

# ConsensusDOCS Guidebook



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by

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## **Introduction to the ConsensusDOCS Guidebook**

ConsensusDOCS is the product of leading construction associations, dedicated to identifying and utilizing best practices in the construction industry for standard construction contracts. The 21 participating associations represent Designers, Owners, Contractors, Subcontractors, and Sureties that literally spell the DOCS in ConsensusDOCS. If you are looking for documents that are pro-Owner or pro-Contractor, you should not use these documents. ConsensusDOCS contracts and forms attempt to fairly and appropriately allocate risks to the Party in the position to manage and control the risk. The practices articulated in the documents are forward-thinking, and may not always represent the status quo, but rather a better path forward. The goal of the multidisciplinary drafters was to create documents that best place the Parties to a construction contract in a position to complete a project on time and on budget with the highest possibility of avoiding claims.

By starting with better standard documents that possess unprecedented buy-in, you reduce your transaction time and costs in reaching a final Agreement. Many “fill-in-the-blanks” are intended to lead to productive discussions about how particular risks should be allocated on specific projects before a contract is finalized. Also, the ConsensusDOCS catalog includes complete “families” of documents for each project delivery method that provide a coordinated set of Agreements and complimentary administrative forms. There also are short form Agreements that address the Owner-Contractor (205), the Owner-Design Professional (245), and the Contractor-Subcontractor contractual relationships in a more abbreviated manner than do the standard Agreements (ConsensusDOCS 200, 240, and 750 respectively).

In this Guidebook you will find comments by individual associations regarding ConsensusDOCS 750. The overview sections highlight issues and innovative features of the documents generally. Association comments are expressions by an association to its association membership. These comments highlight provisions or alert their membership to consider possible project-specific modifications to a consensus standard Agreement or form. ConsensusDOCS contracts covered in the initial release of the complete Guidebook (others will be added later) include the 200; 200.1; 200.2; 240; 300; 410; 750.

# Comments and Recommendations regarding ConsensusDOCS 750\*

## Standard Form of Agreement Between Contractor and Subcontractor

### Comments from AGC for ConsensusDOCS 750:

(Additional comments on this document can be found on AGC's website at [www.agc.org/contracts](http://www.agc.org/contracts))

The Consensus Document 750, Standard Form of Agreement Between Contractor and Subcontractor, introduces several changes from the previous and now defunct AGC 650. Those changes are outlined below:

Avoidance of Conflicts: A new Section 2.2.1 is added discussing the avoidance of conflicts of interest between Contractor and Subcontractor and adds a warranty that neither Party has paid or received any contingent fees or gratuities to or from the other Party, which flows down to their agents, officers and employees.

Electronic Communications: Section 2.3.1 sets out a written protocol for the exchange, storage and retrieval of electronic documents (which can be used in conjunction with new Consensus Document 200.2, the Electronic Communications Addendum.) The Contractor will want to craft a protocol with the Owner tailored to anticipated Project communications and then make sure Subcontractors follow the same protocol during performance of the Project. In the event that litigation results and e-discovery becomes an issue, preservation of electronic information by all Parties consistent with their agreed-upon protocol can help limit the Contractor's liability.

Standard of Care (Section 3.2): This section lowers the standard of care for the Subcontractor in performing its responsibilities under the Agreement from "best skill and judgment" to "diligent efforts." This can be modified if a higher standard is established in the Agreement between Owner and General Contractor.

Correction of Defects (Section 3.15): This section adds language that now explicitly sets forth a remedy for the Contractor, but it first requires 48 hour notice during which the Subcontractor has the opportunity to cure defects or deficiencies in the Subcontractor's Work that damages the Contractor's Work or Owner's property.

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\* This publication is designed to provide information in regard to the subject matter covered. It is published with the understanding that the publisher, endorsers of ConsensusDOCS and contributors to this Guidebook are not engaged in rendering legal, accounting, or other professional services. If legal advice or other professional advice is required, the services of a competent professional person should be sought.

Owner Furnished Information (Section 4.4): This section now provides that, to the extent the Owner provides a warranty regarding Owner-furnished information, the Subcontractor may prosecute a claim in Contractor's name for the use and benefit of Subcontractor regarding breach of that warranty. The Subcontractor may ask to see information identified in the Agreement between Owner and Contractor that is included within the information the Owner warrants.

Time and Cost Adjustments (Section 5.2): This section now explicitly allows for an increase in the Subcontract Time and Subcontract Cost if Contractor's schedule changes impact the Subcontractor's schedule and costs. The Contractor will want to make sure to include a "no damage for delay" provision instead of this section in instances where the Agreement Between Owner and Contractor does not allow the Contractor to recover additional costs as a result of delay.

Liquidated Damages (Section 5.5): This section adds a new provision regarding delay liquidated damages and provides an explicit flow-down provision related to a mutual waiver of consequential damages in the Agreement between Owner and Contractor. Note that any damages for which the Contractor is liable under that Agreement are not consequential damages for the purposes of the waiver of consequential damages in the Subcontract Agreement.

Pay-if-Paid (Section 8.2.5): This section contains a contingent payment provision to the Subcontractor such that payment is due from the Contractor to the Subcontractor within 7 days of Owner's payment to Contractor. Note: this section mirrors the law of most states in that it provides for payment to the Subcontractor within a reasonable time if, through no fault of the Subcontractor, the Owner fails to timely pay the Contractor. Contractors should check applicable law carefully before modifying this section as a "pay if paid" clause shifting risk of receiving payment to the Subcontractor may not be fully enforceable. Some AGC members believe that a "pay-if-paid" clause equitably shares the risk of Owner non-payment, while other specialty members view such provisions as unreasonably withholding payment to Subcontractors.

Because a consensus could not be reached by the ConsensusDOCS drafting organizations on including a pay-if-paid provision, AGC continues to offer publication of the AGC 655 Subcontract (1998 edition) that contains a pay-if-paid clause. The ConsensusDOCS 750 can be modified to incorporate a pay-if-paid clause by adding the following to the beginning of Section 8.2.5:

"Receipt of payment by the Contractor from the Owner for the Subcontract Work is a condition precedent to payment by the Contractor to the Subcontractor. The Subcontractor hereby acknowledges that it relies on the credit of the Owner, not the Contractor for payment of Subcontract Work."

Payment Application Notification (Section 8.2.7): This section now provides for a 7-day period for Contractor to provide written notice to Subcontractor of any disapproval or nullification of all or part of Subcontractor's payment application. This provision did not previously appear in AGC subcontracts.

Indemnification (Section 9.1): This section has new language providing Subcontractor indemnification to Contractor, Architect/Engineer and Owner for all claims for bodily injury and property damage, other than to the work itself, which mirrors standard commercial general

liability insurance coverage language. This section also allows for the Subcontractor to be reimbursed for the percentage of liability in the claim attributable to the negligent acts or omissions of the Owner, Contractor and Architect/Engineer. Such reimbursement was not previously included in the previous and defunct AGC 650 or 655 Subcontracts. The Contractor will want to carefully review insurance obligations in the Agreement Between Owner and Contractor to make sure any special obligations imposed on the Contractor are similarly imposed on the Subcontractor so there is no gap in insurance coverage for these types of losses.

Additional Insured: Several new sections (9.2.11-9.2.11.1) provide “check the box” options creating the Subcontractor’s duty to provide additional liability coverage, the listing of the Contractor as an additional insured on Subcontractor’s CGL policy (which was not addressed at all in the AGC 650) and whether the Subcontractor has a duty to provide Owners’ and Contractors’ Protective Liability Insurance (“OCP”) (Subparagraph 11.5.2.2): If OCP coverage is selected, a Contractor may desire additional insured protection for completed operations in addition to OCP coverage. This can be accomplished by striking “operations” in this section and then checking both boxes. Note: any additional cost incurred by the Subcontractor for purchasing such coverage shall be paid by the Contract, which should be reimbursable by the Owner if a consistent option is chosen in the ConsensusDOCS 200 Owner-Contract Agreement.

Time and Price Adjustments (Section 10.3): This section now explicitly provides for Subcontractor to receive an adjustment to its Time and Price via Change Order to the extent the Agreement Between Owner and Contractor permits the Contractor to receive such adjustments. Thus, the Subcontractor may seek to review the Owner-Contractor Agreement when negotiating the Subcontract to confirm when cost and schedule adjustments are permitted. The ConsensusDOCS provision is consistent with ConsensusDOCS 200.

Contractor Termination (Section 10.4): In this section, the Subcontractor also receives some new protection in the case of the Contractor being terminated by Owner for cause, through no fault of the Subcontractor. Previously, the AGC 650 applied to any Owner termination regardless of whether it was for cause or convenience. Now, the Subcontractor is entitled to recover from the Contractor reasonable costs arising from the termination of the Subcontract, including overhead and profit on Work not performed. The new ConsensusDOCS provision is consistent with ConsensusDOCS 200.

Dispute Resolution (Section 11.5): The Dispute Resolution provisions in Section 11.5 have undergone several modifications, most notably now explicitly imposing a duty of direct discussions and good faith negotiations on the Parties regarding a dispute. In the event that good faith discussions do not resolve the conflict, then mediation and “binding dispute resolution” follow. Again, a fill-in-the-box option is provided, allowing for either arbitration or litigation. Notably, Section 11.6 has now been modified to place the responsibility for binding dispute resolution on the non-prevailing Party, but attorneys’ fees are no longer explicitly called out as a recovery costs. Parties in states where common law imposes a duty to explicitly list the recovery of attorneys’ fees in a contract should be on guard when negotiating this section and should modify it accordingly to provide for the recovery of attorneys’ fees, if desired.

## **Comments from ASA for ConsensusDOCS 750:**

(Additional comments on ConsensusDOCS can be found on ASA's website at [www.asa.org](http://www.asa.org).)

Scope of Work (Article 2): The scope of work should be limited to all work actually indicated in the plans and specifications which was the subject of the Subcontractor's bid.

Subcontractor's Responsibilities (Article 3): Any "flow-down" terms, i.e., terms which impose obligations on a Subcontractor by reference to the contractual obligations of the Contractor to the Owner, should also "flow-up," so that the Subcontractor also has rights against the Contractor by reference to the rights that the Contractor has against the Owner. The Subcontractor should also be entitled to copies of any documents incorporated by reference before signing the Agreement.

A Subcontractor may be required to conduct a site visit, make observations, and report discovered discrepancies, but should not have an affirmative duty to discover problems in the site conditions or design that a person in the Subcontractor's trade would not ascertain by a reasonable, visual inspection. Subcontractors should be entitled to rely on the accuracy and completeness of the plans and specifications, and on the accuracy of reports of conditions furnished by the Contractor.

Where termination is not due to the Subcontractor's default, then the Subcontractor should be entitled to its contract damages, i.e., profit and overhead on uncompleted work, plus all expenses related to termination (such as termination of subcontracts and attorneys fees), plus payment for work completed and expenses for labor and materials to the date of termination.

A Subcontractor's warranty should provide that work is free of defects and performed in workmanlike manner, but should exclude defects inherent in the design or specified materials, ordinary wear and tear, improper maintenance, abuse, modifications, and implied warranties. A Subcontractor's warranty should have a time limit which should run from either substantial completion or issuance of a certificate of occupancy to the Owner, whichever is earlier. A Subcontractor's warranty should reserve the right of the Subcontractor to notice and an opportunity to cure any claimed breach of the warranty, by providing for waiver of any warranty claims where the Subcontractor is not provided an opportunity to cure.

Subcontractors should not ordinarily accept responsibility for design. When design services are requested, the delegation should be specific and should include all design and performance criteria. Subcontractors should be responsible for promptly reporting defects they actually discover, but cannot be responsible for other design defects that it is claimed they "should have" recognized, or for design requirements that violate code standards.

A Subcontractor should be afforded a reasonable time for performance, and should be entitled to equitable adjustments for schedule changes, acceleration and delays. A Subcontractor cannot be responsible for schedule changes it has not reviewed and agreed to in writing.

Any closeout procedures and documents should be specified in the contract documents.

A Subcontractor should not be responsible for safety barriers unless specifically agreed. OSHA penalties are partly based on past violations and are intended as punishment and should not be shifted to other Parties to a construction subcontract.

Hold-harmless terms should be limited to bodily injury and property damage (other than the work itself). Such terms should also be limited to provide indemnity only to the extent of the Subcontractor's negligence, and should provide for payment of attorney's fees rather than including a duty to "defend." Ideally, hold harmless terms flow in both directions and provide mutual obligations to indemnify the other Party to the subcontract against the consequences of the indemnitor's own negligence.

Expenses claimed as backcharges should not be incurred before notice, and reasonable opportunity to cure, are provided to a Subcontractor. Backcharges should be billed within a reasonable time and not saved until the end of a project.

Payment should be passed through from the Owner not more than seven days after the Contractor is paid, or within a reasonable time after the Contractor would have been paid absent circumstances that are not the fault of the Subcontractor. Past due payments should bear interest at a reasonable rate, so long as payment delay is not the fault of the Subcontractor. A Subcontractor should reserve an express right to stop work for non-payment whenever non-payment is not the sub's fault, upon reasonable notice and opportunity to cure, including costs of shut-down, delay and start-up. A Subcontractor should be entitled to payment for suitably stored materials. A general Contractor should hold payments for the benefit of Subcontractors.

Retainage should be limited to the amount retained by the Owner, with any reductions or early release of retainage passed through immediately to Subcontractors. The Contractor should use best efforts to obtain release of retainage from the Owner as soon as permitted under the general conditions.

Contractor's Responsibilities (Article 4): A Subcontractor should have access to complete project financing information, including change orders, in order to evaluate its risk of nonpayment. Disclosures that demonstrate adequate project financing are a necessary condition to a commencement or continuation of a Subcontractor's performance.

Progress Schedule (Article 5): See ASA comments under Article 3 pertaining to a Subcontractor's reasonable time for performance.

Deadlines for claims should be based on actual knowledge of facts giving rise to a claim (rather than constructive knowledge) and should permit a reasonable time for claims; time extensions should be required for all causes reasonably beyond the Subcontractor's control; price adjustments should include the entire cost of delays not caused by Subcontractor (including overhead) and should include a reasonable amount of overhead and profit for extra work. A Subcontractor's time and price adjustments should not be tied to amounts received by the Contractor from the Owner. A Subcontractor should have a right to payment for any extra work that is performed at the Contractor's direction, provided that the Subcontractor confirms verbal instructions in writing before starting work.

One-sided terms that deny a Subcontractor any right to collect damages for delay, often called "no-damage-for-delay" clauses, are unacceptable. Mutual waivers of consequential damages, such as extended home office overhead, are beneficial and encouraged. A Contractor may reserve the right to assess a Subcontractor for a share of liquidated damages actually paid to the

Owner, but only to the extent such share is proportionate to the fault of the Subcontractor in causing a delay.

Changes in the Subcontract Work (Article 7): See ASA comments under Article 5 pertaining to deadlines for claims being based on actual knowledge.

See ASA comments under Article 3 pertaining to the requirement that a Subcontractor conduct a site visit.

Payment (Article 8): See ASA comments under Article 3 pertaining to hold harmless terms, retainage, and payment passed through from the Owner and closeout procedures:

The prevailing Party in any dispute arising out of a construction subcontract should be entitled to attorneys' fees and costs. Terms only requiring payment of a Contractor's attorneys' fees in the event of a Subcontractor's default are one-sided and should be avoided. Terms that permit fees only for designated dispute resolution procedures may exclude other lawful collection procedures and should also be avoided.

Subcontracts should require Contractors to provide copies of any payment bond to Subcontractors on request, and should expressly exempt steps to preserve lien rights from any dispute resolution requirements.

Language requiring one Party to sign waivers in whatever form is considered suitable by the other Party is generally unacceptable. Any waiver form should be specified before the contract is signed, should be conditional on payment (except for payments already received), should not apply to funds still held as retainage, and should not apply to claims unrelated to the payment security rights of the Contractor.

Indemnity, Insurance and Waiver of Subrogation (Article 9): See ASA comments under Article 3 pertaining to hold harmless terms.

Any requirements to name additional insureds on any of the Subcontractor's liability insurance policies, and any waivers of subrogation for claims covered by the Subcontractor's liability insurance policies (particularly workers compensation), are unacceptable. Requirements to provide special notices of policy cancellation or policy non-renewal often cause great difficulties and friction although they have never been shown to provide any benefits to anyone, and are also unacceptable. Requirements for continuation of coverage beyond the policy period, in the absence of a binding commitment from an insurer to provide that coverage, are also unacceptable. Separate liability insurance to cover the Owner and the Contractor for liability arising from "general supervision" of the project, such as Owners and Contractors Protective Liability Insurance ("OCP" - CG 00 09) may be required in lieu of any requirements to name additional insureds or to waive subrogation on the Subcontractor's liability insurance policies. The Owner or Contractor should be responsible to purchase all-risk property insurance including coverage for a Subcontractor's interest in installed work and in materials delivered, suitably stored or in transit. Coverage gaps required to be filled by a Subcontractor should be reimbursed.

Contractor's Right to Perform Subcontractor's Responsibilities and Termination of Agreement (Article 10): See ASA comments under Article 8 pertaining to prevailing Parties in disputes.

See ASA comments under Article 3 pertaining to backcharges and when termination is not due to the Subcontractor's fault.

The Subcontractor should be entitled to claim time and price adjustments for any suspension of work which is not the fault of the Subcontractor. The Subcontractor should be able to terminate the contract for unreasonably long suspensions measured in the aggregate, and not by consecutive days. Terms restricting recovery where work "would have been" suspended anyway due to Subcontractor's fault merely restate common law requirement for causation.

Dispute Resolution (Article 11): Early mediation of disputes is beneficial and should be a condition precedent to the use of any other dispute resolution procedure. Should mediation not resolve a dispute, arbitration by an industry professional such as an architect, engineer, Contractor or Subcontractor is always preferable to litigation before a judge or jury. Arbitration should always be conducted subject to the terms of the written subcontract, so specific subcontract terms can assist Subcontractors to ensure that arbitration will provide a quick and efficient mechanism for resolving disputes. For example, subcontract terms can expressly provide that "The award shall be made within nine months of the filing of the notice of intention to arbitrate (demand), and the arbitrator(s) shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by Agreement of the Parties or by the arbitrator(s) if necessary." Drafting Dispute Resolution Clauses - A Practical Guide, AAA 12/7/2000. Or, subcontract terms may require direct participation by the Parties (not merely through their representatives) for

- selection of the arbitrator (to ensure an industry professional is selected),
- any Agreement or ruling to permit a continuance, and
- any Agreement or ruling to permit any discovery (particularly depositions, which add considerable time and expense) beyond the discovery of information contemplated by Rule F-7 of the AAA's Construction Industry Arbitration Rules, Fast Track Procedures in fast track cases (no claim or counterclaim exceeds \$75,000), or Rule R-22 of the AAA's Construction Industry Arbitration Rules, Regular Track Procedures in regular track cases (\$75,001-\$500,000), or Rule L-4 of the AAA's Construction Industry Arbitration Rules, Procedures for Large, Complex Construction Disputes.

Subcontractor claims should not be tied to resolution of claims by the Contractor against the Owner.

See ASA comments under Article 8 pertaining to attorneys' fees and costs.

Miscellaneous Provisions (Article 12): Subcontracts should provide that the appropriate venue for dispute resolution procedures such as litigation or arbitration is the place where the project is located, and also that the law of the place where the project is located shall govern.