

CONTRACTING FOR INTEGRATED PROJECT DELIVERY: CONSENSUSDOCS



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THE LEADING CONTRACT DOCUMENTS ON INTEGRATED PROJECT DELIVERY FEATURE NOTABLE DIFFERENCES IN THEIR APPROACHES AND SPECIFICS WHEN CONTRACTING FOR COLLABORATION. THIS PAPER IS THE SECOND OF TWO EXPLORING THE AIA AND CONSENSUSDOCS FAMILIES OF IPD CONTRACT DOCUMENTS.

WHY CREATE A STANDARD FORM AGREEMENT? WHAT “NEED” ARE YOU MEETING?

The design and construction industry is fragmented, adversarial, litigious, and inefficient. According to the U.S. Department of Commerce, Bureau of Labor Statistics, construction has actually become less productive since 1964—the only major industry to become less efficient during that time span. The first step towards improvement is realizing that there is a problem. J. Doug Pruitt, the president of the Associated General Contractors of America (AGC) puts it succinctly in characterizing the industry as being broken and needing to be fixed. The Construction Industry Institute insightfully comments, “it is ironic that the one industry in the country which more than all others depends upon coordination, cooperation and teamwork among multiple participants should be the country’s most adversarial industry.” Working in silos and a zero-sum gain mindset may have worked in the past, but it does not serve today’s design and construction industry. Falling back on old approaches that may have been around 100 years or more may be comforting, but it does not place our industry in a position to actually succeed.

The contracts, which ultimately govern the performance of stakeholders in the design and construction process, have been part of the problem. A recent study estimates up to a 20 percent premium is added to cover the premium of just five of the most common exculpatory/disclaimer clauses.¹ A group of 22 leading construction associations representing a diverse coalition of owners, contractors, sureties, and design professionals joined together to develop the

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first catalog of consensus standard contracts based on best practices and fair risk allocation for all parties.² The result is ConsensusDOCS™, which includes more than 80 contracts and forms that address all project delivery methods.³ The signature document of the ConsensusDOCS catalog of contract agreements and forms is the ConsensusDOCS 300 *Standard Form of Tri-Party Agreement for Collaborative Project Delivery* (ConsensusDOCS 300). Upon publication in September 2007, the ConsensusDOCS 300 was the first standard construction contract to address integrated project delivery (IPD), and continues to be the only multi-party IPD standard agreement.⁴ The bar was set high in drafting a document to “break the mold” to provide a new and better path forward for the industry. The ConsensusDOCS 300 brings most directly to individual project sites the ConsensusDOCS drafting process of divergent interests collaborating on a project-first mentality to reach consensus.

One of the goals of the ConsensusDOCS drafters is to write straightforward and easy to understand contracts. The 300 addresses the culture that parties bring to the project.⁵ To determine why the ConsensusDOCS drafting organizations created the first standard IPD contract in its library of contract documents, one simply needs to reference section 3.2, which states:

[t]he Parties agree that the project objectives can be best achieved through a relational contract that promotes and facilitates strategic planning, design, construction and commissioning of the project, through the principles of collaboration and lean project delivery.

Traditionally, contract terms have been focused on individual party rights and obligations. Great effort is usually expended determining what could go wrong on a project. Little effort is used in establishing what should go right as a collective goal. While preventing or proactively addressing problems is positive, attempting to exhaust foreseeable problems and assigning responsibility to one party too often become self-fulfilling prophecies. Construction contracts generally plan how to manage failure, rather than plan for success. Assigning responsibility to an individual party, as opposed to the project as a whole, leads project participants to compete to fulfill their individual responsibilities first and foremost. Contract obligations often lead practitioners to act more like competitors than collaborators. Optimizing an individual’s performance in isolation is highly productive; however, the design and construction process is highly interdependent. Consequently, if not adequately coordinated, an individual who optimizes their isolated performance may actually be wasteful.

Often overlooked in drafting a contract is its primary function—to memorialize a business relationship. IPD contracts are also referred to as “relational” contracts, because they focus on not just what is going to be built, but also how it will be built. Simply put, people build projects. Success on a project is determined more by people successfully working together. The ConsensusDOCS 300 explicitly embraces the term “relational contract” which is part of the written agreement signed by the parties. Construction projects, by their nature, are complex with literally lots of moving parts. By creating a team of problem solvers that are empowered to address sticky problems that are bound to arise is much more effective in getting superior project results than assessing which individual party will be responsible for blame.

Organization of the IPD Contract

A central element of the ConsensusDOCS 300 is how the contract is structured. ConsensusDOCS 300 is a tri-party agreement that requires the owner, design, and constructor to sign the same agreement. This contractual structure binds them to collaborate in the planning, design, development, and construction of the project along with a sharing of project risks and rewards different than a traditional project.⁶ Significantly, key design consultants and trade contractors are envisioned to join the collaborative project team early in the preconstruction services phase and participate as a collaborative partner by signing a joining agreement.⁷

At a global level, the project is governed by a Management Group team established by the agreement, which is:

comprised of an authorized representative of the Owner, the Designer and the Constructor. The original Management Group may invite other critical project participants to become members of the Management Group, for purposes of advancing the overall collaborative approach and the best interests of the Project. Any party added as an additional Management Group member shall be entitled to participate in all Management Group functions and shall have a right to vote on Management Group decisions that directly concern that party's work and area of expertise. . . .⁸

The Management Group is required to:

act in the best interest of the Project as a whole without consideration to each member's own interest, and consistent with applicable laws, codes and regulations. To the extent consensus cannot be reached among the three original Management Group members, the Owner shall make a determination in the best interest of the Project as a whole subject to the dispute resolution process.⁹

Based on anecdotal information from practitioners on successful IPD, the owner has not needed to invoke its veto authority. To do so would likely lead parties to retreat from the collaborative nature, and project-first, mentality that is so critical for successful IPD projects.

The Management Group establishes a core management team, named the Collaborative Project Delivery (CPD) team.¹⁰ The collaborative team directs day-to-day operations. The CPD is an inclusive group that gets all needed project participants in the room at the same time to make informed and timely decisions. Some people perceive IPD project meetings as events in which everybody hold hands and sing kumbaya. Rather, the agreement provides specific mechanisms to facilitate effectiveness. For instance, the Management Group establishes a matrix for regular meetings of the CPD Team that includes meetings for overall project planning and weekly project scheduling and coordination, variance meetings, as well as the record-keeping and reporting requirements for such meetings.¹¹

An essential component for the management team and CPD is mutual trust. Otherwise alignment of everyone's interests with the project is unlikely. The ConsensusDOCS 300 spends a significant amount of effort to foster transparency, open communications, and honesty. Specifically requiring the parties to acknowledge "that a truly collaborative relationship requires

consistently open, honest and clear verbal and written communications that completely and accurately convey all project issues, conflicts, deliverables and reliable commitments to perform obligations as promised, and the Parties shall endeavor at all times to so communicate.”¹² The required culture of open communications is not the norm today and will eliminate many from using IPD in the near term. If mutual trust and other essential cultural components are lacking, then the ConsensusDOCS 300 or any IPD contract is probably not the right option for a project. Using the ConsensusDOCS 300 and IPD generally is not a magic wand, and will fail just like any project delivery method, if not implemented correctly. However, preliminary results on actual projects utilizing a multi-party approach to IPD appear to offer superior project outcomes that dramatically improve efficiency.

The multi-party structure of ConsensusDOCS 300 agreement does not utilize or require an LLC or single purpose entity model. Parties operate under the same agreement that ties their success or failure to the project. Significantly, the design professional and constructor ultimately retain their autonomy and core functions. The lead design professional must furnish or provide all the design and engineering services necessary to design the project in accordance with the owner’s objectives. While “the Designer shall draw upon the assistance of the Constructor and others in developing the Project design . . . the Designer shall retain overall responsibility for all design decisions as required by applicable state laws.”¹³ The constructor is responsible for the supervision and coordination of the work, including the construction means, methods, techniques, sequences, and procedures utilized. The constructor assists in the design, but specifically does not provide professional design services unless required to do so in order to carry out means and methods. By retaining the designer’s and constructor’s core functions, the ConsensusDOCS more readily enable them to implement the project using readily available insurance products and complying with state licensing laws.¹⁴

Establishing Goals and Budget

There is no lump sum or guaranteed maximum price (GMP) established for the project that can create competing interests and counterproductive behavior among the parties. First the owner provides a project budget early in the project. The designer and constructor critique the budget, but the project budget cannot be revised without the owner’s approval. The designer and constructor develop a design and construction budgets collaboratively. The CPD team attempts to design a scope of work based on the budget, rather than creating a budget based on a scope of work. “At such time as the Management Group determines that the project design is sufficiently complete, the Owner, Designer and Constructor shall jointly develop a Project Target Cost Estimate (PTCE).”¹⁵ The project participants’ establishment of the PTCE serves as the benchmark for measuring the project’s overall success, the performance of each party and to what extent each will participate in any savings or losses. The PTCE operates like a soft GMP, and, if approved by the Management Team, is adopted into the contract as an amendment. If it the PTCE exceeds the budget, the CPD must find savings or reduce the scope of work to be within budget.

The largest component of the PTCE is the target value design. The target value design explicitly considers “value, cost, schedule and constructability” as basic components of the design. While ultimately the target value design falls under the responsibility of the designer, such responsibility is performed in collaboration with the CPD team. The constructor and trade contractors are required to assist in this critical effort.¹⁶ By getting all of the necessary team members involved early in preconstruction services and assisting in design, the opportunity to create better value and efficiency is greatly enhanced.

Financial Incentives

The CPD team pursues project goals as established in the PTCE, and diligently attempts to perform such goals better, faster and at a higher quality than originally anticipated. Calculating the designers’ and constructors’ financial incentives above their fees are directly tied to project results. The designer fee is established at the time of contract signing through a menu choice of two options. One option is a percentage of the PTCE cost. The other option is a description of the designer’s cost to perform the work. The constructor’s fee is the cost of the work with a fixed fee. Both the designer and constructor may be entitled to additional compensation if there are changes to the work beyond their control.

Financial incentives are funded through shared savings and delivery of the project under the PTCE. Given that ConsensusDOCS is a standard form, the parties must decide for themselves the financial incentives that are most appropriate. However, guidance is provided. The incentive “program should consider performance in the following areas: cost, quality, safety, schedule, planning system reliability, innovative design, construction processes and teamwork.”¹⁷ These incentives specifically call for superior performance. One of the more obvious incentives for delivering a successful project is repeat business. Delivering an unsuccessful project is a major disincentive. Again, ConsensusDOCS 300 is a relational contract that views delivering projects as a series of relationships that goes beyond even final completion. Construction is not necessarily seen as a one-off transaction.

Conversely, project participants may subject themselves to disincentives for failing to meet budget goals. The parties must decide at project signing if the parties share in losses and to what extent.¹⁸ Potentially the designer’s or constructor’s fees could be put in risk for project failure. However, losses are capped at such fees. There is not a distinction between losses that do not meet the PTCE and losses that exceed the design contingency and construction contingency. Moreover, if insurance does not cover losses, the designer and constructor do not expose themselves to additional losses.

The ConsensusDOCS drafting group has discussed informally providing additional guidance in establishing project financial incentives and disincentives in the future. This may be something that is too project specific to generate. Perhaps more closely tying incentives to the portion or amount of potential losses would provide reciprocal risks and rewards.

Liability

The ConsensusDOCS address liability concerns differently than in traditional contracts. The parties are given a menu of two primary choices in regard to liability exposure. It is noteworthy that the owner groups' advocated for an option creating a "safe harbor" for consensus made decisions. The provision states that:

Project risks arising from collaboratively reached and mutually agreed-upon project decisions made by the Management Group (Safe Harbor Decisions), the Parties agree to release each other from any liability at law or in equity for any non-negligent act, omission, mistake or error in judgment, whether negligent or not, acting in good faith, in performing its obligations under this Agreement except to the extent such act or omission amounts to a willful default of an obligation under this Agreement.¹⁹

The goal of creating a safe harbor for decisions is to strongly encourage creative and innovative approaches to address project issues by providing a shield if those attempted solutions do not succeed. Such decisions must be made knowingly with approval by the Management Team. The document also provide a more traditional approach for liability with the parties to determine specific limits of liability on the designer's and constructors liability, respectively.

Part of the principles of IPD is that you should not sue your collaborative team members. The safe harbor provision is most consistent with this approach. However, it should be noted that costs covered by insurance are excluded by either the traditional or safe harbor approach. Insurance is generally thought of as a mechanism to decrease the adversarial nature of construction by allowing participants to distribute their costs for coverage as part of regularly anticipated project costs. However, the reference to insurance claims indicates that the ConsensusDOCS drafters contemplated the possibility of claims.

Approach to Insurance and Indemnity Issues

Maintaining the traditional core functions of designers and constructors makes traditional insurance products more accessible. Such insurance will readily cover most risks associated with IPD as contemplated by the ConsensusDOCS 300. The insurance requirements are typical of traditional projects and are generally the same as the ConsensusDOCS catalog of agreements. A specific option to require a constructor's professional liability insurance is given due to the high degree of involvement in assisting design service.²⁰ This could certainly extend to key trade contractors as well. Article 21 provides detailed insurance requirements that must be procured by specific project participants.

Less clear is the extent to which traditional risk exposures for constructors and designers will be blurred as a result of the intensive collaboration and mixing of expertise involved in IPD projects. Certainly, IPD brings project participants into the mix early, while at the same time more actively incorporating an owner's participation. Both of these factors will complicate potential application of the *Spearin* doctrine in a different variety than design-build. However, the ConsensusDOCS drafters explicitly retained these ultimate core functions, which would appear to maintain the status quo of ultimate responsibility. Because IPD is so new, it is difficult to say with certainty how this

will ultimately be interpreted by courts. But emphasizing uncertainty misses the forest for the trees. We know that assessing blame between project participants is all too prevalent and persistent in today's construction industry. It is prudent to carefully assemble the right insurance coverages going into an IPD project. However, the whole point in moving to IPD is that the overall risk to the project and project participants is supposed to be diminished.

WHAT IS NEXT?

Information and knowledge gained from IPD generally, and ConsensusDOCS 300 specifically, will increase understanding for further progress on ConsensusDOCS IPD documents. By the time this article is published the 22 ConsensusDOCS drafting organizations will have begun a comprehensive review and revision process based upon usage and comments received.

You may actually submit your comments or suggestions as a stakeholder in the design and construction process at www.consensusdocs.org/feedback/contact.htm. The goal of ConsensusDOCS is to "move on a dime" and proactively respond to the latest industry needs and developments.

CONCLUSION

IPD, as contemplated by ConsensusDOCS 300, is not a magic wand, but it is a new option to lead in a new direction. Time will tell on adoption rates and the success of this new innovative method. Fortunately, the time has never been more advantageous to use new tools and processes. IPD is emerging along with other advances as an exciting new opportunity that offers nothing less than a transformation of the design and construction process. 

ENDNOTES

¹See Patrick J. O'Connor, Jr. "Integrated Project Delivery: Collaboration Through New Contract Form" presented at the AGC Convention March 6, 2009 citing M. Dennis Knight, Teams, Contracts & BIM, ASHRAE J. at 72, 75-76 (Sept. 2008). This article is highly recommended as it provides an insightful as well as entertaining review of IPD contracts as well as a comparison of the ConsensusDOCS and AIA IPD documents. Mr. O'Connor was the lead outside counsel for the AIA C195 family of IPD documents.

²See www.consensusdocs.org/about_member-organizations.html. The organization are as follows: National Association of State Facilities Administrators (NASFA); Construction Users Roundtable (CURT); Commercial Owners Association of America (COAA); Associated General Contractors of America (AGC); Associated Specialty Contractors (ASC); Construction Industry Round Table (CIRT); American Subcontractors Association (ASA); Associated Builders and Contractors (ABC); Lean Construction Institute (LCI); Finishing Contractors Association (FCA); Mechanical Contractors Association of America (MCAA); National Electrical Contractors Association (NECA); National Insulation Association (NIA); National Roofing Contractors Association (NRCA); Painting and Decorating Contractors of America (PDCA); Plumbing Heating Cooling Contractors Association (PHCC); National Subcontractors Alliance (NSA); Sheet Metal and Air Conditioning Contractors' National Association (SMACNA); National Association of Surety Bond Producers (NASBP); The Surety & Fidelity Association of America (SFAA); Association of the Wall and Ceiling Industry (AWCI); National Association of Electrical Distributors (NAED). In addition, the Construction Management Association of America (CMAA) endorses the ConsensusDOCS 301 Building Information Modeling (BIM) Addendum, which was published on June 30, 2008.

³www.consensusdocs.org/information.html.

⁴AIA has since published the AIA C195 -2008 Standard Form Single Purpose Entity Agreement for Integrated Project Delivery (2008). The AIA also publishes a number of documents under the construction management at-risk project delivery method that the AIA describes as IPD- transitional documents.

⁵See Patrick J. O'Connor, Jr. "Integrated Project Delivery: Collaboration Through New Contract Form" presented at the AGC Convention March 6, 2009 at 6 quoting Charles Thomsen, *Managing Integrated Project Delivery: Concepts and Contract Strategies* at 51-52.

⁶ConsensusDOCS Guidebook at 6 www.consensusdocs.org/information_product-commentary.html.

⁷"In forming a Collaborative Project Team, the Parties expect that design consultants and Trade Contractors will be selected to provide preconstruction services early in the preconstruction phase. These parties shall sign Joining Agreements, as they become members of the Team, accepting the principles and methods of collaboration set forth in this Agreement." ConsensusDOCS 300 at § 3.2 (2007).

⁸ConsensusDOCS 300 at § 4.1 (2007).

⁹ConsensusDOCS 300 at § 4.6 (2007).

¹⁰ConsensusDOCS 300 at § 3.3 (2007).

¹¹ConsensusDOCS 300 at § 4.8 (2007).

¹²ConsensusDOCS 300 at § 4.9 (2007).

¹³ConsensusDOCS 300 at § 3.6 (2007).

¹⁴California state law may not allow an LLC to provide construction services.

¹⁵ConsensusDOCS 300 at § 8.3.1 (2007).

¹⁶ConsensusDOCS 300 at § 3.6 and § 8.1.5 (2007).

¹⁷Id. at § 11.3

¹⁸Id. at § 11.5-6

¹⁹Id. at § 3.8.2

²⁰Id. at § 21.3.2

