

ConsensusDocs 300:

A Collaborative Approach to Project Design and Construction

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The release in 2007 of the ConsensusDocs represents a striking change in the landscape of standard form construction agreements. ConsensusDocs is a set of more than 70 standard contract forms, created by a wide group of construction industry associations, which can be used to address the spectrum of contracts required for the completion of a construction project. One such agreement is ConsensusDocs 300, *Standard Form of Tri-Party Agreement for Collaborative Project Delivery*, which is a collaborative agreement negotiated and signed by the owner, contractor and designer before the project gets underway. The purpose of this agreement is to have all key parties work together toward a shared goal using a collaborative decision-making process and giving each party a financial stake in the project’s success. It is believed that the collaborative agreement can create dramatic new efficiencies in project delivery.

Implementation of the Tri-Party Agreement should provide significant benefits to the owner, contractor and designer. Initially, when the design is sufficiently complete, the owner, designer and contractor collaboratively agree on a Project Target Cost estimate. The Project Target Cost represents the total cost to the owner for the design and construction of the project, including all design costs, the contractor’s cost of the work, all contingencies, general conditions and the contractor’s fee. In addition to establishing the owner’s total costs up front, the Tri-Party Agreement also includes a provision for allocating amongst the parties any savings realized on the

project, and, if desired, any costs in excess of the Project Target Cost. Implementation of the Project Target Cost early in the project, in conjunction with savings/loss allocations, allows an owner to accurately set its cost expectations while also providing the designer and contractor incentives to avoid additional expenses, thereby lowering the owner’s risk of the cost of the project ballooning out of control. With all parties sharing equally in project savings, project wide cooperation has been shown to increase significantly.

The collaborative structure established during the project planning phase continues through the design and construction phases through the creation of a “Management Group.” By executing the Tri-Party Agreement, the owner, designer and contractor agree to create a core team to come to a consensus on all decisions which arise on the project; although, if the group fails to come to a consensus, the owner retains the right to make a final determination. This collaborative decision-making process, in conjunction with the incentive clauses addressed above, will reduce the number of disputes which typically arise on a project, alleviating the adversarial relationships which often form during a project.

Another important issue for all parties in executing a construction contract is risk allocation. The Tri-Party Agreement allows the parties to choose between a traditional approach or a non-traditional approach to risk allocation. Under the “traditional” Tri-Party approach, the parties remain liable for their

own negligence, breaches of contract and breaches of their warranty obligations. This approach also includes an option to establish a specific dollar figure for limitation of liability for the designer and contractor. The “non-traditional” Tri-Party approach is essentially a “safe harbor” provision in which the parties agree to release each other from liability or damages resulting from the collaborative decisions made by the Management Group.

As stated, the Tri-Party Agreement aligns parties’ interests and thereby limits as much as possible disputes between the parties. If a dispute occurs, and in line with the collaborative nature of the Tri-Party Agreement, prior to resorting to mediation, arbitration or litigation, the parties are required to take part in good-faith discussions and, if those fail, to submit the dispute to the Management Group. If the dispute remains unresolved, it is subject to a mitigation procedure, specifically a Project Neutral or Dispute Review Board, if one of those options is selected in the Agreement, and to non-binding mediation if neither mitigation procedure is selected. Only after attempting to resolve the dispute through these non-binding steps may the parties utilize binding arbitration or litigation.

The ConsensusDocs standard form agreements, such as the Tri-Party Agreement, bring together the traditionally fragmented groups involved in a construction project: the owner, the designer and the contractor. Through this collaborative framework the ConsensusDocs can provide owners with the legal protection they require while also paving a smooth road for project completion. ●