CHAPTER 1

The Contract Documents

Introduction
A variety of documents are typically incorporated into the prime contract by reference, including specifications, general conditions, supplemental and other conditions, addenda issued before executing the agreement between the owner and contractor, and all modifications issued after execution. Subcontracts typically incorporate by reference these documents together with the prime contract. These incorporated documents are commonly designated as the “Contract Documents.”

Unless specifically enumerated in the contract, contract documents do not include other documents such as proposals, bidding requirements, advertisements or invitations to bid, instructions to bidders, sample forms, the contractor’s bid, or portions of addenda relating to bidding requirements.

Incorporation by reference clauses is used to maintain consistency and uniformity of obligations through the many tiers of the contracting chain. It is imperative that these incorporated documents are received—and read—by all participants on the construction project. Whether or not the incorporated documents are received or read, the terms of the documents are a part of the contract and, as such, they are the responsibility of the parties to the contract.

The quantity of incorporated documents can be voluminous. Due to the sheer number of pages comprising the contract documents, it should come as no surprise that internal conflicts may exist between the documents. Accordingly, an “order of precedence” clause is helpful to identify which contract document prevails when a conflict occurs. For example, the subcontract agreement generally prevails over bid documents if there are conflicting provisions. Similarly, specifications traditionally prevail over plans.

When reviewing contracts, it is important to note that the form contract documents often do not include shop drawings, even if approved by the design professional. Design professionals commonly disclaim responsibility for shop drawings they have reviewed. This practice can lead to a flawed project if carried to the extreme.

The American Institute of Architects (AIA) and Engineers Joint Contract Documents Committee (EJCDC) documents state that shop drawings are to be submitted for review and approval only to ensure conformance with the project’s design.

Tina M. Bird is with the firm of Clark Hill in Chicago, Illinois.
concept. The term “design concept” is not well defined within the industry, and linking the real-world shop drawing process to an ill-defined term may diffuse focus and responsibility. From a practical perspective, divesting the design professional of legal responsibility for shop drawing review may relax the process to the point that design professionals do not diligently check such drawings for workability regarding the rest of the project’s features.

Frequently Used Contract Provisions

American Institute of Architects

AIA A201 sets forth the definition of contract documents as follows:

1.1.1 The Contract Documents are enumerated in the Agreement between the Owner and Contractor (hereinafter the Agreement), and consist of the Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of the Contract, and other documents listed in the Agreement and Modifications issued after execution of the Contract. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Architect. Unless specifically enumerated in the Agreement, the Contract Documents do not include the Advertisement or invitation to bid Instruction to Bidders, sample forms, other information furnished by the Owner in anticipation of receiving bids or proposals, the Contractor’s bid or proposal, or portions of Addenda relating to bidding requirements.

AIA A401 sets forth the definition of subcontract documents as follows:

1.1 The Subcontract Documents consist of (1) this Agreement; (2) the Prime Contract, consisting of the Agreement between the Owner and Contractor and the other Contract Documents enumerated therein; (3) Modifications issued subsequent to the execution of the Agreement between the Owner and Contractor, whether before or after the execution of this Agreement; (4) other documents listed in Article 16 of this Agreement; and (5) Modifications to this Subcontract issued after execution of this Agreement. These form the Subcontract, and are as fully a part of the Subcontract as if attached to this Agreement or repeated herein. The Subcontract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Subcontract Documents, other than Modifications issued subsequent to the execution of this Agreement, appears in Article 16.

AIA A201 expressly provides that shop drawings are not contract documents.

3.12.4 Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents. Their purpose is to demonstrate the way by
which the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents for those portions of the Work for which the Contract Documents require submittals. Review by the Architect is subject to the limitations of Section 4.2.7. Informational submittals upon which the Architect is not expected to take responsive action may be so identified in the Contract Documents. Submittals which are not required by the Contract Documents may be returned by the Architect without action.

The AIA limits the responsibility of the design professional in its review of the contractor’s shop drawings by providing in Section 4.2.7 of AIA A201 that the review is for the “limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents.”

Section 4.2.7 further provides that review of the shop drawings is “not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents.”

**ConsensusDOCS**

ConsensusDOCS 200 defines contract documents, in Paragraph 2.4, as follows:

* * *

**2.4.4** The *Contract Documents* consist of this Agreement, the drawings, specifications, addenda issued prior to execution of this Agreement, approved submittals, information furnished by the Owner under Paragraph 4.3, other documents listed in this Agreement and any modifications issued after execution.

Under the ConsensusDOCS, “approved submittals” are contract documents. Subcontract documents are defined in ConsensusDOCS 750 at Section 2.3 and provide that the contractor shall make all subcontract documents available to the subcontractor. That provision reads as follows:

The Subcontract Documents include this Agreement, the Owner-Contractor agreement, special conditions, and general conditions, specifications, drawings, addenda, Subcontract Change Orders, approved submittals, amendments and any pending and exercised alternates. The Contractor shall provide to the Subcontractor, prior to the execution of the Subcontract Agreement, copies of the Subcontract documents to which the Subcontractor will be bound. The Subcontractor similarly shall provide copies of applicable portions of the Subcontract Documents to its proposed subcontractors and suppliers. Nothing shall prohibit the Subcontractor from obtaining copies of the Subcontract Documents from the Contractor at any time after the Subcontract Agreement is executed. The Subcontract Documents existing at the time of the execution of this Agreement are set forth in Article 13.
Paragraph 2.4 of ConsensusDOCS 750 provides that in the event of a conflict between the subcontract agreement and the subcontract documents, the subcontract agreement governs. In addition, ConsensusDOCS 750 contains the following language pertaining to submittals in Paragraph 3.7.1:

The approval of any Subcontractor submittal shall not be deemed to authorize deviations, substitutions, or changes in the requirements of the Subcontract Documents unless express written approval is obtained from the Contractor and Owner authorizing such deviation, substitution, or change.

Engineers Joint Contract Documents Committee

Paragraph 1.01 of EJCDC 700 defines contract documents as follows:

* * *

12. Contract Documents. Those items so designated in the Agreement. Only printed or hard copies of the items listed in the Agreement are Contract Documents. Approved Shop Drawings, other Contractor’s submittals, and the reports and drawings of subsurface and physical conditions are not Contract Documents.

Like the AIA, EJCDC provides that even approved shop drawings are not Contract Documents.

Paragraph 3.03 of EJCDC 700 addresses the precedence of various contract documents as well as the intent and amendment of the contract documents.

* * *

B. Resolving Discrepancies

Except as may be otherwise specifically stated in the Contract Documents, the provisions of the Contract Documents shall take precedence in resolving any conflict, error, ambiguity, or discrepancy between the provisions of the Contract Documents and:

a. the provisions of any standard, specification, manual, code, or instruction (whether or not specifically incorporated by reference in the Contract Documents); or

b. the provisions of any Laws or Regulations applicable to the performance of the Work (unless such an interpretation of the provisions of the Contract Documents would result in violation of such Law or Regulation).

3.04 Amending and Supplementing Contract Documents

The Contract Documents may be amended to provide for additions, deletions, and revisions in the Work or to modify the terms and conditions thereof by either a Change Order or a Work Change Directive.

The requirements of the Contract Documents may be supplemented and minor variations and deviations in the Work may be authorized, by one or more of the following ways:
1. A Field Order.
2. Engineer’s approval of a Shop Drawing or Sample; (subject to the provisions of Paragraph 6.17.D.3); or
3. Engineer’s written interpretation or clarification.

Paragraph 6.17.D.3 further provides:

Engineer’s review and approval shall not relieve Contractor from responsibility for any variation from the requirements of the Contract Documents unless Contractor has complied with the requirements of Paragraph 6.7.C.3 and Engineer has given written approval of each such variation by specific written notation thereof incorporated in or accompanying the Shop Drawing or Sample. Engineer’s review and approval shall not relieve Contractor from responsibility for complying with the requirements of Paragraph 6.17.C.1.

As with the AIA, the design professional’s approval of shop drawings does not protect the contractor in the event of a conflict with the contract documents, except in the case of “minor variations” and only then if the contractor specifically complies with the notification requirements of Paragraph 6.17.D.3.

**Alternative Contract Provisions**

The following alternative clauses are intended to establish an order of precedence for conflicting provisions in and among the contract documents and reduce subjectivity with respect to the core pretext of contract documents. While all are intended to provide clarity, some clauses may be difficult to negotiate without substantial subcontractor negotiation leverage. In particular, the last alternative is unrealistic for a typical subcontractor negotiation position, but it is meant to identify a laundry list of issues, some of which may be appropriate for a particular contract.

**Strike from the List of Contract Documents Any Document That Does Not Apply to the Project**

This may seem apparent, but many form contracts list documents that may not exist for the project in question. Striking from the enumerated list any documents that do not exist for the project will prevent the creation of such a document at a later date to benefit one side’s position.

**Limit the Subcontract Documents to Documents Actually Provided to the Subcontractor**

Only to the extent that the Contractor has furnished the Subcontractor a copy of the Contract Documents enumerated therein upon the Subcontractor’s request, the Subcontract Documents consist of . . .

This modification is intended to offer the subcontractor some protection when it does not or cannot obtain copies of the contract documents. If certain portions of the contract documents are omitted inadvertently or intentionally, this modification may free the subcontractor from an obligation it did not intend to assume. Matters
of proof on what was delivered to the subcontractor are difficult, particularly when
the contract documents are voluminous.

Most contractors will resist this approach because on occasion they receive
some of the contract documents only after the contract is signed. Nevertheless, the
contractor is bound to the contract documents. Contractors will likely hold their
subcontractors to a similar standard.

**Require the Contractor to Provide the Subcontractor
with a Complete Set of Subcontract Documents**

The Contractor shall provide copies of all Subcontract Documents to the
Subcontractor prior to execution of this Agreement. Failure to provide any
Subcontract Document shall relieve the Subcontractor of the obligation to
comply with the terms of said omitted document.

ConsensusDOCS 750 subcontract agreement provides that the contractor shall
“make available” subcontract documents to the subcontractor before execution,
and the more onerous AIA form subcontract requires the contractor to provide
subcontract documents only if the subcontractor has requested and paid for them.
A provision requiring the contractor to provide the subcontractor with a complete
set of the contract documents may be more palatable if the subcontractor agrees to
pay for the documents.

While most contractors do not object to furnishing the contract documents to
their subcontractors, contractors will often resist this provision, because an inad-
vertent failure to provide a contract document to a subcontractor would have the
extreme result of releasing the subcontractor from a contract obligation.

**Strike or Amend the More Onerous Provisions
That May Appear in the Contract Documents**

Notwithstanding anything contained in the Subcontract Documents to the
contrary, Subcontractor does not agree to and shall not be bound by:

(a) any provision or agreement wherein Subcontractor waives its or its
sub-subcontractor’s rights under any mechanics lien laws or public con-
struction bond laws prior to receiving payment for all labor, services,
equipment, materials and fixtures;

(b) any provision wherein Subcontractor waives damages for delays or
interferences with or acceleration of Subcontractor’s Work caused by
others, including, but not limited to, the delay of predecessor activities,
stacking of trades during Subcontractor’s performance or Contractor’s
failure to properly schedule or coordinate Subcontractor’s Work with
other work being done in connection with the Project;

(c) any provision whereby Subcontractor purports to accept liability for
damages beyond those directly resulting from the default or deficiency
of Subcontractor’s performance;

(d) any provision whereby Subcontractor is required to perform extra
Work prior to receipt of a duly authorized Change Order. The order-
ing of extra Work from Subcontractor by any person acting as foreman, supervisor or management employee of Contractor shall constitute an agreement to pay for said Work, whether or not confirmed by Change Order;

(e) any provision wherein Subcontractor is required to pay its sub-subcontractors and suppliers before receiving payment from Contractor;

(f) any provision requiring funds received from Contractor to be placed in or to be deemed or construed as having been placed in a trust for any purpose or party, except as provided by law;

(g) any provision which requires Subcontractor to perform its Work in accordance with any standard other than as shown or described within the Contract Documents;

(h) any provision requiring Subcontractor to give or receive notice within less than five (5) working days of the event giving rise to the necessity of giving or receiving notice;

(i) any provision permitting Contractor to withhold payment from Subcontractor or to require Subcontractor to furnish a surety bond to provide coverage to any party for a potential loss covered by insurance for which the Contractor or Owner are named as additional insureds;

(j) any provision permitting Owner or Contractor to withhold payment from Subcontractor or requiring Subcontractor to defend against or post bond with respect to any claim asserted or suit brought by any sub-subcontractor or supplier of Subcontractor, unless Subcontractor has been paid for the Work which is the subject matter of the claim or suit;

(k) any provision whereby Subcontractor is bound by the determination of any arbitration, litigation or other dispute resolution proceeding unless Subcontractor is permitted, at its own expense, to fully participate as a party in interest in any hearing conducted with respect to the dispute, including, but not limited to voting on arbitrators or mediators, and introducing evidence. Subcontractor shall be responsible for payment of its portion of the fees and costs only.

Some of these will be more objectionable to the contractor than others. If the subcontractor elects this approach, limiting it to the three or four most objectionable clauses will probably be easier to negotiate than the entire laundry list set forth above.

Modify the Subcontract Documents Clause to Provide That the Subcontractor’s Proposal Is a Contract Document

In addition to the Contract Documents identified above, the Subcontractor’s proposal shall be a Contract Document, and shall control in the event of a conflict with the other Contract Documents.

This clause can also be used by the contractor and inserted in the prime contract. Most owners will object to the inclusion of the contractor’s bid as a contract
document out of concern that it will exclude something that should be included in the contract. In addition, the qualifications in the bid can conflict with other language in the contract documents. For the same reasons, contractors may object to attaching the subcontractor’s bid as a subcontract document.

**Add an Order of Precedence Clause**

The order of precedence of the Contract Documents in the event of conflict shall be in the same order as listed in the definition of Contract Documents.

Contractors and subcontractors will want a provision addressing the order in which the various contract documents will apply in the event of a conflict. Subcontractors will want the provisions of the subcontract to prevail over any term in the prime contract–incorporated documents.

**Related Topics**

- Flow-Down Clauses

**Notes**