

How Do the AIA Contract Documents and ConsensusDOCS Subcontract Forms Compare?

By Thomas Barfield

The American Institute of Architects (AIA) and ConsensusDOCS LLC both recently released subcontract agreements that benefit subcontractors more than the subcontracts offered by general contractors. The ConsensusDOCS publications supersede the standard form contracts previously published by the Associated General Contractors of America (AGC) and the Commercial Owners Association of America (COAA). AIA Document A401–2007 (A401) and the ConsensusDOCS 750 (750) have similar terms for important issues such as change orders, delays, digital documents, interest, property insurance, patents, safety, subcontract assignment, dispute resolution and storage facilities.

Overall, 750 has more favorable additional insured terms for subcontractors than the A401 and grants entitlement to added compensation for contractor-directed timing and sequence changes. However, 750 suffers in comparison with A401's broad array of payment terms and ease of use with private general contractors' prime contract documents.

Many subcontractor benefits are available only when 750 is used in tandem with ConsensusDOCS 200 (owner-contractor agreement). Unlike the merging of A401 and A201 (the AIA's general conditions document), ConsensusDOCS 200 is not made a part of 750 by reference or otherwise. Thus, many important ConsensusDOCS 200 terms are lost when 750 is used with some other prime contract form.

The following compares the two documents on key issues.

Payment

The A401 payment terms represent a big plus for subcontractors. Advantages include helpful standalone terms and flow-through of beneficial A201 general conditions terms. The 2007 edition of A201 added options for the owner to contact subcontractors directly and to issue joint checks, if necessary, to help ensure prompt payments to subcontractors. A401 also allows subcontractors to contact the architect directly to learn the amount approved for their progress payment applications.

By contrast, 750 does not offer similar protection to subcontractors, but it does allow the contractor to protect sub-subcontractors and suppliers if subcontractors fail to pay them promptly.

Although both A401 and 750 require the contractor to make payments to subcontractors for properly performed work even if the owner has not paid the contractor, a huge difference in timing applies. A401 calls for such payments to be made upon the subcontractor's demand, whereas 750 requires only that contractors pay subcontractors after an undefined "reasonable time" has elapsed. Also, A401 starts interest accrual when payment is due, while 750 limits interest to the proportionate share, if any, of the owner's interest payments to the contractor, unless late owner payments were the contractor's fault.

The ConsensusDOCS 200 prime contract form includes helpful language allowing release of retainage for subcontractors' work accepted by the owner with no further retainage after 50 percent completion. However, these terms are not repeated in 750 and would flow through to 750 only if ConsensusDOCS 200 is used as the prime contract.

Indemnity

In both forms, the hold-harmless terms apply only to the extent of losses caused by the subcontractor's negligent acts or omissions. New language in 750, not found in A401 or the prior AGC 650 (contractor-subcontractor agreement), entitles either party to reimbursement of legal defense costs paid above its percentage of liability for an underlying claim. However, the duty to defend claims against others in the superseded AGC 650 has been eliminated from 750, and courts may be reluctant to reimburse a subcontractor for volunteered legal expense.

Also, it is ordinarily difficult to reach agreement on the percentage of each party's fault when cases are settled out of court.

Unlike A401, 750 requires parties to indemnify one another against fines caused by a failure to comply with applicable safety requirements, but not for added fines covering repeated or willful violations.

Consequential Damages

Both A401 and 750 contain waivers of consequential damages, but 750 has several potential holes in its safety net for subcontractors. A401 contains a standalone joint consequential damages waiver between the contractor and subcontractor, plus a flow-through of the comprehensive waiver provision in the A201 general conditions. By contrast, 750 limits the waiver of consequential damages to the extent contained in the general contract.

The ConsensusDOCS 200 provides space for the owner and contractor to insert exclusions to the consequential damages waiver in the prime contract, and 750 requires the subcontractor to accept these same exclusions as long as a copy of the prime contract was provided to the subcontractor prior to execution of the subcontract.

However, when subcontractors use 750 in conjunction with a prime contract that is silent about consequential damages, the subcontractor may be on the hook for a large claim if it delays the job.

Temporary Services

New A401 language obligates the contractor to make available to subcontractors, at no cost, all temporary jobsite facilities, equipment and services except as otherwise identified in the agreement. By contrast, 750 requires the parties' responsibilities for temporary services to be shown on an attached exhibit.

The 750 approach presumes the parties will prepare an exhibit that would include the dozens of temporary facilities that might create future back-charge disputes. Hence, the A401 terms prevail for subcontractors in an area that has long needed more specificity.

Additional Insured

For additional insured coverage, 750 terms are more favorable to subcontractors than those in A401. Unlike A401's requirement that additional insured coverage must be provided by subcontractors, 750 allows the contractor to choose whether the subcontractor will be required to purchase and maintain primary additional liability insured insurance at the contractor's expense.

If the contractor requires the additional liability coverage, it may choose between an owners and contractors protective (OCP) policy for the subcontractor's operations and/or additional insured coverage for operations and completed operations.

Unlike 750, A401 and A201 do not require the additional insured coverage to be primary to the contractor's or owner's own insurance. A401's additional insurance requirement contains a limitation to losses caused in whole or in part by the subcontractor's negligent acts or omissions. Thus, the subcontractor's insurer is potentially liable for 100 percent of a loss, with possible ramifications for the subcontractor's future premium rates and insurability.

Schedule Changes

Another plus for 750 is the subcontractor's right to an equitable adjustment in contract time and amount resulting from contractor-directed changes to the time, order or priority in which the subcontractor's work is performed. No such specific authority exists in A401, although A401 states claims may be asserted for delays caused by contractor-directed changes.

Design Delegation

Through inclusion of A201 terms, A401 makes clear that recipients' reliance on the accuracy and completeness of delegated design certifications applies only if all performance and design criteria are furnished. While ConsensusDOCS 200 contains comparable language, 750 lacks this important limitation.

Owner Financing Information

A401 requires that the contractor promptly make available to the subcontractor financial information received from the owner that affects the subcontract. 750 does not place a notification requirement on the contractor but allows subcontractors to request owner financing information provided to the contractor. If the contractor does not provide the requested information, the subcontractor is authorized to request the financial evidence directly from the owner or its lender.

The subcontractor may have a problem enforcing this, however, because neither the owner nor the lender is a party to 750, and ConsensusDOCS 200 does not obligate the owner to provide financing information to subcontractors.

Contractor Takeover

750 allows the contractor to take over performance of the subcontractor's work if the subcontractor does not commence and continue satisfactory correction of a default with diligence and promptness following a single three-business-day notice, with termination permitted after a subsequent seven-day notice.

A401 has a similar provision, although it requires only a single 10-day notice prior to subcontract termination.

Caution

Unlike A401, 750's terms have been revised with little publicity since the original version was published in 2007, and the terms currently available for download may differ materially from those originally published. Thus, subcontractors considering work under the current 750 must review individual subcontract terms to be aware of changes to their obligations and rights—largely defeating the purpose of using standard subcontract forms. Of particular interest to subcontractors, 750 warranty terms for many months held them liable for normally excluded damages such as those caused by abuse, misuse or neglect by others.

By contrast, if A401 needs modification, the AIA issues a new document with a revised date and a well-publicized notice of change.

Subcontractors are fortunate to have two national subcontract documents for securing subcontract terms comparable to the obligations and rights found in equitable owner-contractor agreements. The 750, particularly when used in conjunction with the ConsensusDOCS 200 general contract, offers subcontractors greater protections than typical general contractors' private subcontract forms.

But with its favorable payment terms and adaptability for use in conjunction with practically any general contract document, A401 is perhaps more ideal for subcontractors to utilize in conditioning their bids. Even if some A401 terms are not accepted during negotiations, the remaining terms can provide better subcontractor protections than would the contractor's form.