

The process of negotiating a teaming agreement is often a microcosm of how the parties will work together for later success (or failure). A team that can openly address risk allocation, compensation, and liability during the pursuit phase is more likely to communicate effectively and resolve issues during contracting and execution. Conversely, if a would-be design-builder resists or refuses to negotiate fundamental rights and liabilities arising from pre-award activities, red flags should be flashing for potential consultants and subcontractors. Such behavior suggests that the same party may be difficult in final contract negotiations, administration, and dispute resolution once the project is live.

By contrast, discussing substantive contract terms early builds trust and reduces the risk of deal fatigue or unpleasant surprises once the award is secured. Potential consultants and subcontractors should not wait until negotiation of the subsequent agreement to raise “go/no-go” terms—only to find the design-builder

unwilling to agree. Similarly, if the design-builder has not proactively discussed acceptable terms with critical consultants and subcontractors, it could find itself unable to fulfill commitments made to the owner in its proposal on terms that are acceptable or commercially viable. By addressing such terms in a term sheet or draft form at the teaming stage, the parties increase the likelihood of seamless contract finalization and long-term collaboration.

Avoiding Pitfalls Through Coordination

Confusion about which contract—the teaming agreement or subsequent agreement—should govern claims arising from pre-award activities has spawned a hefty body of caselaw dissecting merger clauses and contractual definitions for words like “scope”, “term”, and “work”. Unless carefully coordinated, a merger clause may inadvertently extinguish protections and terms that one party intended to survive or vice versa. Clear drafting that identifies how claims arising from pre-award activities will be treated ensures continuity rather than conflict.

Best Practices for Roadmap-Ready Agreements

- Treat the teaming agreement as a contract with enforceable obligations.
- Use the process to create a roadmap for how the parties will work together in the pursuit and later project execution.
- Address critical issues, such as exclusivity, confidentiality, liability caps, dispute resolution, ownership of work product, and the risk of pricing incomplete design.
- Incorporate appropriate attachments to help define the parties' agreements and intentions, such as a scope narrative, responsibility matrix, risk register, and schedule.
- Attach a comprehensive term sheet or a draft form of the subsequent agreement to set clear expectations and give meaning to the parties' obligations to negotiate in good faith.
- Plan for transition by specifying survival of essential provisions and understanding how, or if, liability can arise under the teaming agreement apart from liability under the subsequent agreement.

Conclusion

By beginning as you mean to go on—using the teaming agreement to set roles, allocate risk, and outline the path to a final contract and project completion—project participants can reduce uncertainty, protect themselves from inappropriate liability, and establish the trust and clarity necessary for team success.

¹ DBIA's Contracts Committee and its Design Professionals' Advisory and Engagement Committee partnered to prepare the updated form.

² *Fleming Steel Co. v. Jacobs Eng'g Grp., Inc.*, 373 F. Supp. 3d 567, 584 (W.D. Pa. 2019) (summary judgment denied where manufacturer sufficiently alleged unwritten teaming agreement guaranteeing manufacturer's position as sole-source supplier).

³ *Rolls-Royce N. Am. Techs., Inc. v. Dynetics, Inc.*, 2013 WL 5754945 (N.D. Ala. 2013) (injunction granted where evidence showed breach of obligations to negotiate

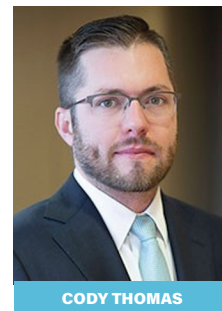
exclusively and in good faith); *Alabama Aircraft Indus., Inc. v. Boeing Co.*, No. 2:11-CV-03577-RDP, 2018 WL 11418017, at *5 (N.D. Ala. Nov. 6, 2018) (limitation of liability clause enforceable); *Middlesex Corporation, Inc. v. Fay, Spofford & Thorndike, Inc.*, No. 1584CV02592, 2019 WL 3552609 (MA Sup. Ct. Suffolk Cnty. June 28, 2019) (risk of pricing incomplete design documents effectively allocated to design-builder by teaming agreement). The *Middlesex* case can be accessed through the Massachusetts Trial Court Case Access website, here: <https://www.masscourts.org/eservices/home.page.11>.

⁴ *E.g., Trianco, LLC v. Int'l Bus. Machines Corp.*, 271 F. App'x 198, 202 (3d Cir. 2008) (although couched in binding terms through words like “will” and “shall”, any “obligation” to enter a subcontract upon successful pursuit was an unenforceable “agreement to agree”).

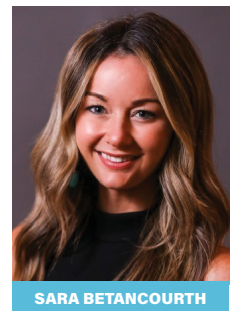
⁵ *Web Apps Agency, LLC v. HNTB Corp.*, No. 4:23-CV-01524, 2025 WL 2523186, at *3 (S.D. Tex. Sept. 2, 2025) (where teaming agreement was silent on license to use work product, a license permitting defendant to incorporate the work into its proposal and publications in connection with the same was implied by the circumstances of engagement); *Meritage Homes of Arizona, Inc. v. Bingham Engineering Consultants, LLC*, 2014 WL 2592354 (Ariz. Ct. App. Div. 1 2014) (consultant engineer liable to contractor on theory of breach of implied warranty of adequate design).

⁶ *AECOM Tech. Servs., Inc. v. Flatiron | AECOM, LLC*, No. 19-CV-2811-WJM-KLM, 2023 WL 5758860 (D. Colo. June 16, 2023), reconsideration denied, 2023 WL 5748376 (D. Colo. Sept. 6, 2023) (merger clause extinguished a teaming agreement such that the subcontract's limitation of liability and attorney fee transfer clauses would apply to claims arising from proposal phase services); *Gannett Fleming, Inc. v. Corman Constr., Inc.*, 243 Md. App. 376, 403, 220 A.3d 411, 427 (2019) (subcontract arbitration clause subjected all claims between the parties “related to” the subcontract to binding arbitration, which encompassed pre-bid services performed under earlier teaming agreement).

AIA CONTRACT DOCUMENTS PUBLISHES NEW AND UPDATED DESIGN-BUILD DOCUMENTS AND NEW VOLUMETRIC MODULAR CONSTRUCTION AGREEMENTS



CODY THOMAS



SARA BETANCOURTH

By Cody Thomas, Esq. and Sara Betancourt, Esq.

Design-Build

AIA Contract Documents recently published updates to its Design-Build (DB) family. This release includes new and updated agreements and forms. The 2024 DB Agreements include:

- A141®–2024, Traditional Owner/Design-Builder Agreement

- A141[®]PDB–2024, Progressive Owner/Design-Builder Agreement
- A145[™]–2025, Abbreviated Owner/Design-Builder Agreement
- A441[™]–2024, Design-Builder/Subcontractor Agreement
- B141[™]–2024, Traditional Design-Builder/Architect Agreement
- B141[™]PDB–2024, Progressive Design-Builder/Architect Agreement
- C141[™]–2024, Owner/Consultant Agreement for DB
- C441[™]–2024, Architect/Consultant for DB

For a complete list of all the new DB documents and a summary of each, see this [link](#).

Key additions and updates to the DB Agreements

- *Progressive DB*: This release introduces agreements for progressive DB projects. To respond to the varying degree of Owner involvement possible on DB projects, the 2024 DB Agreements include Progressive DB versions of the A141 and B141, in addition to Traditional DB versions.
- *Standard of Care*: The Design-Builder must provide Design Services consistent with the degree of skill and care ordinarily provided by Design-Builders performing the same services in the same or similar locality under the same or similar circumstances.
- *Warranty*: The Design-Builder now provides the same warranty as a Contractor provides in AIA Document A201[®]–2017.
- *Dispute Resolution*: A new process was introduced allowing the parties to select either “Meet and Confer” or a “Project Neutral” for the initial resolution of claims.
- *Early Release Work*: Early Release Work provisions were added to require the Design-Builder to prepare a proposal and an authorization to proceed.

To learn more, see our [Design-Build Guide](#).

Volumetric Modular Construction

In early 2025, AIA Contract Documents released a coordinated set of agreements specifically tailored for Volumetric Modular Construction (VMC) projects. This release includes:

- A181[™]–2025, Owner/Construction Manager as Constructor for VMC
- A281[™]–2025, General Conditions for VMC
- A481[™]–2025, Construction Manager/Modular Subcontractor Agreement for VMC
- B181[™]–2025, Owner /Architect Agreement for VMC

These new agreements are based on the framework of the AIA Contract Documents Construction Manager as Constructor family. They are designed for projects where the Owner engages a Construction Manager (CM) who will not only complete the construction, but also provide construction management services. This project delivery also requires the CM to provide the owner with a GMP proposal.

For a summary of each new document, see this [link](#).

Key Attributes of the VMC Agreements

The new VMC agreements contain robust sections for Pre-Design and Preconstruction Services provided by the CM, Modular Subcontractor, and Architect, including:

- *Pre-Design and Preconstruction Services*: Coordinated provisions between the CM, Modular Subcontractor, and Architect during the Pre-Design and Preconstruction phases, including elements of design-assist and delegated design services;
- *Delegated Design*: Requirements for the Modular Subcontractor to engineer and design the Modules;
- *Coordination*: Requirements for the CM, Modular Subcontractor, Architect, and Owner to regularly meet and coordinate during the concurrent development of the designs of the Modules and the overall Project; and
- *Design Freeze Date*: Processes for establishing the Design Freeze Date, as well as defining this commonly used term.

Furthermore, these coordinated agreements describe the CM's and Modular Subcontractor's Construction Phase services, including:

- *Construction and Delivery*: The Modular Subcontractor's requirements for constructing the Modules and delivering them to the Project Site or Staging Site, where appropriate;
- *Permitting*: The Modular Subcontractor's responsibility to properly obtain permits for the Modules;
- *Inspections of the Modules*: Processes for inspecting the Modules at the Modular Facility and after delivery to the Project Site or Staging Site;
- *Installation, Assembly, and Connection*: Provisions addressing the responsibility to install, assemble, and connect the Modules on the Project Site;
- *Transfer of Risk of Loss*: A defined process for transferring the risk of loss of the Modules from the Modular Subcontractor to the Construction Manager; and
- *Defining the Sites*: Each site – Project Site, Modular Facility, and Staging Site – is properly defined and specified throughout the coordinated agreements.

These new agreements also address the nuances of payments on VMC projects, including:

- *Advance Payment*: Optional provisions for an Advance Payment to the Modular Subcontractor; and
- *Offsite Construction Payments*: Requirements for payments to the CM and Modular Subcontractor for offsite construction.

To learn more about the VMC agreements, please see our [VMC Guide](#).

CONSENSUSDOCS PUBLISHES AN UPDATED CONSTRUCTION MANAGEMENT AT-RISK STANDARD AGREEMENT



BRIAN PERLBERG

By Brian Perlberg,
Executive Director
and Senior Counsel,
ConsensusDocs
Coalition

ConsensusDocs recently published updates to the [ConsensusDocs 500 Standard Agreement Between Owner and Construction Manager At-Risk](#). Construction Management At-Risk (CM@R), also known as CM/GC and CMc, is one of the three most commonly used project delivery methods in the design and construction industry. While design-bid-build is still the most commonly used project delivery method in the United States, CM@R and design-build are both increasing as a share of the marketplace. They are so well established that calling them alternative project delivery methods no longer seems appropriate.

CM@R helps facilitate the early involvement of the General Contractor and trade partners, thereby opening up opportunities for collaboration and effective communication. Significantly, the use of design assist (see [ConsensusDocs 541](#)) and building information modeling (BIM) (see [ConsensusDocs 301](#)) becomes more efficient under CM@R. CM@R helps fast-track projects as well as foster deeper collaboration with earlier input from the trades and the Construction Manager. CM@R can be used as a transition to integrated lean project delivery, as embodied by the [ConsensusDocs 300](#), or an IPD-hybrid approach with the [ConsensusDocs 305](#) Lean Addendum and 500 together.

Highlights regarding revisions to the ConsensusDocs 500 CM@R Standard agreement include:

Limited Waiver of Consequential Damages

This clarifies that insurance coverage alone is insufficient to exclude the waiver of consequential damages; the insurance company must also pay the proceeds. (\$6.7).

Shared Savings

A shared savings clause was added (\$7.2).

Builder's Risk Policy

The requirement to cover “existing structures” under this property insurance has been eliminated. Obtaining property insurance

through a Builder's Risk policy that covers damage to existing structures may not always be feasible. (§11.3.1).

Risk of Loss

There was also a clarification on when the risk of loss transfers. It now transfers at Substantial Completion rather than Final Completion (§11.3.6).

Interim Directives

Revised language provides additional clarity surrounding interim directives. Interim directives do not necessarily cause an increase in the GMP. ConsensusDocs uses this term to encompass directed change orders that are issued due to a lack of agreement on cost and schedule impacts, as well as field instructions. AIA uses the term "construction change directives (CCDs)" for a similar concept.

Reasonable Attorney Fees

Clarified that all reimbursable attorneys' fees must be reasonable throughout the standard agreement. Significantly, ConsensusDocs is the only standard construction contract document family that provides for the non-prevailing party in claims to pay reasonable attorneys' fees and court costs, a feature unique to ConsensusDocs' standard contract documents.

Statute of Repose

Added statute of repose in addition to statute of limitations as reasons for barring commencing arbitration. Some state courts have ruled that the statute of limitations and statute of repose don't apply to arbitration actions. Therefore, it is prudent to put this in standard contracts (§13.5.1.1).

Cost Reporting

Moved cost reporting language in §3.7.6.1 to the cost-of-the-work section in §8.4. Added a three-year period to retain records or longer as required by applicable law.

No Waiver of Performance

Clarified the "no waiver of performance" language so that not necessarily enforcing or insisting upon a contractual right does not waive such contractual right by implication (§14.6).

Contingent Assignment

Added a required contingent assignment provision for suppliers as well as subcontractors in subcontractor and supplier agreements §5.3.2).

Contingency

Adds a definition of contingency (2.4.4) and clarifies that Contingency is part of the GMP (3.4.2.8)

Hazardous Materials

Created a duty to defend as part of the indemnity obligation to hold the owner harmless for hazardous materials brought to the site by the Constructor or someone for which Constructor is liable (§3.15.6).

Payment Applications

Provides the Owner additional assurances and supporting material for the payment application process (§10.2). Provided additional language regarding the potential rejection of a payment application and the resubmittal process (§10.4).

Bonds

Provides a new check-the-box option to set the penal sum based upon the GMP or agreed-upon estimate. Specified that performance and payment bonds must be issued by a surety company holding a certificate of authority to conduct surety business (§11.6).

Damaged Work

Clarified that CM's obligations to remedy damage or loss do not apply to damage covered by an owner's property insurance or is attributable to the owner or the owner's separate contractors (§3.13.5).

Design Documents

Simplified language that the Owner may get a license for the Constructor to use the design documents through a license or other means (such as purchasing the copyright) (§2.3.1).

Warranty

Clarified that Constructor's warranty obligations to correct material and equipment defects for owner-provided materials and equipment are limited to installation defects (§ 3.10.3).

Schedule

Revises language reflecting that the preliminary schedule is a precursor to the defined term Schedule of the Work (§3.3.3). Requires a submittal schedule within 30 days of commencing the Work (§3.16.1).

Tariffs

Tariffs remain a pressing issue in construction contracts in today's A/E/C industry. CM@R, a cost-of-the-work agreement, helps address tariffs to a certain extent (See [In Light of Tariff Uncertainty, Cost-Plus Contracts are a Great Solution](#)). When the GMP is set and the ability to procure materials as soon as possible is also a factor, it maximizes the benefits of the CM@R project delivery method as a means to mitigate the impact of tariffs. The best way to address the uncertainty caused by the tariffs is to use a price escalation clause, such as the one found in [ConsensusDocs 200.1](#). Information on price escalation clauses and other finer points related to tariffs is now addressed in the ConsensusDocs Tariffs and Price Escalation Resource Center, located [here](#).

New ConsensusDocs 500 CM@R Contract Access and Transition Timeline

ConsensusDocs subscribers will gain access to the new version of the ConsensusDocs 500 CM@R standard contract upon publication. Existing users will continue to have access to the previous edition as well for the next 13 months.

EJCDC ANNOUNCES UPCOMING REVISIONS TO KEY DOCUMENT FAMILIES



ZACK JONES

*Zach Jones,
Engineers Joint
Contract Documents
Committee,
General Counsel*

In 2025, the Engineers Joint Contract Document Committee (EJCDC) celebrated its 50th year of producing fair, objective standard documents for engineer lead projects. EJCDC currently has two subcommittees actively working on document revisions, Construction and Engineering.

Design-Build Documents: A Collaborative Framework for 2025

EJCDC has approved its revisions to both its Traditional Design-Build family of documents and its Progressive Design-Build documents. Both document sets should be released shortly.

Construction Documents: The Industry Standard for Engineer Led Projects

EJCDC's Construction Subcommittee is currently revising its Construction document family, known as the C-Series, which were last updated in 2018. These documents, which represent the most commonly used design-bid-build documents produced by EJCDC, should be approved by the full committee in 2026.

Release of Updated Engineering Documents

EJCDC's Engineering Subcommittee continues to review and improve its documents intended to assist owners, design-professionals, and their subconsultants entering into professional services—and professional services adjacent—agreements. EJCDC is in the process of publishing its revised E-582, Agreement Between Owner and Engineer as Program Manager, and E 571, Short Form of Agreement Between Engineer and Subconsultant for Professional Services. Both of these documents should be published in 2025.

For further information on the release dates and detailed content of these documents, stakeholders are encouraged to keep an eye on upcoming EJCDC publications and announcements. Any questions or comments regarding EJCDC may be directed to EJCDC's general counsel, Zach Jones, at zjones@martinjoneslaw.com.

IMPORTANT D2 DATES

D2 Monthly Zoom Conference

December 11, 2025
12:00 ET

January 8, 2026
12:00 ET

February 12, 2026
12:00 ET

UPCOMING FORUM EVENTS

2026 Midwinter Meeting

February 4-6, 2026
Dana Point, CA

2026 Annual Meeting

May 6-9, 2026
Chicago, IL

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