EXECUTIVE SUMMARY

ConsensusDocs offers the ConsensusDocs 748 Standard Agreement Between Constructor and Testing Laboratory. This is an important industry standard document that can potentially be used on projects of American Council of Independent Laboratories (ACIL) member. Consequently, ACIL and the leadership of its Construction Materials Engineering Testing Section (CMET) undertook this project to create a guidebook to aid its members in understanding the ConsensusDocs 748, to provide an explanation of specific clauses of note and to provide recommended changes where appropriate. The working group also determined the services provided by a Testing Laboratory should be deemed as professional services and not as a contractor/subcontractor relationship. It should be noted that the ConsensusDocs 748 is a copyrighted document and it use on a project should only be used with an appropriate license, which then allows for modifications by the subscriber.

Some examples of the significant changes suggested in this guidebook include, but are not limited to the following:

1. Provide terms and terminology related to testing laboratories and the functions that they perform on a construction project.
2. Provide additional clarification of the lab's responsibilities from that of the constructor.
3. Provide additional guidance on reports and use of the data they contain, as well an inclusion for misuse of these documents.
4. Provide clarification or replacement of certain terms used in some of the articles that were more favorable to the constructor, to terms that are mutually beneficial. The most significant one was to place a limit on liability, as the current article has no limit.
5. Added terms that were missing were to provide clarification during the contract negations (i.E. Hidden conditions, workplace hazards, other safety items specific to laboratories, etc.), Rather than after a laboratory shows up on site.
6. Provide a means of collecting on invoices when there is non-payment.

GENERAL INSTRUCTIONS

1. Care should be taken when reviewing the Contract to where the point of service is, as some sections may be only applicable to field services and not lab services (when only lab services are performed).
2. Throughout the document contractor and subcontractor were changed to consultant and subconsultant, respectively, as the services provided by the lab are of a professional consulting service.
3. Laboratories are not and should be authorized to contribute to the actual construction of the project.
4. All underlined text should be considered for insertion into the document.

GUIDEBOOK SECTION

Article 2 GENERAL PROVISIONS

Add the following text before **Section 2.1**:

"Wherever used herein, the term Lab shall mean an independent professional consultant, rendering construction materials engineering and testing (CMET) professional services. The term Lab does not imply that it is engaged in providing construction contracting work, nor is it responsible in any way for the construction means, methods, procedure, techniques, schedules, or sequences, nor for any aspect of overall jobsite safety. These duties are and shall remain the sole responsibility of the Contractor. Furthermore Lab personnel providing CMET services on a project may not be classified as construction workers and are not authorized to contribute to the actual construction of the project."

Section 2.1.1 Replace "contractor" with "consultant"

Section 2.1.2 Delete "unless authorized in writing by Constructor or the Constructor's Representative."
Add "Services provided by Lab are consulting in nature."

Section 2.1.3 Replace "subcontractors" with "subconsultants"

Section 2.1.4 Insert in the first sentence: … of this Agreement, "preferably during the proposal stage," the Constructor…

Section 2.1.4 Remove "all of" twice from the second sentence and insert the words "applicable" and "mutually negotiated". The second sentence now reads as, "Lab agrees to be bound to the Constructor by the applicable terms of the Contract Documents and, with respect to the Services, to assume to Constructor the mutually negotiated obligations and responsibilities that Constructor…"

Section 2.1.4 Remove "all" from the second sentence and insert: …ancillary to the Service, "that fall within the Lab's purview."

Section 2.2.1.1 Add "(including terms and conditions)" to EXHIBIT A

Section 2.2.4 Replace **3.10.4** with "**3.2**"

Insert "**Section 2.2.6** Hidden conditions means a condition that is concealed or is not capable of detection by reasonable visual observation."

Section 2.2.6 now becomes **2.2.7**

Section 2.2.7 now becomes **2.2.8**. Replace "Subcontractors" with "Subconsultants"

Section 2.2.8 now becomes **2.2.9**

Section 2.2.9 now becomes **2.2.10**

Section 2.2.10 now becomes **2.2.11**

Section 2.2.11 now becomes **2.2.12**

Section 2.2.12 now becomes **2.2.13**. Replace "Subcontractor" with "Subconsultant" twice, and replace "contractor" with "professional consultant." **2.2.13** now reads as " "Subconsultant" is a person or entity retained by Lab as an independent professional consultant to provide labor… The term Subconsultant does not include…"

Section 2.2.13 now becomes **2.2.14**

Section 2.2.14 now becomes **2.2.15**

Section 2.2.15 now becomes **2.2.16**

Article 3 TESTING LABORATORIES RESPONSIBILITIES

Section 3.2.2 In third sentence, remove "other" and edit sentence to read, "Reports, notes, data, and similar documents created by Lab will be provided as instruments of service to the Constructor, for the Constructor's exclusive use, as related to "the Project" described in this agreement. Utilization of this documentation by the Constructor for any other purpose or distribution to third parties without Lab's consent is prohibited."

Section 3.2.2 Delete remainder of clause. "All documentation remains the property… not expressly identified in this Agreement."

Section 3.4.1 Insert … scope, and complexity, "in the same or comparable locality," during the time…

Section 3.4.2 Remove "design or" in the first sentence

Section 3.5 Replace "subcontractors" with "subconsultants" in the second sentence

Section 3.5 Insert beneath **3.5**:

Section 3.5.1 Constructor and/or Owner shall disclose all known and/or potential workplace and project site hazards to Lab prior to start of Lab's activities.

Section 3.5.2 Constructor shall provide Lab with Constructor's Site Safety and Health Plan prior to start of Lab's activities.

Section 3.5.3 Lab shall be afforded safe access to and on the worksite in accordance with all applicable federal and state safety laws and regulations, including but not limited to relevant provisions of the OSHA standards, whichever is more stringent shall prevail.

Section 3.5.4 Constructor and its subcontractors shall adhere to all applicable safety requirements while within the exclusion zone work area established by Lab personnel.

Section 3.6 Replace "Subcontractors" with "Subconsultants". Insert at the end of the clause, "and/or accredited."

Section 3.8 Delete "is of the essence for this Agreement" so that the title is just "TIME".

Section 3.8 Insert at the beginning, "Constructor shall provide lab with adequate notice of when services will be required."

Section 3.8 In what is now the second sentence, add to the end …current Project schedule in use at the time, "as outlined in the Lab technical proposal."

Section 3.8.1 Replace **6.3** with "**6.4**"

Section 3.9 Remove "All samples are the Constructor's property." Insert …samples "submitted to the Lab" shall be either:

Section 3.9 Remove the entire sentence "Lab shall be responsible for….of its services"

Section 3.10.1 Insert at the end, "The Lab shall have no responsibility for the presence, discovery, handling, removal, or disposal of, or exposure to, hazardous wastes at the project site, or any costs or liabilities resulting from hidden conditions."

Section 3.10.6 Replace "Subcontractors" with "Subconsultants" twice and delete "and subcontractors" twice.

Section 3.10.7 Replace "Subcontractors" with "Subconsultants"

Section 3.10.8 Insert underlined: During Lab's performance of the Services, Lab shall be responsible for the proper delivery, handling, storage, and removal of all materials brought to the Worksite by Lab, for performances of its services.

Section 3.11 Insert …records relating to this Agreement "upon written request and for the cost of retrieval and reproduction."

Section 3.11 Replace "all such" with "required"

Insert "**Section 3.12** Constructor acknowledges that test records shall not relieve the Constructor in any way from its obligations and responsibilities to conduct the work in conformance with the project contract documents."

Section 3.12 now becomes **Section 3.13**

Section 3.13 now becomes **Section 3.14**. In this section, replace "Subcontractors" with "Subconsultants"

Section 3.14 now becomes **Section 3.15**

Section 3.15 now becomes **Section 3.16**

Section 3.15.1 now becomes **Section 3.16.1** In this section,
- Replace "constructor" with "lab"
- Replace "receive" with "retain"
- Remove "except for"
- Remove "or subcontractors"
- Insert "as instruments of service" after "or procured by lab"
- Remove "upon the making of final…pursuant to section 9.3"

Section 3.15.2 now becomes **Section 3.16.2**
- Delete everything but "COPYRIGHT"; add "The copyright shall remain with the Lab"

Section 3.15.3 now becomes **Section 3.16.3**

Section 3.15.4 now becomes **Section 3.16.4**
- Delete "renovating, remodeling or expanding"
- Delete "or on other projects"
- Replace "Subcontractors and consultants" with "**Subconsultants**"

Insert "**Section 3.16.5** The Lab shall not be responsible for the interpretation and/or misuse by others of documents furnished by the Lab. Constructor agrees to indemnify and hold harmless the Lab from and against all claims, damages, losses, and expenses arising from the interpretation and/or misuse by others of the documents provided by the lab."

Section 3.15.5 now becomes **Section 3.16.6**
- Replace "**Section 3.15.2**" with "**Section 3.16.2**"

Section 3.15.6 now becomes **Section 3.16.7**
- Replace "Subcontractors and its consultants rights and" with "Subconsultants"

Section 3.16 now becomes **Section 3.17**
- Replace "Subcontractors and subsubcontractors" with "Subconsultants"

Section 3.17 now becomes **Section 3.18**

Article 4 SUBCONTRACTS (Replace "SUBCONTRACTS" with "SUBCONSULTANTS")

Sections 4.1 & 4.2
Replace all "subcontractor" and "subcontractors" with "subconsultant" and "subconsultants"

Section 4.3 Replace "SUBCONTRACT" with "SUBCONSULTANT" in the article subsection title

Section 4.3.1
- Replace all "subcontract" and "subcontractor" with "subconsultant"
- Replace "shall" with "may"
- Remove "subject to the prior rights of any surety"

Section 4.3.2 Replace "Subcontractor's" with "Subconsultants"

Section 4.4
- Replace all "subcontractor" and "subcontractors" with "subconsultant" and "subconsultants"
- Add "s" to "supplier" to read suppliers
- Delete "If this Agreement is terminated, each.... adjusted as a result of suspension."

Article 5 CONTRACTORS RESPONSIBILITIES

Section 5.2 Replace "Subcontractors" with "Subconsultants"

Article 6 INDEMNITY, INSURANCE, AND WAIVERS

Section 6.1.1
- Replace "Subcontractors" with "Subconsultants"
- Delete "Lab shall be entitled to reimbursement… provided for by the subsection below."

Section 6.1.2 Insert "…negligent acts or omissions of the Constructor and the Constructor's Subcontractors…"

Section 6.1.2 Remove the last sentence "Constructor shall be entitled …. the subsection above"

Section 6.1.3 Delete "NO"

Insert "**Section 6.1.4** Notwithstanding any other provision of this agreement, and to the fullest extent permitted by law, the total liability, in the aggregate of Lab, its officers, directors, and employees to the Constructor and anyone claiming by, through or under Constructor, for any and all claims, losses, costs of damages whatsoever arising out of, resulting from, or in any way related to the Project of this Agreement from any cause or causes, including, but not limited, to the negligence, professional errors or omissions, strict liability or breach of contract or warranty, express or implied, of Lab or its officers, directors, and employees (hereafter "Claims"), shall not exceed the total insurance proceeds paid on behalf of or to Lab by Lab's insurers in settlement or satisfaction of Constructors Claims under terms and conditions of Lab's insurance policies applicable thereto (excluding fees, costs and expenses of investigation, claims adjustment, defense and appeals). In no event shall the Lab be liable for any special, indirect, consequential or economic damages, including but not limited to damages for loss of use, loss of profits, loss of investment, or otherwise, resulting from the services and reports it renders hereunder."

Insert "**Section 6.3** Constructor recognizes that the Lab's insurance policies may contain certain exclusions, including but not limited to those for certain claims arising from the discharge, dispersal, release, or escape of pollutants."

Section 6.3 now becomes **Section 6.4**

Remove **Section 6.4.1** in its entirety.

Article 7 PAYMENT

Insert "**Section 7.2** In the event legal action is necessary to enforce the payment terms of this agreement, Lab shall be entitled to collect from Constructor any judgement sums due plus reasonable attorney's fees, court costs, and other expenses incurred by Lab for such collection actions."

Article 8 DISPUTE MITIGATION AND RESOLUTION

Sections 8.5.3 and **8.5.4** Replace all instances of "arbitration" with "binding dispute resolution"

Article 9 SUSPENSION, NOTICE TO CURE AND TERMINATION

Section 9.3 Change "…supporting data prepared by Lab, its consultants and contractors, for the Project." to read "… supporting data prepared by the Lab, and its subconsultants, for the Project."

Insert "**Section 9.4** TERMINATIONS FOR LAB'S CONVENIENCE Lab may, without cause, terminate this Agreement with Constructor, upon seven (7) days written notice. If this agreement is so terminated, Lab may recover from Constructor payment for all Services performed in accordance with the Agreement, all costs resulting from the termination, plus a premium payment as stated below, provided that Lab has delivered to Constructor all reports and supporting data prepared by Lab, and its subconsultants for the Project. The premium payment shall be [ ] dollars ($[ ])."