

**TWO OLD DOGS LEARN NEW TRICKS:  
A COMPARISON OF AIA A401 AND  
CONSENSUSDOCS 750**

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## INTRODUCTION

On September 28, 2007, the ConsensusDOCS were released, including 70 standard form construction contracts created in collaboration with over 20 trade organizations. On November 5, 2007, the AIA released revisions to its construction contracts, including the A201 and A401. These subcontractor-subcontractor form agreements will have a significant impact on the industry. See 259 Engineering News-Rec. 12 (11/5/07). While both documents have been modified extensively, there are inherent strengths and weaknesses in each. It is crucial to understand the impact of these new modifications on subcontractors, contractors, owners and architects.

## COMPARISON OF PROVISIONS

### **AIA A401 Provisions Which Are More Advantageous to Subcontractors<sup>1</sup> Than ConsensusDOCS 750**

#### Consequential Damages

Consequential damages are generally defined as losses not *directly* and *immediately* flowing from a party's actions, but rather from indirect consequences or results of an act. Consequential damages are, therefore, different from direct damages of a breach. For example, when an HVAC system fails, direct damages are typically the costs of repairing the system. However, consequential damages may also exist, such as personal injuries resulting from the failure, damages for delays to the project, lost profits, etc. In the absence of an agreement to the contrary, a party who breaches a contract or otherwise causes an injury may be liable for both direct and consequential damages.

AIA A401 provides in Section 15.4:

“The Contractor and Subcontractor waive claims against each other for consequential damages arising out of or relating to this Subcontract, including without limitation, any consequential damages due to either party's termination in accordance with Article 7.”

Section 5.5.1 of ConsensusDOCS 750 provides in relevant part:

“Except for damages provided for by the Subcontract Documents as liquidated damages and excluding losses covered by insurance required by the Subcontract Documents, the Contractor and Subcontractor waive claims against each other for consequential

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<sup>1</sup> This presentation discusses and analyzes how the provisions are more “advantageous to subcontractors.” By negative implication, these provisions are more disadvantageous to contractors.

damages arising out of or relating to this Agreement, to the same extent the Owner-Contractor agreement, furnished to the Subcontractor in accordance with Paragraph 2.3, provides for a mutual waiver of consequential damages by the Owner and Contractor, including to the extent provided in the Owner-Contractor agreement, damages for loss of business, loss of financing, principal office overhead and expenses, loss of profits not related to this Project, loss of bonding capacity, loss of reputation, or insolvency. Similarly, the Subcontractor shall obtain in another agreement from its Sub-Subcontractors mutual waivers of consequential damages that correspond to the Subcontractor's waiver of consequential damages herein. To the extent applicable, this mutual waiver applies to consequential damages due to termination by the Contractor or the Owner in accordance with this Agreement or the Owner-Contractor agreement. The provisions of this Article shall also apply to and survive termination of this Agreement.”

Consequential damages are difficult to predict. To account for this, many construction agreements limit or even *eliminate* a party's ability to recover consequential damages.

The AIA provision contains an unrestricted mutual waiver of consequential damages. In contrast, ConsensusDOCS 750 continues to bind Subcontractors to provisions in the Prime Contract which permits recovery of consequential damages. Indeed, ConsensusDOCS 750, Section 5.5.2, further ties a sub-subcontractor's scope of damages to the same extent “the Owner-Contractor agreement provides a mutual waiver of consequential damages.”

Some recent articles have asserted the ConsensusDOCS approach to consequential damages is misleading and unfair. See J.Acert, “Introduction to ConsensusDOCS,” 17 Cal. Construct. L. Rep. 9 (October 2007). Thus, on the balance, subcontractors need to be keenly aware of potential damages and liabilities when signing ConsensusDOCS 750. Indeed, a subcontractor needs not only to be aware of the terms of its contract with the contractor, but also the terms of the contractor's contract with the owner. In contrast, a contractor will find the ConsensusDOCS more advantageous because it ties the subcontractor to the same damage waiver as contracted with the owner.

### Paid-When-Paid

“Pay-if-paid” or “pay-when-paid” clauses are often used in contracts between general contractors and subcontractors. The clauses usually provide that a general contractor is not required to pay a subcontractor *unless or until* the owner pays the general contractor. In effect, these clauses seek to transfer the credit risk of an owner's non-payment from the general contractor to the subcontractor. Enforceability of “pay-when-paid” clauses will vary from state to state. In any event, subcontractors should avoid “pay-when-paid” clauses if at all possible.

AIA A401 provides in Section 11.3 in relevant part:

“ . . . 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 Architect does not issue a certificate for payment or 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 as provided in Sections 11.7, 11.8 and 11.9.”

ConsensusDOCS 750 provides in relevant part:

“8.2.5 TIME OF PAYMENT Progress payments to the Subcontractor for satisfactory performance of the Subcontract Work shall be made no later than seven (7) Days after receipt by the Contractor of payment from the Owner for the Subcontract Work. If payment from the Owner for such Subcontract Work is not received by the Contractor, through no fault of the Subcontractor, the Contractor will make payment to the Subcontractor within a reasonable time for the Subcontract Work satisfactorily performed.

and

8.3.4 FINAL PAYMENT DELAY If the Owner or its designated agent does not issue a certificate for final payment or the Contractor does not receive such payment for any cause which is not the fault of the Subcontractor, the Contractor shall promptly inform the Subcontractor in writing. The Contractor shall also diligently pursue, with the assistance of Subcontractor, the prompt release by the Owner of the final payment due for the Subcontract Work. At the Subcontractor’s request and expense, to the extent agreed upon in writing, the Contractor shall institute reasonable legal remedies to mitigate the damages and pursue payment of the Subcontractor’s final payment including interest. If final payment from the Owner for such Subcontract Work is not received by the Contractor, through no fault of the Subcontractor, the Contractor will make payment to the Subcontractor within a reasonable time.”

The AIA provision obligates the Contractor to pay the Subcontractor progress payments upon timely demand for payment, even if the Contractor has not been paid by the Owner for a reason not caused by the Subcontractor. In contrast, there is no presumption in favor of payment under the ConsensusDOCS, and the relevant provisions only require the Contractor to pay a Subcontractor within an undefined “reasonable time” if payments are not received from the Owner. This lack of a definite period in which payment should be made to the Subcontractor shifts risk to the Subcontractor and makes the AIA provision more attractive to

the Subcontractor. The indefinite nature of the ConsensusDOCS provision gives a Contractor more “wobble room” to delay payment to a Subcontractor and thus makes the ConsensusDOCS provision the choice of Contractors.

### Dispute Resolution

If a contract contains no specific provision on how the parties will resolve disputes among them, the “default” is for the parties to handle the matter before the appropriate state or federal court. Most construction agreements contain some dispute resolution procedures with the goal of either encouraging negotiated resolutions, or limiting costs.

AIA A401 provides in Section 6.6.1 that:

“any claim arising out of or related to this Subcontract, except those waived in this Subcontract, shall be subject to mediation as a condition precedent to binding dispute resolution.”

“Mediation” is a non-binding process where the parties generally seek the assistance of a third party to attempt to resolve their matters through negotiation. A401, Section 6.1.2 provides that unless the parties agree otherwise, the American Arbitration Association, following its Construction Industry Mediation Procedures, shall act as the mediator of any dispute between the parties. For matters not resolved by mediation, the Contractor and Subcontractor have the alternative of proceeding with arbitration under Section 6.3, or referring the matter to a court of competent jurisdiction. See Section 6.2.

In contrast, ConsensusDOCS 750, in Article 11, calls for the Contractor and Subcontractor to stay their dispute pending resolution of disputes between the Owner and Contractor:

“11.4 DISPUTES BETWEEN CONTRACTOR AND SUBCONTRACTOR In the event that the provisions for resolution of disputes between the Contractor and the Owner contained in the Subcontract Documents do not permit consolidation or joinder of disputes of third parties, such as the Subcontractor, resolution of disputes between the Subcontractor and the Contractor involving in whole or in part disputes between the Contractor and the Owner shall be stayed pending conclusion of any dispute resolution between the Contractor and Owner. ...”

As with AIA A401, the ConsensusDOCS provide for attempts to reach resolution through negotiation as a precondition for litigation or binding arbitration.

“11.5.1 DIRECT DISCUSSIONS If the Parties cannot reach resolution on a matter relating to or arising out of the Agreement, the Parties shall endeavor to reach resolution through good faith direct discussions between the Parties’ representatives, who shall

possess the necessary authority to resolve such matter and who shall record the date of first discussions. If the Parties' representatives are not able to resolve such matter within seven (7) Days, the Parties' Representatives shall immediately inform senior executives of the Parties in writing that resolution was not affected. Upon receipt of such notice, the senior executives of the Parties shall meet within seven (7) Days to endeavor to reach a resolution. If the matter remains unresolved after fifteen (15) Days from the date of first discussion, the Parties shall submit such matter to the dispute resolution procedures selected in Article 11."

The parties are required to resort to mediation as a precondition to engaging in "binding dispute resolution." See ConsensusDOCS 750, Sections 11.5.2 and 11.5.3. If mediation is unsuccessful, the parties are permitted to proceed with arbitration or litigation.

"11.5.2 MEDIATION If direct discussions pursuant to Subparagraph 11.5.1 do not result in resolution of the matter, the Parties shall endeavor to resolve the matter by mediation through the current Construction Industry Mediation Rules of the American Arbitration Association, or the Parties may mutually agree to select another set of mediation rules. The administration of the mediation shall be as mutually agreed by the Parties. The mediation shall be convened within thirty (30) working Days of the matter first being discussed and shall conclude within forty-five (45) working Days of the matter being first discussed. Either Party may terminate the mediation at any time after the first session, but the decision to terminate shall be delivered in person by the terminating Party to the non-terminating Party and to the mediator. The costs of the mediation shall be shared equally by the Parties.

11.5.3 BINDING DISPUTE RESOLUTION If the matter is unresolved after submission of the matter to a mitigation procedure or mediation, the Parties shall submit the matter to the binding dispute resolution procedure selected herein: (Designate only one)

\_\_\_ Arbitration using the current Construction Industry Arbitration Rules of the American Arbitration Association or the Parties may mutually agree to select another set of arbitration rules. The administration of the arbitration shall be as mutually agreed by the Parties.

\_\_\_ Litigation in either the state or federal court having jurisdiction on the matter in the location of the Project."

As with the consequential damage provisions, the ConsensusDOCS require a Subcontractor to have a greater awareness of agreements between the Owner and Contractor than is required in the corresponding AIA provisions. Similarly, the ConsensusDOCS dispute resolution procedures make disputes between the Contractor and Subcontractor subordinate to disputes between the Contractor and Owner, to the extent the dispute involves the same subject matter as the issues between the Contractor and Subcontractor. A Subcontractor signing a ConsensusDOCS contract needs to be more keenly aware of the provisions between the Owner and Contractor as well as any disputes that may occur between them. The ConsensusDOCS represent a substantial advantage for a Contractor, because it forces coordination and subordination of disputes with Subcontractors, rather than piecemeal dispute resolution which could occur under the AIA provisions.

### Payment for Stored Materials and Temporary Facilities and Services

On most significant jobs, subcontractors are required to order expensive equipment and materials to be paid for under the contract as the project progresses. However, these arrangements can pose a number of important issues for the subcontractor: When will payments for those materials be made? Who is responsible for the care, custody and control of the materials on-site? What if the materials are stolen? Who will insure the materials and what sort of policies are required? The answers to these issues will generally be governed by the terms of the contract.

Under AIA A401, Section 14.1, “The Contractor shall furnish and make available at no cost to the Subcontractor the Contractor’s temporary facilities, equipment and services . . . .”

In contrast, ConsensusDOCS 750 provides in Section 8.2.4:

“STORED MATERIALS Unless otherwise provided in the Subcontract Documents, and if approved in advance by the Owner, applications for payment may include materials and equipment not yet incorporated in the Subcontract Work, but delivered to and suitably stored on-site or off-site including applicable insurance, storage and costs incurred transporting the materials to an off-site storage facility. . . .”

Thus, the presumption under A401 is that the Contractor shall furnish facilities at no cost to the Subcontractor, whereas the ConsensusDOCS provide that a Contractor “may” obtain approval for costs associated with storage, but unless approved otherwise, the presumption is the Subcontractor is responsible for such costs.

### Assignment of Subcontract to Owner

AIA A401 presumes that the Owner may accept the Contractor’s obligation and retain the ability to enforce the Subcontract in the event the Contractor is unable to perform. Section 7.4.1, incorporates by reference AIA A201, and provides: “Each subcontract agreement for a portion of the Work is assigned by the Contractor to the Owner.” See A201, Section 5.4.1.

Such assignment is only effective after a termination of the Contract by the Owner for cause. See Section 5.4.1.1. In the event of such an assignment, or an assignment by the Subcontractor to any third parties, the Owner continues to be liable to the Subcontractor for obligations under the Subcontract. See Section 5.4.3.

In contrast, ConsensusDOCS 750 provides:

“10.5 CONTINGENT ASSIGNMENT OF THIS AGREEMENT  
The Contractor’s contingent assignment of this Agreement to the Owner, as provided in the Owner-Contractor agreement is effective when the Owner has terminated the Owner-Contractor agreement for cause and has accepted the assignment by notifying the Subcontractor in writing. . . .”

The difference between the two provisions is that the Owner assumes and retains legal responsibility for obligations owed to the Subcontractor under the AIA. This is also true under the AIA even after a Subcontractor is further assigned by the Owner to replace the prime Contractor, thus further cementing the Owner’s responsibility to the Subcontractor in the event it accepts the assignment. For Contractors, the assignment provision in the AIA imposes significant and substantial responsibilities that do not exist in the ConsensusDOCS.

#### Owner’s Right to Confirm Payment to Subcontractors

While not part of the contract between the Contractor and Subcontractor, revisions to AIA A201 (the agreement between Owner and Contractor) include a provision which gives the Owner the right to request written evidence from the Contractor that the Contractor has paid for subcontracted Work and supplies. If the Contractor fails to furnish such evidence within seven days, the Owner shall have the right to contact Subcontractors to ascertain whether they have been paid. See A201, Section 9.6.4. The ConsensusDOCS lack a similar provision. The advantage of the AIA provision to subcontractors is that it ensures subcontractors are being paid by general contractors.

### **ConsensusDOCS 750 Provisions Which Are More Advantageous to Subcontractors Than AIA A401**

#### Indemnity

Subcontractors expect to undertake some risk when signing a subcontract. Subcontractors generally do not expect to be liable for damages caused by the conduct of the general contractor, owner, or other subcontractors. However, a subcontractor can assume such liability when signing an agreement with an indemnification provision.

An indemnification provision typically requires the subcontractor pay for the general contractor’s losses if the general contractor is liable to a third party. For example, if the

general contractor is sued, the subcontractor may be responsible to reimburse (or *indemnify*) the general contractor for money the general contractor paid to the third party.

AIA A401, Section 4.6.1, provides:

“To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect’s Consultant, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney’s fees, arising out of or resulting from performance of the Subcontractor’s Work under this Subcontract, provided that no such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor’s Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligations shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 4.6.”

The parallel provision in ConsensusDOCS 750 is Section 9.1.1.

“9.1.1 INDEMNITY To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Contractor, Architect/Engineer, the Owner and their agents, consultants and employees (the Indemnitees) from all claims for bodily injury and property damage other than to the Work itself that may arise from the performance of the Subcontract Work, including reasonable attorney’s fees, costs and expenses, that arise from the performance of the Work, but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor’s Sub-Subcontractors or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable. The Subcontractor shall be entitled to reimbursement of any defense cost paid above Subcontractor’s percentage of liability for the underlying claim to the extent attributable to the negligent acts or omissions of the Indemnitees.”

Both the AIA and ConsensusDOCS provisions contain comparable negligence provisions which limit the Subcontractor’s liability to the extent the losses and indemnification responsibility require negligent acts or omissions by the Subcontractors. However, the

ConsensusDOCS goes a step further by entitling the subcontractor to reimbursement for the cost of any defense paid above the Subcontractor's percentage of liability to the extent the harm was caused by the indemnitee (i.e. the Contractor, Architect/Engineer, or Owner). The logic of this provision is that it only imposes liability on the Subcontractor if the Subcontractor has done something wrong. The Subcontractor does not need to reimburse the indemnitees for their own bad acts. The AIA document does not limit the Subcontractor's indemnification responsibility, thus providing greater protection to Contractors.

### Owner Ability to Pay

An owner's ability to pay is crucial to the successful completion of a project. Thus, evidence the owner has obtained reasonable financing to fulfill its obligations is important to both general contractors and subcontractors alike. "Owner ability to pay" clauses seek to give contractors and subcontractors the ability to obtain such evidence. An "owner ability to pay" clause *may* provide the subcontractor authority to obtain the owner's financing information (either from the Contractor or the Owner) depending upon the language of the clause.

ConsensusDOCS 750 at Section 4.2 provides:

#### "4.2 OWNER'S ABILITY TO PAY

4.2.1 The Subcontractor shall have the right upon request to receive from the Contractor such information as the Contractor has obtained relative to the Owner's financial ability to pay for the Work, including any subsequent material variation in such information. The Contractor, however, does not warrant the accuracy or completeness of the information provided by the Owner.

4.2.2 If the Subcontractor does not receive the information referenced in Subparagraph 4.2.1 with regard to the Owner's ability to pay for the Work as required by the Contract Documents, the Subcontractor may request the information from the Owner or the Owner's lender."

In contrast, neither AIA A401 nor A201 contain an "ability to pay" provision. Thus, a Subcontractor signing an AIA subcontractor agreement must either have an independent basis for having confidence in Owner's ability to pay, or have similar grounds to believe the Contractor will be able to pay in the event the Owner defaults.

As Colette Nelson, Executive Vice President of the American Subcontractor's Association noted: "The concern of those doing construction is that the money is always flowing from the top . . . and in an economy that is frequently volatile – or an individual owner's situation may be volatile – it is important to receive information." Fin. & Com. Daily Newspaper (MN) "Builders Say No – Go to Go-To Document" (10/23/07). In response, Suzanne Hirness, AIA's Managing Director and counsel for contract documents said, "We

think it is a pretty reasonable balance of rights to the owner and contractor.” *Id.* The ability of subcontractors to obtain information regarding the viability of an owner’s ability to pay is certainly an important contract provision that is lacking in the AIA standard form. The ConsensusDOCS provision represents substantial to a Subcontractor, however it presents little “cost” to a Contractor in allowing a Subcontractor to obtain information from an Owner, other than potentially disrupting the Contractor’s relationship with the Owner.

### Schedule

Time is generally of the essence in most construction projects. Nevertheless, it is common practice for Contractors to alter a project’s schedule well *after* construction has commenced.

ConsensusDOCS 750, Section 5.2 provides:

“5.2 SCHEDULE OBLIGATIONS The Subcontractor shall provide the Contractor with any scheduling information proposed by the Subcontractor for the Subcontract Work. In consultation with the Subcontractor, the Contractor shall prepare the schedule for performance of the Work (the Progress Schedule) and shall revise and update such schedule, as necessary, as the Work progresses. Both the Contractor and the Subcontractor shall be bound by the Progress Schedule. The Progress Schedule and all subsequent changes and additional details shall be submitted to the Subcontractor promptly and reasonably in advance of the required performance. The Contractor shall have the right to determine and, if necessary, change the time, order and priority in which the various portions of the Work shall be performed and all other matters relative to the Subcontract Work. To the extent such changes increase Subcontractor’s time and costs, the Subcontract Amount and Subcontract Time shall be equitable adjusted.”

The ability of the Subcontractor to hold the Contractor to equitable adjustments in time and entitlement to payments as a result of modifications of the Work schedule is a crucial provision. The AIA A401 contains no similar provision. The presence of Section 5.2 in the ConsensusDOCS represents a substantial advantage to subcontractors which does not exist in the AIA documents. By the same token, this imposes a real cost to contractors to the extent they change or modify the schedules under the ConsensusDOCS which do not exist under the AIA.

### Additional Insured

Contractors and Subcontractors must typically provide insurance for the work they perform on a project. This generally involves each individual Contractor and Subcontractor securing separate insurance policies to cover any losses incurred as a result of their work. In

some instances, the Subcontractor may have a duty to provide additional liability coverage on behalf of the Contractor. This can be accomplished with an “additional insured endorsement,” which is a mechanism that adds the Contractor to the Subcontractor’s insurance policy.

ConsensusDOCS 750 provides in relevant part:

“9.2.11.1 If required by Subparagraph 9.2.11, the additional liability coverage required of the Subcontractor shall be:

[Designate Required Coverage(s)]

\_\_\_\_\_ .1 ADDITIONAL INSURED. Contractor shall be named as an additional insured on Subcontractor’s Commercial General Liability Insurance specified, for operations and completed operations. . . .”

\_\_\_\_\_ .2 OCP. Subcontractor shall provide an Owners’ and Contractors’ Protective Liability Insurance (“OCP”) policy with limits equal to the limits on Commercial General Liability Insurance specified, or limits as otherwise required by Contractor.

Any documented additional cost in the form of a surcharge associated with procuring the additional liability coverage in accordance with this Subparagraph shall be paid by the Contractor directly or the costs may be reimbursed by Contractor to Subcontractor by increasing the Subcontract Amount to correspond to the actual cost required to purchase and maintain the additional liability coverage...”

In contrast, AIA A401, Section 13.4 provides:

“The Subcontractor shall cause commercial liability coverage required by the Subcontract Documents to include: (1) the Contractor, the Owner, the Architect and the Architect’s consultants as additional insureds for claims caused in whole or in part by the Subcontractor’s negligent acts or omissions during the Subcontractor’s operations; and (2) the Contractor as an additional insured for claims caused in whole or in part by the Subcontractor’s negligent acts or omissions during the Subcontract’s completed operations.”

The most significant difference between the AIA and ConsensusDOCS provisions is that the additional insured coverages must be provided under the AIA at the Subcontractor’s expense. Additionally, the AIA provision requires Subcontractors to provide additional insurance coverage for “completed operation” claims which leaves Subcontractors vulnerable

in situations where there is joint or contributory negligence causing damages outside the responsibility of the Subcontractor. The AIA provision shifts costs to the Subcontractor, whereas the ConsensusDOCS makes the Contractor for these insurance expenses. Regardless of which provision is used, Contractors and Subcontractors need to be aware of the relative cost shifting provisions between the two contracts.

### Involvement of Architect

As one might expect, the AIA documents have the Architect playing a central role in administration of the contract and authorization of final payment. For example, AIA A401, Section 4.1.5 provides that:

“The Subcontractor agrees that the Contractor and the Architect each have the authority to reject Work of the Subcontractor that does not conform to the Prime Contract. The Architect’s decisions on matter relating to aesthetic effect shall be final and binding on the Subcontractor if consistent with the expressed intent in the Prime Contract.”

Likewise, Section 12.1 provides in relevant part:

“Final payment . . . shall be made by the Contractor to the Subcontractor when the Subcontractor’s Work is fully performed . . . , the Architect has issued a certificate for payment covering the Subcontractor’s completed Work.”

Moreover, it is worth noting that under the General Conditions for a Construction Contract (A201) the Architect maintains its substantial role as the “Initial Decision Maker” in disputes between the Contractor and the Owner. See AIA A201, Section 5.2.

In contrast, the Architect, under the ConsensusDOCS is limited, providing architectural design services for the Owner rather than serving as a contract administrator. See ConsensusDOCS 750, Sections 2.3, 3.7.1, 3.7.2 and 3.8. Nevertheless, the Architect continues to play a role in verifying the appropriateness of applications for payment by the Subcontractor. See Section 8.2.

A review of commentary and blogs on the internet demonstrates the primary criticism of the ConsensusDOCS by architects is their marginalized role in the ConsensusDOCS. See [www.csinet.org](http://www.csinet.org) (Go to “Forums” then to “Specifications Discussion” then to “AGC ‘ConsensuDOCS’”). This author has placed the minimalized role of architects in contract administration as a “advantage” of the ConsensusDOCS over its AIA counterparts. However, there are certainly arguments to the contrary. In either event, Subcontractors and Contractors need to be aware of the substantial and differing roles of the Architects under the ConsensusDOCS and the AIA forms, especially in dispute resolution.

## **CONCLUSION**

Whether you are using the ConsensusDOCS or AIA forms, you need to be aware of the differences between these contracts and how you may be impacted.

## SUMMARY COMPARISON

<b>TOPIC</b>	<b>AIA A401 SECTION</b>	<b>AIA - DESCRIPTION</b>	<b>ConsensusDOCS SECTION</b>	<b>ConsensusDOCS - DESCRIPTION</b>	<b>ADVANTAGE</b>
<b>Consequential Damages</b>	A401, §15.4	Contractor and subcontractor waive consequential damages.	750 §5.5.1	Contractor and subcontractor waive consequential damages subject to prime contract between owner and general contractor.	AIA – Subcontractors ConsensusDOCS - Contractors
<b>Paid-When-Paid</b>	A401, §11.3	Contractor must pay subcontractor within 7 days of demand, if unpaid through no fault of subcontractor.	750 §8.2.5, §8.3.4	Contractor only required to pay subcontractor if unpaid through no fault of subcontractor within “reasonable time.”	AIA – Subcontractors ConsensusDOCS – Contractors
<b>Dispute Resolution</b>	A401, §6.1.2, §6.6.1, §6.3	Mediation required then parties can opt for litigation or arbitration.	750 §11.5.1, §11.5.2, §11.5.3	Mediation required then parties can opt for litigation or arbitration. However, the contractor disputes are subordinate to disputes between the contractor and owner.	AIA – Subcontractors ConsensusDOCS – Contractors
<b>Stored Materials</b>	A401, §14.1	Contractor shall furnish at no cost to subcontractor temporary facilities, equipment and services.	750 §8.2.4	Contractor “may” obtain approval for costs associated with storage, but unless approved otherwise, presumption is subcontractor is responsible for costs.	AIA – Subcontractors ConsensusDOCS – Contractors
<b>Assignment of Subcontract</b>	A401, §7.4.1 A201, §5.4.1	An owner who assumes and retains responsibility for obligations owed to the subcontractor, continues after the subcontractor is further assigned by the owner to replace the contractor.	750 §10.5	The subcontractor agreement is assigned to the owner in the event of breach by the contractor.	AIA – Subcontractors ConsensusDOCS – Contractors
<b>Owner Confirms Payment</b>	A201, §9.6.4	Owner has right to confirm contractor paid subcontractor	N/A	N/A	AIA – Subcontractors ConsensusDOCS - Contractors

<b>TOPIC</b>	<b>AIA A401 SECTION</b>	<b>AIA - DESCRIPTION</b>	<b>ConsensusDOCS SECTION</b>	<b>ConsensusDOCS - DESCRIPTION</b>	<b>ADVANTAGE</b>
<b>Indemnity</b>	A401, §4.6.1	Contractor is required to indemnify the owner, contractor, and architect from all claims or loss resulting from subcontractor's negligent work.	750 §9.1.1	Contractor is required to indemnify the owner, contractor, and architect from all claims or loss resulting from subcontractor's negligent work. However, it provides that subcontractor is entitled to reimbursement for costs paid above the subcontractor's percentage of liability.	ConsensusDOCS – Subcontractors AIA – Contractors
<b>Owner's Ability to Pay</b>	N/A	N/A	750 §4.2	Subcontractor has the right to request from contractor information regarding owner's ability to pay for the work.	ConsensusDOCS – Subcontractors AIA – Contractors
<b>Schedule</b>	N/A	N/A	750 §5.2	To the extent schedule changes are made, not caused by the subcontractor, the subcontractor shall have the right for increased costs and equitable adjustment of time schedule.	ConsensusDOCS – Subcontractors AIA – Contractors
<b>Additional Insured</b>	A401, §13.4	Subcontractor is required to provide "additional insured" CGL coverage at its expense.	750 §9.2, §11.1	Subcontractor shall provide CGL coverage at contractor's expense.	ConsensusDOCS – Subcontractors AIA – Contractors
<b>Involvement of Architect</b>	A401, §4.1.5, 12.1 A201, § 5.2	Architect plays a central role in contract administration, payment authorization and is "Initial Decision Maker" in disputes.	750 §2.3, §3.7, §3.8, §8.2	Architect's actions are limited to architectural design and payment approval.	ConsensusDOCS – Subcontractors AIA – Contractors



