

Introducing the ConsensusDOCS 725 Sub-Subcontract

by Donald Gregory, Esq.

The ConsensusDOCS coalition has published another standard agreement, continuing its promotion of contract documents designed in the best interests of the entire project. With this latest release, ConsensusDOCS set out to craft a document appropriate to an increasingly specialized construction industry, which uses sub-subcontractors more frequently. The agreement, the ASA-endorsed ConsensusDOCS 725 *Standard Agreement Between Subcontractor and Sub-Subcontractor*, represents the industry's first form contract between a subcontractor and a sub-subcontractor. The document features streamlined provisions and vocabulary to reflect the unique relationship between the parties. Though not perfect, the ConsensusDOCS 725 signifies a marked improvement over two widespread business practices: (1) adapting an existing form subcontract or purchase order as a sub-subcontract; and (2) entering into a sub-subcontract relationship without any formal agreement at all.

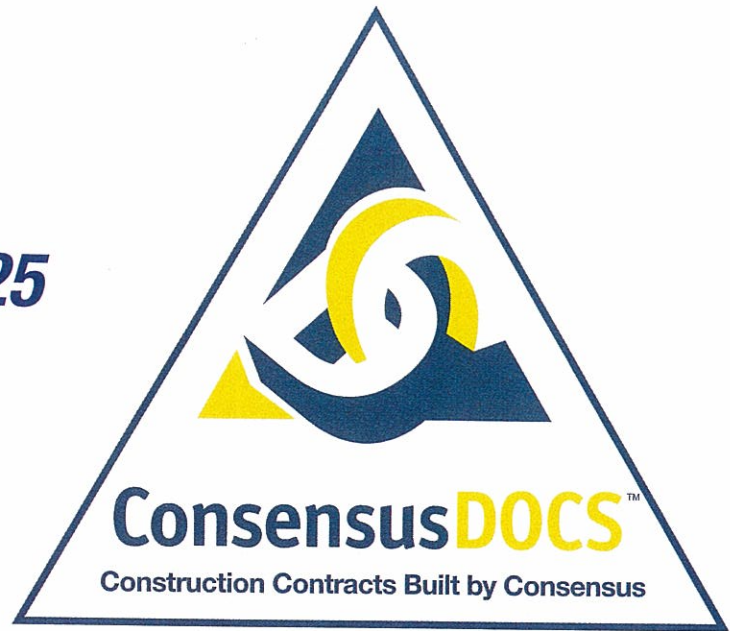
The ConsensusDOCS 725 provides a simpler alternative to using an adapted subcontract. Until now, sophisticated parties have adapted subcontracts to try to fit the "sub-sub" relationship. Subcontract documents, such as the ConsensusDOCS 750, are well over 20 pages long with dozens of provisions that may not be needed in a limited scope sub-subcontract. ConsensusDOCS 725 offers a brief six-page sub-subcontract alternative designed for use with a sub-subcontractor with a limited scope of work. Many subcontractors believe that it will be easier to get a short

form sub-subcontract signed with their sub-subs.

Using the ConsensusDOCS 725 is far superior to using no formal contract at all. Many sub-subcontract relationships are governed either by purchase orders or by bid proposals. While those documents guarantee simplicity, there is not much legal certainty in such a relationship. The ConsensusDOCS 725 ensures that many job-specific requirements flow downstream to the sub-subcontractor. The document provides space to include a description of the subcontract work, drawings and specifications, the progress schedule, and other job-specific items. Both the subcontractor and the sub-subcontractor benefit from the shared vision for the job. The sub-subcontractor also gets to enjoy protections similar to what the

Learn More About the ConsensusDOCS 725 on Oct. 13

Learn more about how managing your sub-subcontractors can be easier and more effective with the ASA-endorsed ConsensusDOCS 725. On Oct. 13, 2009, Donald Gregory will present the webinar, "Managing Sub-Subcontractors Made Easier!" from 12:00 p.m. to 1:30 p.m. EDT (9:00 a.m.-10:30 a.m. PDT). This program is \$199 for members/\$279 for non-members.



subcontractor receives on important job-related issues such as change orders and suspension of the work. The subcontractor, in turn, gets the benefit of having downstream parties integrated into the project fairly, sharing responsibility for the completion and quality of the work.

The ConsensusDOCS 725 contains many of the key provisions one would expect in a ConsensusDOCS form agreement. Change orders must be in writing. Sub-subcontractors will get a time extension if the work is somehow delayed. Sub-subcontractors may also collect delay damages where appropriate. The subcontractor will pay the sub-subcontractor on a "pay-when-paid" basis, and payments must be made within seven days after receipt from the contractor. If the contractor fails to pay, the subcontractor still must pay within a reasonable time. The sub-subcontractor can stop working on seven days' written notice if payment is not timely. The sub-subcontractor must indemnify the subcontractor, but only to the extent of its own negligence. The parties can mutually agree upon a retainage percentage, and the funds will be released as the upstream retainage is released.

The ConsensusDOCS 725 generally will work well with upstream agreements. Provisions governing time for payment and stop work rights are very similar to provisions in the ConsensusDOCS

750 and American Institute of Architects A401-2007 model subcontract agreements. Likewise, termination rights in the new sub-subcontract are very similar to what exists in form subcontracts. Like the ConsensusDOCS 750, the sub-subcontract channels dispute resolution through direct discussions, followed by mediation, and terminating in the parties' check-box choice between litigation and arbitration. Also like the 750, the sub-subcontract strongly encourages multi-party dispute resolution.

The ConsensusDOCS 725 requires no specific lien waivers or other documentation from the sub-subcontractor in order to receive payment. Most upstream agreements require a subcontract to submit both lien waivers and itemized applications for payment in order to be paid. Because of these differences, the subcontractor may face payment risks that are not shared with the sub-subcontractor, unless an exhibit is attached setting forth the proof of payment required.

ConsensusDOCS 725 does not require the sub-subcontractor to warrant the quality of the work. It does not address correction of non-conforming work. It also does not address contractor-requested uncovering of the work for inspection. In other words, the subcontractor's burden to ensure the quality of the work is not directly shared with the sub-subcontractor.

There are other upstream provisions not covered by the sub-subcontract, but many of them are minor. Still, parties that need more detail from their agreements have options. The ConsensusDOCS 750 provides a more comprehensive agreement, and minor changes will convert it into a sub-subcontract as well. And the ConsensusDOCS 725 is flexible — parties can add detailed

exhibits to address complex issues like payment risk and work quality on a customized basis.

On the whole, the ConsensusDOCS 725 fills a need and represents a step forward for industry form agreements. Like other ConsensusDOCS agreements, it includes consensus language designed to be fair to all. The agreement better integrates sub-subcontractors into the broader project, and it does so in a concise and simple manner. For more information

about the ConsensusDOCS 725, or other ConsensusDOCS agreements, go to www.consensusdocs.org. (Editor's note: Use partner code ASA and promotion code 100 when ordering to receive your ASA-member discount.) ■

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Glenn M. Gelman & Associates specializes in the tax and accounting needs of contractors. We understand the unique requirements and time constraints of the construction industry. Our philosophy is to provide clients with unparalleled timely, professional services bearing in mind that the value of our services must outweigh the cost.