



## Bulletin

# Comparison of Industry Standard Form Agreements Between General Contractor and Subcontractor

### INTRODUCTION

Several industry organizations have developed form agreements for use in the construction contracting process. The most commonly used form agreement between prime or general contractors (GC) and subcontractors is the AIA A401 (A401). The newer ConsensusDOCS 750 (CDS750), however, is gaining popularity.

The A401 has been in circulation for decades and underwent significant revisions in 2007. The CDS750 was first released in 2007 as part of a large family of contracting documents developed by a group of construction industry associations and organizations, including the MCAA. CDS750 was then revised in 2011. Prior to 2007, the Associated General Contractors of America (AGC) supported the AGC Form 650 Construction Subcontract. The new CDS750 is based in large part on that prior form.

While both the CDS750 subcontract and the A401 subcontract include relatively fair allocations of risks, other proprietary subcontract forms generated by individual GC's can often be unbalanced in favor of the GC and contain some

severely one-sided provisions (for more information, see CT9). More than likely, utilizing either an A401 or CDS750 form will yield terms and conditions more favorable to a subcontractor than a GC's own form.

Both the A401 and the CDS750 are endorsed by the MCAA, either directly or through the MCAA's membership in the Associated Specialty Contractors (ASC). While the forms are similar in many ways, each contains some provisions that are better than the other from a subcontractor's perspective. The discussion below will highlight some of the similarities and differences between these form subcontracts. Please note, however, that when utilizing any form agreement, the parties should insure it matches the industry original, or that any modifications are mutually agreed upon. And, be sure that all the fill-in-the-blanks are completed by the parties.

#### **Note:**

The abbreviation "GC" is used throughout this article to reflect the upstream party with whom the Subcontractor is contracting. In the A410, this party is referred to as the Contractor and in the CDS750, this

party is referred to as the Constructor. Also, in the CDS750, the architect/engineer is referred to as "Design Professional."

## **COMPARISON OF SPECIFIC PROVISIONS IN THE AIA A401 AND CONSENSUSDOCS750**

### **The Subcontract Documents:**

**A401:** The terms and conditions that make up the A401 are found in the written Subcontract itself, the Owner/GC agreement, any other documents referenced in the Subcontract as making up part of the Subcontract *and* the AIA A201 general conditions which are also incorporated by reference into the A401 (to the extent they do not conflict with the Owner/GC agreement). The GC *must make available* copies of all Subcontract Documents to the Subcontractor prior to execution of the Subcontract.

**CDS750:** The terms and conditions that make up the CDS750 are found in the written Subcontract itself, the Owner/GC agreement, any other documents referenced therein as making up part of the Subcontract. The GC *must provide* copies of all Subcontract Documents to the Subcontractor prior to execution of the Subcontract.

### **Scope of Work/Code Compliance:**

**A401:** The Subcontractor is obligated to provide all work described in the Subcontract Documents or reasonably inferable therefrom per the A201 incorporated by reference therein. Also, the A201 expressly states that the GC (and therefore the Subcontractor) "is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the

Contractor shall promptly report to the Architect any nonconformity discovered by or made known to the Contractor as a request for information in such form as the Architect may require." The Subcontractor's obligations to comply with applicable laws, ordinances, codes, etc. are expressly limited to those bearing on the performance of the Subcontractor's work.

**CDS750:** The Subcontractor is obligated to provide all work shown in the Subcontract Documents or reasonably inferable therefrom. Though the Subcontractor must examine and compare Owner-furnished Subcontract Documents, the Subcontractor is not liable for any errors or omissions contained therein, unless the Subcontractor knowingly fails to recognize or report a problem to the GC. Further, the CDS750 states that the Subcontractor is not responsible for verifying that the Subcontract Documents are in compliance with applicable codes. However, elsewhere, the CDS750 expressly requires Subcontractor to comply with all "Laws" (defined as applicable laws, ordinances, codes, etc.) at its own expense, thereby potentially creating a conflict within the CDS750.

### **Progress Payments:**

**A401:** The A401 does not contain a "pay-if-paid provision" (see CT 3), but instead, a "pay-when-paid provision," as follows: "The Contractor shall pay the Subcontractor each progress payment no later than seven working days after the Contractor receives payment from the Owner. If ... the Contractor does not receive payment for any cause which is not the fault of the Subcontractor, the Contractor shall pay the Subcontractor, **on demand**, a progress payment ..." (emphasis supplied). Per the A201 (incorporated by reference into the A401) the Owner has

the express right in its sole discretion to contact subcontractors directly and to issue joint checks to the Subcontractor and GC to help insure the Subcontractor is timely paid. Additionally, the Subcontractor can contact the architect to discover information regarding amounts requisitioned by the GC on behalf of the Subcontractor's work.

**CDS750:** Similarly, the CDS750 does not contain a "pay-if-paid provision," but does contain a "pay-when paid" clause: "Progress payments to Subcontractor for satisfactory performance of the Subcontract Work shall be made no later than seven (7) days after receipt by the Constructor of payment from the Owner for the Subcontract Work. If the payment from the Owner for the Subcontract Work is not received by the Constructor, through no fault of the Subcontractor, the Constructor will make payment to the Subcontractor **within a reasonable time** for the Subcontract Work satisfactorily performed." (emphasis supplied). The phrase "a reasonable time" is somewhat uncertain when compared to the "on demand" language found in the A401. Note that the AGC has maintained its Form 650 for use by a GC wishing to include a more onerous pay-if-paid provision in a form subcontract. Under the CDS750, upon Subcontractor's request, the GC must provide Subcontractor a copy of the GC's most current payment application to Owner showing amounts approved or paid by Owner on behalf of the Subcontractor's work. Finally, although the CDS200 is silent regarding the Owner issuing joint checks to the GC and Subcontractor, the CDS750 permits the GC to issue joint checks to the Subcontractor and its lower tier subcontractors and suppliers.

#### **Payment for Stored Materials:**

**A401:** The Subcontractor is to be paid for materials and equipment delivered

and suitably stored on-site. Also, the Subcontractor can invoice for materials and equipment suitably stored off the site if approved by the GC. No Owner approval is required.

**CDS750:** The CDS750 permits payment for materials and equipment suitably stored on-site or off-site, provided all required supporting documentation is satisfactory to the Owner and the GC.

#### **Retainage:**

**A401:** The A401 provides that the GC cannot hold a greater retention from the Subcontractor than the Owner is withholding on behalf of the Subcontractor's work. However, unless modified by the contracting parties, there is nothing in A201 general conditions incorporated into the A401 by reference that requires any reduction of retainage prior to completion of the project.

**CDS750:** Again, the GC cannot hold a greater retention from the Subcontractor than the Owner is withholding on behalf of the Subcontractor's work provided the Subcontractor's work is satisfactorily performed. However the Owner/GC agreement, CDS200, gives the Owner discretion to release or reduce retention on the work of specific subcontractors, and the GC must then, in turn, release the same to that Subcontractor. Additionally, the CDS200 states that as between the Owner and GC, no further retainage will be withheld by Owner once the work is 50% complete, providing a benefit to trade subcontractors who tend to finish ahead of the project as a whole.

#### **Final Payment:**

**A401:** As with progress payments, if the GC does not receive timely payment from the Owner through no fault of the

Subcontractor or does not pay the Subcontractor within seven days after receipt of payment from the Owner, final payment to the Subcontractor shall be made by GC upon Subcontractor's demand.

**CDS750:** The GC must make final payment to Subcontractor within seven days after the GC receives the final payment from the Owner. Under the CDS750, if the Owner does not make a timely final payment due to no fault of the Subcontractor, the GC must notify the Subcontractor in writing and pay Subcontractor its final payment "within a reasonable time."

#### **Interest on Late Payments:**

**A401:** Payments due, but unpaid, bear interest from the date payment was due. When the Owner fails to make a timely payment, the GC is to pay the Subcontractor upon Subcontractor's demand, and interest on unpaid amounts due to the Subcontractor should begin to accrue once Subcontractor demands the same.

**CDS750:** For late Owner payments, the GC is obligated to pay the Subcontractor only the Subcontractor's proportionate share of interest the GC actually receives from the Owner. However, if non-payment is due to the GC's fault, interest begins to accrue on the date payment was due but unpaid.

#### **Changes in the Work:**

**A401:** The GC may direct the Subcontractor to make changes within the general scope of the Subcontract, and the Subcontract sum and performance time will be adjusted accordingly. Prior to commencing the changed work, the Subcontractor must submit a written claim for price and time adjustments. When the GC directs a change in writing, but the parties have

not agreed on price, the Subcontractor must nevertheless proceed. Under the A201 for Owner-directed changes, upon the GC's request, "the Architect will make an interim determination for purposes of monthly certification for payment for those costs and certify for payment the amount that the Architect determines, in the Architect's professional judgment, to be reasonably justified."

**CDS750:** Changes stemming from Owner directives will be processed in accordance with the Owner/GC agreement. When a change not stemming from the Owner is directed by the GC, but the parties have not agreed on the change order price, the GC is to direct the change by way of an Interim Directed Change entitling the Subcontractor to an interim payment equal to 50% of the Subcontractor's estimate of the change. Similarly, the CDS200 states that for Owner-directed changes, if the Owner and the GC cannot agree on the change order price, then the Owner must pay the GC 50% of the GC's estimated cost. The CDS750 states that the Subcontractor is not obligated to perform any extra work impacting its cost or time without first receiving from the GC a change order or a written instruction that complies with the Subcontract.

#### **Schedule/ Delay Damages:**

**A401:** Time is of the essence in this form, making delayed completion a material breach of the Subcontract. The A401 does not contain a "no damage for delay" clause (see CT 9) and, therefore, the Subcontractor has a cause for damages if the GC or Owner delays or interferes with its work. Requests for extensions of time must be made promptly to the GC in accordance with the Subcontract Documents. Liquidated damages set forth in the Subcontract "shall be assessed against the Subcontractor only to the extent caused

by the Subcontractor or any person or entity for whose acts the Subcontractor may be liable, and in no case for delays or causes arising outside the scope of this Subcontract.” The A401 does not address the Owner’s liquidated damages which may be assessed against the GC.

**CDS750:** Similarly, time is of the essence under the CDS750, and it does not contain a “no damage for delay” clause. The CDS750 contains a provision stating that the Subcontractor is entitled to an equitable adjustment in both Subcontract amount and time for GC-directed changes in the time, order or priority in which the Subcontractor’s work is to be performed to the extent the same increase applies to the Subcontractor’s time and/or costs. If liquidated or other delay damages are assessed against the GC, the GC will assess the same against the Subcontractor to the proportionate extent of the Subcontractor’s responsibility for the delay. The GC is also entitled to recover from the Subcontractor other actual damages that the GC sustains as a result of the Subcontractor’s delay.

#### **Warranty:**

**A401:** The Subcontractor warrants its work to be free from defects (“except for those inherent in the quality of the Work”), of good quality, new (unless the Subcontract Documents require or permit otherwise) and in conformance with the Subcontract Documents. Excluded from the Subcontractor’s warranty are damages or defects “caused by abuse, alterations to the Work not executed by the Subcontractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage.” As per the A201, the warranty runs for one year from substantial completion of the project.

**CDS750:** The CDS750 contains warranty exclusions similar to those expressed in the A401. The Subcontractor’s warranty under the CDS750 runs from substantial completion of the Subcontractor’s work, though there seems conflicting verbiage between the warranty provision and the substantial completion provision.

#### **Indemnification:**

**A401:** Under the A401, the Subcontractor agrees to indemnify and hold harmless the Owner, GC, architect and architect’s consultants from damages for bodily injury or property damage (other than to the work itself) resulting from its performance, but only to the extent the damage was caused by negligent acts or omissions by the Subcontractor or those for whose acts it is liable.

**CDS750:** The CDS750 indemnity obligation is also one of comparative negligence making the Subcontractor responsible only to the extent the damage was caused by negligent acts or omissions by the Subcontractor or anyone for whose acts the Subcontractor is responsible.

#### **GC Bonds:**

**A401:** The A401 requires the GC to furnish on request, a copy, or permit a copy be made, of any GC bond covering payment of obligations arising under the Subcontract.

**CDS750:** The CDS750 requires the GC or Owner to furnish on request a copy of any bond covering the GC’s payment of obligations arising under the Subcontract upon the Subcontractor’s written request.

## **Dispute Resolution:**

**A401:** At the time of subcontracting, the GC and Subcontractor select the method of dispute resolution they choose to utilize by checking the appropriate box in the form agreement (i.e. litigation, arbitration or other mutually acceptable method). If nothing is selected, litigation is the default procedure. However, as a condition precedent to the selected binding dispute resolution procedure, the parties must first submit to a non-binding mediation in accordance with the American Arbitration Association's Construction Industry Mediation Rules. The cost of such mediation is shared.

**CDS750:** If a dispute between the Subcontractor and the GC involves the Owner, the CDS750 mandates that the dispute will be resolved in the same tribunal and forum as disputes between the Owner and the GC. For disputes not involving the Owner, the GC and Subcontractor can select at the time of subcontracting either arbitration or litigation. However, before proceeding to litigation or arbitration as selected, the CDS750 dictates that the GC and Subcontractor should first undertake several non-binding efforts to resolve the dispute, i.e. (1) discussions between authorized representatives of the GC and Subcontractor, then, if the issue is still not resolved, (2) discussions between senior executives from each party, then, finally (3) mediation in accordance with the American Arbitration Association's Construction Industry Mediation Rules, unless otherwise agreed. The CDS750 contains detailed timing for all of these steps. Each party bears its own cost for the non-binding steps. However, once the dispute reaches binding litigation or arbitration, the non-prevailing party pays all costs and attorneys' fees as determined by the adjudicator.

## **Consequential Damages:**

**A401:** The GC and the Subcontractor mutually waive claims against each other for consequential damages arising out of the Subcontract.

**CDS750:** The GC and the Subcontractor mutually waive their rights to recover consequential damages against each other, but this is subject to certain express exceptions. The GC reserves its rights to pass down to the Subcontractor: (1) liquidated, consequential or other damages that the Owner is entitled to recover from the GC; (2) damages covered by insurance required by the Subcontract. Also, the Subcontractor must obtain similar waivers from its lower-tier subcontractors.

## **Temporary Facilities:**

**A401:** The GC is to furnish and make available at no cost to the Subcontractor all of the GC's temporary facilities, equipment and services, except as specifically noted in the Subcontract.

**CDS750:** Allocation of the responsibilities for temporary services is to be addressed by way of a separate exhibit.

## **Information Regarding Owner's Ability to Pay:**

**A401:** Even without the Subcontractor's request, the GC must make available to the Subcontractor information that the GC has received from the Owner that affects the Subcontractor. Although there is no obligation under the A401 for the Owner to provide financial information to the Subcontractor, the A201 (incorporated by reference into the A401) does permit the GC to obtain this information from the Owner, and the Owner must provide the same as a

condition precedent of the GC's obligation to commence its performance.

**CDS750:** The CDS750 states that, unless prohibited by the Owner/GC agreement, upon the Subcontractor's request, the GC shall provide information it has regarding the Owner's ability to pay for the work. Under the 2011 updates to the CDS750, unless prohibited by the Owner/GC agreement, the GC must automatically share with the Subcontractor information it receives regarding any material changes in the Owner's financial ability to pay. If the GC does not provide such information to the Subcontractor, the Subcontractor may then request the financial evidence directly from the Owner or the Owner's lender. The CDS200 permits the GC to obtain financial information from the Owner and, as provided in the A201, the Owner must provide evidence of financing as a condition precedent of the GC's obligation to commence its performance.

#### **Liens:**

**A401:** The A401 requires the GC to provide the Subcontractor, upon written request, information necessary and relevant for the Subcontractor to evaluate, give notice of or enforce mechanic's lien rights." There is no express requirement in the A401 that the Subcontractor provide monthly partial lien waivers.

**CDS750:** The CDS750 allows the Subcontractor to request from the Owner "through the" GC information necessary to preserve lien rights. The CDS750 does require the Subcontractor to provide claim or lien waivers as a prerequisite to payment, but the Subcontract prohibits the GC from requiring unconditional waivers before payment is received by the Subcontractor or for amounts in excess

of payments actually received. A review of the A401 and the CDS750 will quickly reveal that both agreements will likely include a more reasonable allocation of risk between the Subcontractor and the GC than forms prepared by or on behalf of the GC.

#### **CONCLUSION**

Although the above discussion touches on many of the provisions contained in these form agreements, when using either of these forms, the Subcontractor should be aware of the full content of each, in particular, the strict timing and notice provisions. Insurance provisions should be reviewed by the Subcontractor's broker or risk manager to insure compliance.