ConsensusDocs®
BUILDING A BETTER WAY

ConsensusDocs Guidebook

ConsensusDocs 300 – Standard Multi-Party Integrated Project Delivery (IPD) Agreement

February 2016 Edition

Introduction to the ConsensusDocs Guidebook

ConsensusDocs is the product of leading construction associations, dedicated to identifying and utilizing best practices in the construction industry for standard construction contracts. The 40 participating associations represent Design Professionals, Owners, Constructors, Subcontractors, and Sureties that literally spell the DOCS in ConsensusDocs. ConsensusDocs contracts and forms attempt to fairly and appropriately allocate risks to the Party in the best position to manage and control the risk. The practices articulated in the documents are forward-thinking, and may not always represent the status quo, but rather a better path forward to achieve optimum Project results. The goal of the multi-disciplined drafters was to create documents that best place the Parties to a construction contract in a position to complete a Project on time and on budget with the highest possibility of avoiding claims.

By starting with better standard documents that possess buy-in from all stakeholders in the design and construction industry, you reduce your transaction time and costs in reaching a final agreement. Using fairer contracts helps eliminate unnecessary risk contingencies and thereby facilitates better pricing.

This Guidebook provides overview comments regarding general considerations, and specific comments pertaining to specific sections of the ConsensusDocs 300 (2016). Some comments help in completing "fill-in-the-blanks." Significantly, this Guidebook contains sample exhibits for users to create their own project-specific Risk Pool Plans and Responsibility Matrix.

The ConsensusDocs coalition organizations and ConsensusDocs staff are deeply indebted to the hard work of many seasoned professionals who contributed countless hours in the creation of the ConsensusDocs contracts as well as this Guidebook. Their collective experience represents hundreds of years of practical experience in the construction field. Contributor names can be found at the conclusion of the overall Guidebook.

Comments regarding ConsensusDocs 300*
Standard Multi-Party Integrated Project Delivery Agreement

Overview:

Why bother with an Integrated Project Delivery (IPD) Agreement? Stated briefly, multiple studies have reported that construction projects often suffer from adversarial relationships, low rates of productivity, high rates of inefficiency and rework, frequent disputes, and lack of innovation, resulting in too many projects that cost too much and/or take too long to build. Also, projects continue to injure or kill too many workers, and owners are often disappointed with the quality of the end product. The project delivery approach embraced by the ConsensusDocs 300 is seen as an antidote to these ills.

The initial "Integrated Form of Agreement for Lean Project Delivery" ("IFOA"), which later became the template for the original ConsensusDocs 300, was developed for a leading healthcare provider who had decided to deliver all of its projects using Lean Project Delivery. It was produced as a response to the community's belief that this different project delivery approach was inconsistent with existing industry contracts, which contain contractual risk transfer mechanisms and commercial incentives that get in the way of Lean Project Delivery.

At their foundation, all project delivery systems have three basic domains within which they operate: the project organization, the project's "operating system," and the commercial terms binding the project participants. In order for any delivery system to be coherent and effective, the structure in each of these domains must be aligned and in balance. If you attempt to make adjustments in only one or two of the domains, you are likely to produce outcomes that are less than optimal. Think of it as an under-inflated tire—while it's only flat on the bottom, it still makes steering difficult.

The ConsensusDocs 300 is the only industry standard form that addresses all three basic domains:

- Project Organization: The ConsensusDocs 300 enables teams to implement a "collaborative organizational structure," where decisions are made by a multi-disciplinary team with a focus on what is in the best interest of the Project.

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* This publication is designed to provide information in regard to the subject matter covered. It is published with the understanding that the publisher, endorsers of ConsensusDocs, and contributors to this Guidebook are not engaged in rendering legal, accounting, or other professional services. If legal advice or other professional advice is required, the services of a competent professional person should be sought.

—From the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations

- Operating System: The ConsensusDocs 300 also adopts the fundamental principles and basic practices of the "Lean Project Delivery System," including the Last Planner™ System, Target Value Design, and Built-in Quality.
- Commercial Terms: The ConsensusDocs 300 allows the team to develop commercial terms, governing how Project participants will be paid and how risk and reward will be shared, in ways that support the needed behaviors and lean performance that will drive superior outcomes.

This new version of the ConsensusDocs 300 reflects the learning that has occurred during the past ten years since the original IFOA was introduced. It also attempts to use language that is consistent with the emerging industry standards addressing the fundamental principles and basic practices of Lean Project Delivery.

Certainly, parties can work collaboratively under a traditional project delivery approach, but doing so becomes more difficult as uncertainty and project complexity increase. Conversely, simply signing a new "collaborative" form of agreement, without engaging in the sustained effort necessary to shift traditional behaviors and develop new project management capabilities, is unlikely to produce improved results.

The ConsensusDocs 300 requires the Project team to openly engage in an explicit effort to align the operating system with a collaborative organizational structure and commercial terms that support Project-wide optimization and sustained learning. This approach creates a real opportunity to optimize the industry's goal of creating value for minimum cost and time, while sending every worker home safe, every day.

Goal of 2016 Update: The ConsensusDocs 300 was first published in 2007 when Integrated Project Delivery and IPD were making their way into the construction lexicon. The original ConsensusDocs 300 was the first industry standard multi-party IPD Agreement, and as a first-generation document it reflected then-new concepts and ways of interacting and contracting that were then tested and refined. The original ConsensusDocs 300 impacted many early practitioners and has been used on more than one hundred projects.

IPD as a project delivery method has grown significantly in the last 8 years and has spread geographically and across commercial markets. Intense experimentation and deep learning have characterized its spread. With experience, this methodology has matured and its practitioners have grown increasingly sophisticated in their performance and in their understanding of associated contractual issues.

The new 2016 version of the ConsensusDocs 300 is a product of the accumulated experience of the years since initial publication and reflects the intensive work of several of the leading legal practitioners in the field. The updated document has been comprehensively revised with an eye toward clarity, flexibility, and simple expression. It also reflects the current best practices in an area where we expect to see rapid growth. Thus, it is intended to be a document of equal utility to seasoned practitioners and novices.

Multiple-Party Agreement (article 1): This is a multi-party agreement, meaning the Owner, Design Professional, and Constructor all sign the IPD Agreement at the earliest possible stage of the Project. The intent is to assemble the collaborative Project team at the very beginning of the Project, not in a piecemeal fashion. Additional parties can easily be added using the ConsensusDocs 396 Standard Joining Agreement. Project participants executing the ConsensusDocs 396 become a Joining Party and potentially a Risk Pool Member. Alternatively, the parties could modify the standard document to allow additional signatories to the IPD Agreement at initial contract signing and thereby expand the number of signatory parties beyond three. (Experienced legal counsel is recommended to modify the standard text to accommodate a so-called "polyparty" model of more than three signatories, as there are a number of issues to work through in shifting from a three-party model.)

Joining Agreement (section 2.2): For Projects where the original signers to the IPD Agreement include fewer than all of the eventual members of the IPD Team (which will likely be the case for most Projects), the ConsensusDocs 396 Standard Joining Agreement is the recommended form for adding IPD Team members. By executing the ConsensusDocs 396, the Joining Party acknowledges receipt and review of a copy of the Project IPD Agreement and agrees to be bound to the terms of the Agreement applicable to its involvement in the Project, and to participate fully as a member of the IPD Team. The ConsensusDocs 396 also provides a checkbox for indicating whether the subject Joining Party will or will not be a Risk Pool Member under the Risk Pool Plan. As drafted, the ConsensusDocs 396 is not a substitute for the Joining Party's separate consulting agreement or subcontract, but rather assumes that each Joining Party will also be entering into a consulting agreement with the Design Professional or Owner, or a subcontract with the Constructor.

Pull Planning (section 2.6): It is possible to use pull planning when it is not contractually required. The ConsensusDocs 300 drafters thought it was superior to include pull planning in the agreement and address the construction process.

Early leaders in the removal of waste from design and construction found inspiration in Toyota's lean manufacturing principles. From these they discovered that the most important element for efficiency in a construction project is the reliable transfer of work from one trade to another. Based on this insight, they developed a collaborative approach to project planning keyed on those responsible for directly supervising the work, the "Last Planners."

In pull planning, the Last Planners engage with each other to work out a plan for each Project that includes the best of available alternatives that optimize the Project as a whole rather than just for individual participants. These Last Planners should be those with a deep knowledge of what their staffs are good at and what they are not. They also must know the scope of the work for each phase. This includes the materials, hours planned for the work, and equipment or information that is available to them or is needed. In addition, each must know the work required of the other team members for the phase in question. Through this understanding, Last Planners can make requests and negotiate handoffs during the pull planning conversation, leading to

reliable commitments as to delivery of specific units of work. Finally, to be successful, the Last Planners must know the conditions of satisfaction of the internal and external "customers" of their completed unit of work.

With this knowledge, the Last Planners collaborate to create a schedule for the Project. They start with each desired phase goal and work backward to define each task required of each participant to reach that goal. Often, Project teams will create this schedule with sticky notes containing each day's tasks where each participant has a different color. The end-to-beginning planning process can involve a lot of movement of sticky notes on the calendar as trade-offs are negotiated to facilitate the best outcome. Handled properly, each delivery of work or material is "pulled" forward for performance just in time to allow the next performance to begin. In this fashion, work is delivered reliably from one participant to the next.

For more on pull planning, see this 2014 paper by leading trainers on pull planning.

IPD Team Contingency (section 5.1.4): The IPD Team Contingency addresses the contingency needed by the Constructor and Design Professional (and, by extension, their Subcontractors and design consultants) to cover unanticipated Payable Costs for the entire Project, but is not meant to cover Change Order conditions or other items that owners should cover through a separate owner's contingency. The goal is to have one team contingency that is collectively established based on the team's analysis of the particular risks of the Project, seeking to avoid the common problem of Projects having too much and often overlapping contingency misallocated among Project participants, because each team member's contract value has its own contingency within it for many of the same risks as other team members. One common contingency fund allows money to flow across contractual boundaries and be appropriately sized for the entire Project's needs. To assure that IPD Team Contingency funds are used where needed for the good of the Project, the Core Group manages the use of this contingency. When used, the funds are transferred from the IPD Team Contingency line item to the appropriate line item of incurred cost in the cost model. Section 5.1.4 clarifies that the Owner should not dictate tapping the IPD Team Contingency inappropriately for those items spelled out in section 15.2, which includes an Owner changing its Project requirements. While not a contractual requirement, it is prudent for an Owner to create a separate Owner's contingency to help cover items that merit a change order in section 15.2. There are some recent studies that cover what a reasonable Owner should expect to cover with contingency.

The Validation Study (section 5.3): At the core of the preconstruction process in IPD lies the Validation Phase. Its purpose is to determine whether the Project and other Owner criteria can be achieved for the Allowable Cost.

The first step in this process is the review of the Owner's Program by the Core Group to establish Project goals. The Core Group assists the Owner in further developing the Owner's Program if it is not complete. Then, the Design Professional and Constructor identify the Project requirements and determine whether additional information or investigations are required. The

information is obtained and investigations conducted by the IPD Team. Next, the Core Group issues a report of findings and recommendations. Once the Owner's Program is sufficiently defined, the IPD Team undertakes the Validation Study. As part of this, the Core Group develops an estimate of the Expected Cost. The Validation Study encompasses a budget of all Payable Costs, IPD Team compensation, contingencies, a proposed Risk Pool Plan showing all participants and their respective Risk Pool amounts, and a Project Schedule with major milestone dates. Note that the Allowable Cost, the Owner's Program, and the Project Business Case can be revised pursuant to subsections 5.2.1 or 5.2.2. It is the resulting criteria, as revised, that the Core Group must confirm as part of the Validation Study.

Once the Validation Study is completed, the Owner can approve the Validation Study and proceed with the Project, use it as a basis for further discussion with the IPD Team, or cancel the Project. Importantly, this gives the Owner better and timelier information regarding the Project's viability. Before detailed design begins, the Owner gets to make an informed decision based upon carefully vetted information gathered and formulated through the collaborative engagement of all major Project participants. Through the Validation Study, IPD brings the Owner to the major decision point on the Project at less expense and with much better information and deeper insight than a traditional process would.

Target Value Design (article 6): Unique among industry standard IPD forms, the ConsensusDocs 300 "writes into the contract" the lean concept of Target Value Design (TVD)—the strategy where cost is not a trailing, derivative outcome of design but instead a driving force.

Article 6 provides specific guidance on this strategy. During the design process, workers from each participating company, designer and constructor alike, pool their expertise to find new ways of meeting both monetary and value objectives. The result is cost modeling that is constantly updated. The "starting gun" for this process is the confirmation by the Validation Study that the Expected Cost of the Project can be attained for an amount under the Owner's Allowable Cost. Target Value Design thereupon sets in motion a process for not only designing to Expected Cost, but optimally beating it.

The engines for accomplishing this result include the allocation of tasks among participants in a Responsibility Matrix (section 6.2—see discussion below), the creation of a Design Professional work plan (section 6.3.5), the required use of pull-based design production (section 6.3.4), reaching consensus on design document standards and TVD protocols (sections 6.3.6 and 6.6.3), avoiding the need for formal requests for information between participants and re-drawing of others' work (sections 6.3.1 and 6.4), assignment of smaller, focused teams called "TVD clusters" to major Project components and deliverables (section 6.6.3.4), and—where deemed appropriate—implementation of building information modeling (BIM) (section 6.3.7).

The centrality of cost to the Target Value Design strategy is not at the expense of other important Project considerations. Proceeding in tandem with cost modeling are assessments of

constructability (sections 6.7.3 and 6.7.4) and how to maximize value to the Owner—including such important considerations as life cycle and operational cost (section 6.7.1).

For a helpful outline of TVD basics, see Hal Macomber and John Barberio, *Target-Value Design: Nine Foundational Practices for Delivering Surprising Client Value* (2007).

Responsibility Matrix (section 6.2): In an integrated team structure, where work is assigned to the team member whose performance will be in the best interest of the Project, team members need a mechanism to determine who is responsible for what. The Responsibility Matrix is how the Core Group will document this. For example, the Core Group may determine that the best outcome for the Project would be for the structural engineer to produce the structural design documents through detailed design. Then, the structural steel trade would take over the bulk of the detailed drafting of the construction documents for structural steel, with the structural engineer providing collaboration and oversight. This kind of arrangement would be documented in the Responsibility Matrix. A sample Responsibility Matrix is found in Exhibit 1 to this Guidebook for ConsensusDocs 300, though please note that this is only a sample based on a matrix created for a specific large health-care project and would not be suitable for other projects without significant modification.

Target Cost (section 6.6.1): The Target Cost is established as a goal for the Project that is less than the Expected Cost. The IPD Team achieves this through innovation and collaboration. The Core Group is given the mandate to establish the Target Cost in the Risk Pool Plan.

Target Cost is integral to the Target Value Design process. In its practice the IPD Team designs to a Target Cost, which converts cost into a design criterion rather than a design outcome. The IPD Team anticipates the cost consequences of different possible designs, and selects only those alternatives that fit within the relevant component of the Target Cost. Estimates are updated in real-time throughout the design to keep it on target. This is accomplished through cross-functional teams with the required areas of expertise to comprehensively address the design, constructability, and cost consequences of decisions. If a component portion of the Target Cost is exceeded, the cost of another component or components should be reduced correspondingly. Note, however, that the Core Group can authorize a decision to exceed the Target Cost.

Value Analysis (section 6.7.1): The ConsensusDocs 300 intentionally avoids the term "value engineering" so as not to imply a traditional VE process that assumes a non-integrated design approach in which design is produced by the designer in isolation after which the constructor reviews and offers VE comments that require additional design work to incorporate. This kind of VE approach is inherently wasteful. Instead, IPD calls for designers and builders to work in tandem to consider value from multiple perspectives as the design is being developed in the first place. Value analysis proposals, as part of a Target Value Design process, are a mechanism for bringing key values into the design development.

Operations Quality Plan (section 6.8.3): In Lean circles, this is commonly called a "5S" plan. For more information, see www.leanconstruction.org/training/glossary.

Correction of Defective Work (section 9.2.1.15; section 12.7): IPD projects have approached payment of the costs for post-completion correction of defective work in a variety of ways. The ConsensusDocs 300 assumes a traditional approach in which the Constructor assumes the costs of correcting its defective work (with Subcontractors correspondingly responsible for their defective work).

However, a significant minority of IPD projects provide for the Owner to reimburse Risk Pool Members their costs (without earning profit thereon) for addressing Defective Work during the one-year correction of work period, which results in the need for Owner to defer closing the books on the Project until all defective work identified by the first anniversary of the Substantial Completion date is completed and paid. These projects have often included a "warranty reserve" within the Estimated Maximum Price (EMP) to minimize the magnitude of cost true-ups after the one-year completion anniversary. A potential advantage of this approach would be to allow extracting any mark-up or burden in overhead or labor rates included by contractors to cover costs of post-completion warranty call-back work.

There are other less common approaches to payment of post-completion correction of defective work. The Constructor and certain Risk Pool Subcontractors could each include a lump sum warranty management cost in the breakdown of Payable Costs that is billed at Substantial Completion and then assume the expense of correcting their Defective Work after Substantial Completion. This would allow the Owner to close its books on the Project shortly after final payment and avoid the capital accounting issue of the approach in the prior paragraph.

Another less common alternative is having the Constructor and/or certain Risk Pool Subcontractors enter a separate long-term maintenance arrangement with the Owner covering both preventative maintenance and correction of defects in order to allow the costs of corrective work to be paid out of the Owner's operations budget rather than with capital dollars.

Risk Pool (article 10): IPD Projects utilize a wide variety of risk/reward compensation approaches. Rather than standardize one approach, ConsensusDocs has provided flexibility in the ConsensusDocs300 to allow for a team-created risk/reward compensation approach. Teams are cautioned, however, that Risk Pool Plans are contract documents and require careful drafting and expert advice to make sure needed considerations are appropriately included and addressed. Section 10.4 sets out a minimum set of considerations.

The ConsensusDocs 300 also recognizes that some teams may benefit by using a carefully prepared industry standard Risk Pool Plan. Thus, the ConsensusDocs Guidebook provides different Risk Pool Plan templates at Exhibits 2 through 3 to showcase some common approaches to risk/reward compensation.

If Payable Costs Exceed Amount Budgeted (section 10.5): When the total Payable Costs exceed the amount budgeted for Payable Costs in the current EMP, the Risk Pool Members' profits become vulnerable. Before tapping profits, the overrun is first paid from any insurance proceeds (where applicable) or amounts recovered from third parties in reimbursement of Payable Costs. Next, the IPD Team Contingency is utilized. Only after these two sources of funds are depleted are the undistributed amounts of Risk Pool Members' profit utilized to cover the overrun. If that is not sufficient, then distributed amounts of profit must be returned by the Risk Pool Members to cover the overrun.

After all profits are exhausted, the Owner is responsible for all Payable Costs that exceed the EMP. In this fashion, the ConsensusDocs 300 balances the risks and rewards of the Risk Pool Members so that none are creating a potential to "bet the company" through their participation in the Project. That is unless the EMP Amendment provides otherwise.

Guarantee of the Estimated Maximum Price? (section 11.3): The EMP Amendment executed at the time the EMP is established gives the Core Group the option of establishing the EMP as a guaranteed price. By providing the option for Risk Pool Members to guarantee the Estimated Maximum Price, however, ConsensusDocs 300 does not assume or recommend that the EMP *should* be guaranteed by the Risk Pool Members. To the contrary, ConsensusDocs 300 assumes in the structure of the document, and the drafters assert that best practice is to provide, that the EMP *should not* become a guaranteed maximum price. Instead, it should function in its intended role as a metric for risk/reward compensation determinations. However, ConsensusDocs 300 recognizes that certain Projects, although structured and operated as integrated projects, are sometimes required to include a cost guarantee to the Owner, often as a result of later-imposed financing requirements. Thus, ConsensusDocs 300 has provided flexibility to address this possibility in section 11.3, which would require express language in the EMP Amendment to effectuate.

When faced with such a requirement for a cost guarantee, the IPD Team should consider using a Risk Pool Plan and EMP Amendment that sets the guaranteed EMP at a significantly higher dollar value than the estimated Actual Cost, but sets a different metric (a "Risk/Reward Metric") at the amount of estimated Actual Cost, with any shared savings or Risk Pool loss measured against the Risk/Reward Metric rather than the EMP. For Payable Costs that exceed the Risk/Reward Metric, the Owner would reimburse those costs (or an agreed percentage of those costs) until they total the guaranteed EMP, at which point each Risk Pool Member assumes its own further costs. This allows the team to focus on the Risk/Reward Metric as the "real number," and keep contingencies and profit percentages at levels more consistent with IPD, because the team's cost risk for amounts greater than their profit is limited to only catastrophic and unlikely cost overruns.

Risk Identification (section 12.1): One of the first collective efforts undertaken by the parties, including those executing a joining agreement, is the identification of material project risks. This is accomplished through one or more workshop sessions, and may involve participants beyond

the IPD Team. These workshop sessions are to be led by a facilitator chosen by the Core Group. The process for identifying project risk may involve a number of approaches including matrix/mapping, brainstorming, check list, and other appropriate techniques. Most construction organizations rely on a combination of intuition, judgment, and experience to identify and manage construction risk. More structured risk assessment, whether it be in the form of decision analysis, sensitivity analysis, Monte Carlo simulation, or other recognized approaches, are also grounded in the participants' experience and intuition. The IPD contracting approach recognizes that there is value in the collective experience and intuition of all relevant IPD Team members. Upon identification of project risks, the IPD Team ranks and scores the risks, paying particular attention to potential cost and time impacts to the project. Once project risks have been ranked, the IPD Team develops a risk management plan for addressing the identified risks subject to Core Group approval. Contingency plans are developed for addressing identified risks and responsibilities for managing specific risks are assigned.

Indemnification (section 12.4): The agreement calls for cross-indemnification between and among the parties to the extent of a party's negligence. A party is entitled to reimbursement of defense costs paid above its percentage of liability for the underlying claim. Note that while state law may require or imply a defense obligation for an indemnitor in certain jurisdictions, the contract itself does not explicitly require the indemnitor to defend the indemnitees. The constructor's and design professional's indemnity obligations are subject to the liability limitations set forth in section 12.6. Professional liability is allocated to the team member having responsible charge for the design element associated with the error or omission, except where the team member is required by law to overstamp the applicable documents for a design-built trade, in which case the liability is allocated to the design-build trade responsible for drafting the documents.

Insurance (section 12.5):

The parties shall evaluate and endeavor to develop a coordinated insurance program consistent with the risk allocation set forth in the IPD agreement. Any coordinated insurance program shall provide a minimum level of coverage outlined in this section. Coordinated insurance programs, such as owner-controlled insurance programs (OCIP) or contractor-controlled insurance programs (CCIP) work well within an integrated project delivery structure. Coordinated insurance programs give the parties more control over tailoring coverage for specific project needs. Moreover, controlled insurance programs reduce disputes among program participants as compared to traditional project insurance approaches.

In the event a coordinated insurance program is not pursued, the agreement requires the constructor to procure and maintain workers' compensation, employer's liability, business automobile liability, commercial general liability, and contractor professional liability insurance. The design professional shall procure and maintain professional liability, commercial general liability, workers' compensation, employer's liability, and automobile liability insurance. The

owner shall procure and maintain its own general liability insurance. The limits of liability and policy terms and conditions are to be set forth in Exhibit C.

The responsibility for securing property insurance in the form of a builder's risk policy falls to the party designated in the Estimated Maximum Price (EMP) amendment. The property insurance shall name the owner, constructor, subcontractors, sub-subcontractors, suppliers and design professional as named insureds. Coverage is to be procured on an all-risk form and shall insure, at a minimum, the perils set forth in section 12.5.3. The owner is responsible for deductibles or co-insurance penalties with a specified amount deemed Payable Costs. If the project involves remodeling or refurbishing an existing structure or the construction of an addition to an existing structure, the owner is responsible for insuring the existing structure against the perils identified in section 12.5.3. The insurance shall remain in effect until the sooner of final payment or such time as no person other than the owner has an insurable interest in the property. The builder's risk policy must contain a waiver of subrogation in favor of the named insureds. The owner is also responsible for procuring and maintaining business income insurance responding to loss of use of the owner's property caused by fire or other casualty loss. The parties waive all rights against each other to the extent loss is covered by applicable property insurance.

Subcontractor Default Insurance; Bonds (section 12.5.2.1): While requiring surety bonds of the Constructor is rare in IPD agreements, subcontractor default insurance (SDI) is becoming increasingly more common and is often seen as a more attractive way to mitigate the risk of Subcontractor default. The language of section 12.5.2.1's SDI option has been carefully drafted to address certain issues raised by the use of SDI in an IPD agreement and should not be modified without careful consideration and expert guidance. Some of the significant issues regarding SDI in an IPD agreement include:

- Satisfying SDI underwriting requirements. While SDI insurers have varying positions/requirements regarding the terms of the IPD agreement relative to the Constructor and its Subcontractors, in general the IPD agreement would need to provide for the Constructor to be able to cure the failures of its Subcontractors/Suppliers, terminate the Subcontractor for default, and bear some measure of financial risk of loss resulting from the default of the Subcontractor or Supplier. In the drafters' experience, the Constructor's profit and shared savings being at risk for Subcontractor performance issues, plus the Constructor's indemnity against third-party claims arising out of a Subcontractor's negligent acts or omissions, have satisfied the requirement that the Constructor bear financial risk from a subcontractor default. In addition, the IPD agreement must not include terms that would impede the SDI insurer's right to recover from a defaulting Subcontractor.

- Subcontractors that are Risk Pool Members. It is uncommon for Subcontractors that are Risk Pool Members to be enrolled in an SDI program. As with all insurance, SDI insurers' appetite to write SDI policies varies with the insurance market. The drafters are

aware of past IPD projects where a Risk Pool Member trade (usually as a Subcontractor but even as a direct IPD agreement signatory under the Constructor's management) was accepted by the SDI insurer for enrollment, but more recently in our experience SDI insurers have resisted enrolling Risk Pool Member Subcontractors (with their limited contractual liability) in SDI programs. This creates a particular difficulty for use of an SDI program on an IPD project. SDI programs, subject to limited exceptions, require all Subcontractors to be enrolled in the SDI coverage. If the Project intends to include a Subcontractor as a Risk Pool Member, but the SDI insurer simultaneously resists enrolling the Risk Pool Member and yet requires enrolling all the Constructor's Subcontractors, the Project has a conundrum. One possibility would be to "bond out" the Risk Pool Member by requiring it to carry payment and performance bonds, since one of the limited exceptions to enrolling all Subcontractors in the SDI coverage is that no bonded Subcontractors may be enrolled.

- Addressing SDI Deductibles. SDI programs are typically procured by Constructors to cover many projects across their company, with individual projects enrolled into the program. Thus, the deductibles or self-insured retention (SIR) amounts for the SDI program are often set at an amount appropriate to the Constructor's entire portfolio of projects. Where that is the case, the Owner and Risk Pool Members will often find it more equitable to set a limit on the amount of the SDI deductible or SIR that can be charged to the Project as a Payable Cost, established at a value that would be fair for the Project to bear. The standard text in the SDI option under section 12.5.2.1 provides a blank to fill in the amount for this limit, which of course could be filled in with the full amount of the applicable deductible or SIR if that was agreeable to the parties. Also, some SDI insurers may have policy language that requires the SDI deductible expense be "borne by the insured" in order for the payment to be counted against the Constructor's SDI deductible responsibility. In that case, some SDI insurers have been willing to issue a policy endorsement without charge that allows the amount of SDI deductible reimbursed as a Payable Cost to be counted against the Constructor's SDI deductible responsibility.

Regarding the possibility of surety bonding, the drafters of ConsensusDocs 300 are aware of at least one true IPD agreement involving a public institutional owner that involved some degree of surety bonding. In exploring the available options with the surety and Constructor, the surety indicated that it was willing to either:

- issue both performance and payment bonds covering the Constructor's Construction Phase obligations in a penal sum equal to the Constructor's estimated Construction Phase Payable Costs in the equivalent of the EMP plus the Constructor's Profit. The Constructor's Subcontractors would need to be covered by either the Constructor's SDI program or by payment and performance bonds of their own. In this scenario, the Constructor's surety indicated that it would require some revisions to the IPD agreement to further define the Constructor's scope of work; or

- issue only a payment bond covering the Constructor's Construction Phase obligations to make payment for labor and materials. The Constructor's Subcontractors would need to be covered by either the Constructor's SDI program or by payment and performance bonds of their own.

Ultimately, in this particular project, the Owner had the flexibility under its institutional requirements to require only a payment bond from the Constructor and allow the Constructor (who had no self-performed trade work) to cover the risk of performance failure through use of an SDI program. In that project, the Constructor's surety was willing to issue a payment bond in a penal amount equal to the Constructor's estimated Construction Phase costs for labor and materials (through subcontracts) plus Constructor's Profit, as detailed in the equivalent of the EMP. The surety viewed that particular IPD agreement (which was not on a ConsensusDocs 300 form) favorably, even though outside their normal experience, and charged an attractive premium on the payment bond that was considerably less than the full cost of both a payment and performance bond for an equivalent penal sum.

Limitation of Liability (section 12.6): The limitation of liability provision protects members of the Risk Pool Team. It also eliminates the Safe Harbor concept from the original ConsensusDocs 300, which required an election that in experience was seldom selected.

The limitation of liability covers any claim by the Owner or any other Risk Pool Member. Any such claim cannot exceed the Risk Pool Member's profit at risk and share of any savings. Importantly, however, claw-backs are permitted. So, if the Project pays out a share of profits and savings, and later dips into the red, those amounts are subject to a claim for return.

This approach was consciously chosen instead of the alternative seen in other agreements: a general waiver of claims. The limitation of liability was chosen in part due to widespread adoption in states of Fairness in Construction Acts, many of which flatly prohibit an advance waiver of claims by the Constructor or Trade Contractors. In addition, individual states have more unique, but nonetheless effective, limitations on general waivers.

There are several exceptions to section 12.6's limitation of liability. Claims arising out of fraud or willful misconduct are not subject to this cap. Claims covered by insurance are likewise excluded, as are recoveries from third parties. Both insurance and third-party recoveries are important mechanisms for protecting the risk pool and are the most likely of the exceptions to manifest. Government fines and penalties are excluded, the thought being that every Risk Pool Member bears the responsibility of complying with applicable Laws. Failure to pay sums due under the IPD Agreement is an obvious exception. The last express limitation is a default on correction of work obligations. This gives an Owner recourse for post-completion claims regarding Defective Work, since the Profit pool and shared savings have been fully disbursed.

Warranties (section 12.7): See comment on Correction of Defective Work above at section 9.2.1.15.

Submittals (section 13.4): Teams are encouraged to develop processes to (1) minimize the need for submittals through more collaborative work between designers and trades and (2) implement pull planning and other Lean principles to minimize the waste in the submittals process.

Right to Audit (section 16.11): Collaborative project delivery, without a lump sum or GMP, should be based on transparency of decisions and open-book accounting. Section 16.11 requires the Designer and Constructor to maintain full and detailed accounts subject to inspection and a final accounting.

Dispute Resolution (Article 18): Generally the collaborative nature of the ConsensusDocs 300 contracting approach is to increase communication and cooperation to go the extra mile to avoid formal disputes. Elimination of or early resolution of disputes are key components of driving out waste in the Project. However, should they be needed, dispute mitigation and resolution procedures are also provided for in this agreement.