



COAA

Construction Owners
Association of Alberta



Our collaboration model supports both seasoned professionals and rising stars in their quest to advance the best new ideas and technologies.



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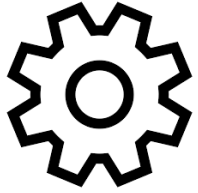


Collaborative Contracting: Terms and Conditions

December 3, 2020



House Keeping



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RECORDING & MATERIALS

Will be made available on the COAA website following the webinar.

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It is a VUCA World:

- Volatility
- Uncertainty
- Complexity
- Ambiguity



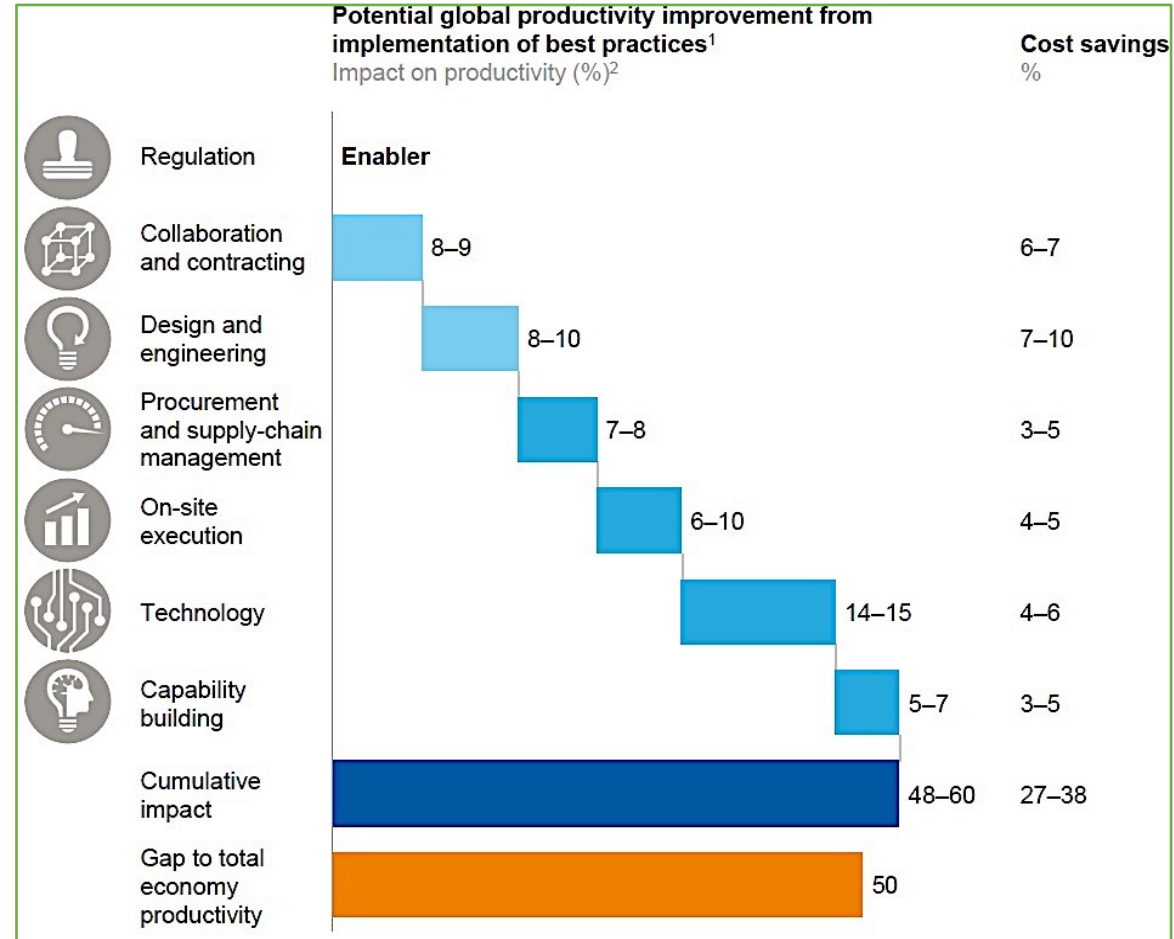
“The world as we have created it is a process of our thinking. It cannot be changed without changing our thinking.” Albert Einstein



Shift to Collaboration

McKinsey & Company identifies the following causes for poor productivity and cost:

- Poor Organization and Decision-Making
- Inadequate Communication
- Flawed Performance Management
- **Contractual Misunderstandings**
- Missed Connections
- Poor Short-Term Planning
- Insufficient Risk Management
- Limited Talent Management



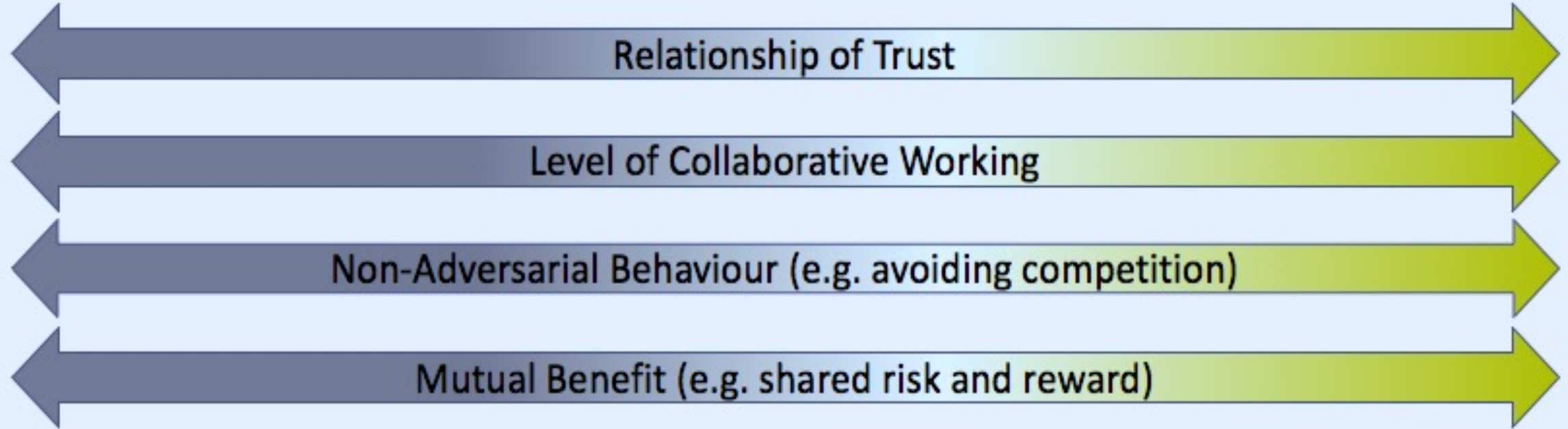
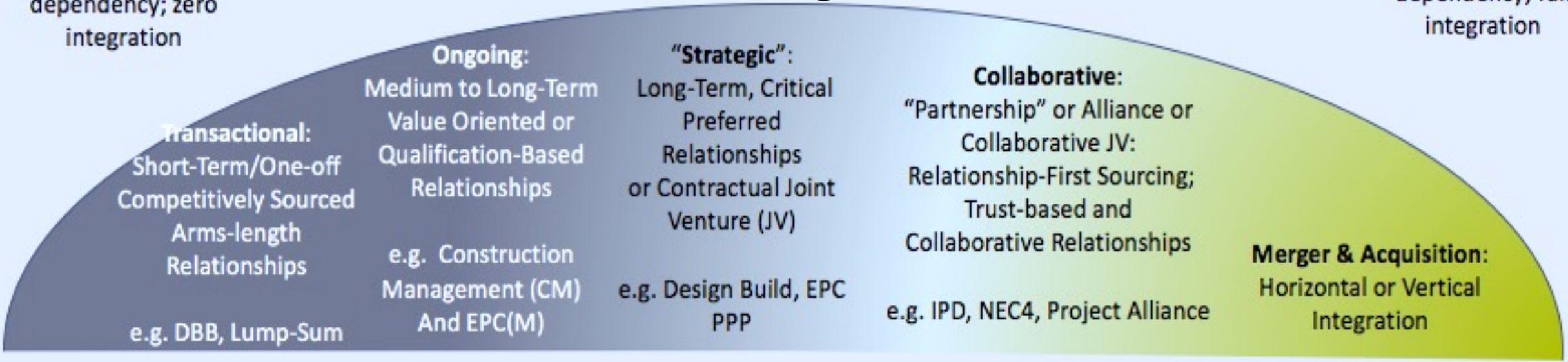
“There is a need to move away from the hostile contracting environment that characterizes many construction projects to a system focused on collaboration and problem solving”



Contracting Spectrum

No inter-dependency; zero integration

Highly inter-dependency; full integration



What is Collaborative Contracting?

- An innovative and positive alternative to conventional contracting , where in respect of *a particular endeavour* (e.g. project, R&D effort, JV, etc.):
- Two individuals or a group commit (with a *binding document*) to:
 - Build and rely on *relationships of trust*;
 - Work together *collaboratively*; while
 - Seeking *mutual gain* for all parties; and
 - *Avoiding adversarial* behaviours; (typically associated with contracts).



Collaborative Contracting vs. Traditional

Attribute	Traditional	Relational
Enforcement of Promises	External Adjudication	Internal Adjustment
Definition of Success	Compliance	Satisfaction
Project Organization	Segregated/Sequential	Integrated/Concurrent
Decision Authority	Hierarchical	Distributed
Contract Provisions	Prescriptive	Enabling
Communication System	Channeled	Networked
Risk Allocation	Assigned	Shared
Accountability	Audit	Transparency



Collaborative Contract Forms are Not New

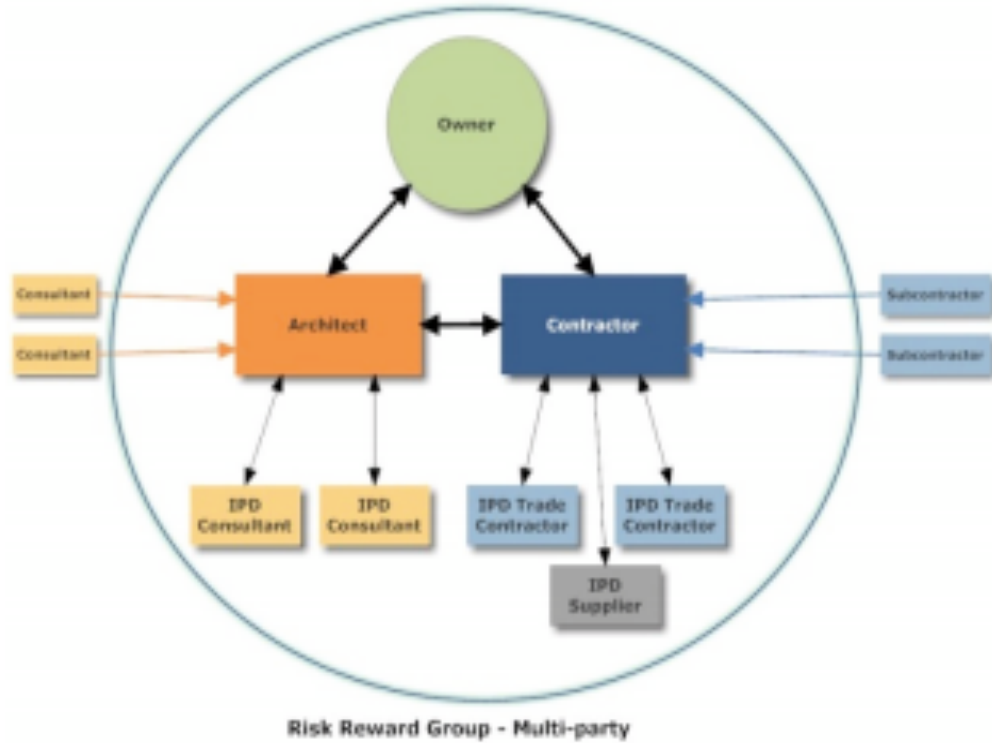
- Project Alliance Agreements (PAA's)
- Integrated Project Delivery Agreements (IPD) e.g. CCDC-30
- NEC4 – Alliance Option
- FIDIC – Framework Alliance Contract-1 (FAC-1)
- Adaptations of the Above
- Custom-builds

And more are coming.....

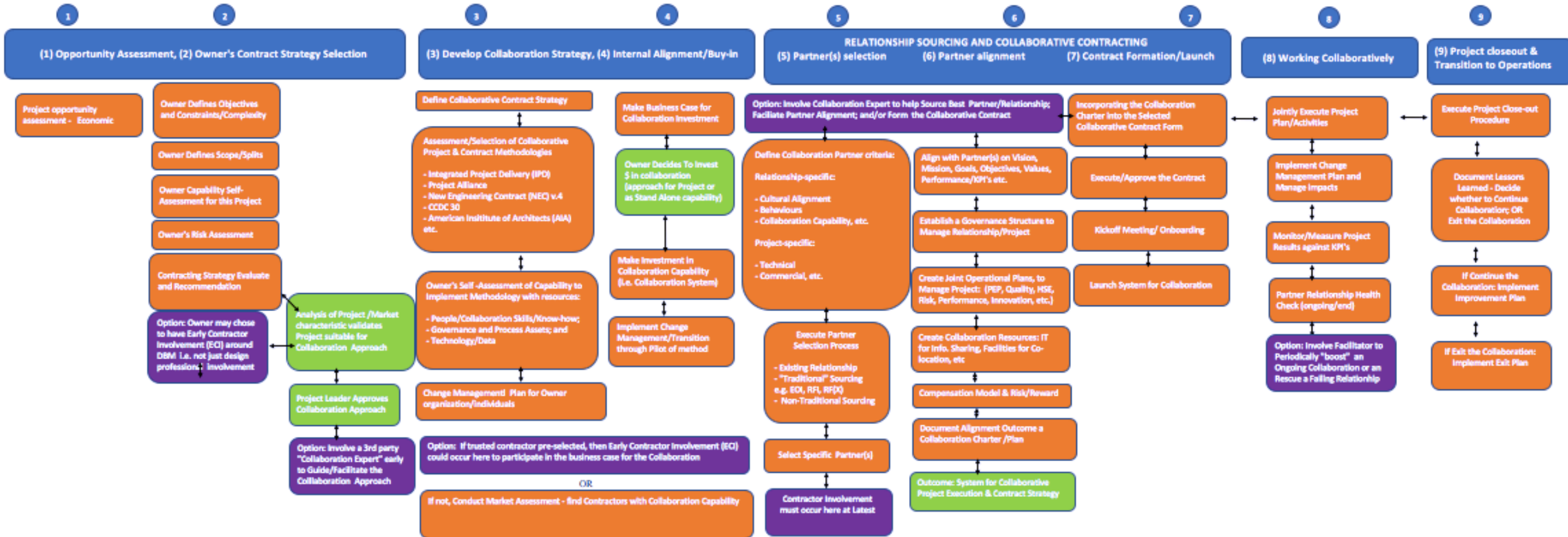


Examples of Collaborative Contracting Structures

Figure 7 - Multi and Poly-Party IPD Structures



The “How” of Collaborative Contracting



Where Do I Find it?: <https://www.coaa.ab.ca/library/>



9 Key Terms and Concepts

1. Agreement to Collaborate
2. Intellectual Property, Confidentiality, non compete
3. Compensation
4. Changes and Scope Allocation
5. Warranty and Rework
6. Termination and Suspension
7. Waiver of liability and Indemnification
8. Insurance
9. Conflict Management



1. Agreement to Collaborate

- IPD Team agrees to collaborate

2.1.1 The IPD Team shall facilitate collaborative planning, design, construction, and commissioning of the Project. Each member of the IPD Team shall make reasonable commercial efforts to:

- .1 establish and maintain an atmosphere of mutual trust, respect and tolerance;
- .2 work together and individually to achieve transparent and cooperative and timely exchange of relevant information relating to the Project, and to share ideas for improving Project delivery;
- .3 actively promote harmony, collaboration, and cooperation among all entities performing on the Project,
- .4 actively participate with the PMT and perform the Contract Tasks assigned in Appendix D - CONTRACT TASKS MATRIX;
- .5 support the full engagement of their PMT representative and provide the necessary resources to allow its PMT member to meet or exceed its commitments; and
- .6 resolve disputes by amicable negotiations prior to using the other forms of resolution as specified in Part 8 of the General Conditions — CONFLICT MANAGEMENT.

GC 2.1.2 Although the Contract establishes a relationship of mutual trust and good faith among the members of the IPD Team, it does not create an agency relationship, fiduciary relationship, partnership, or joint venture among or between them.



1. Agreement to Collaborate: Project Teams

- Integrated Project Delivery Team
- Joint decision making committees. EG
 - Project Management Team (PMT)
 - Project Implementation Team (PIT)
 - Senior Management Team (SMT)



2. Unique Intellectual Property (IP) Issues

- Ownership of a Collaborative outputs (e.g. design)
 - Realities of a Shared Digital Environments
 - Challenges of the “Joint Ownership”
- Open Book Pricing & Confidentiality



3. Compensation

- The Principle - Shared Risk Reward
- Target price standard arrangement
 - Comprised of:
 - Reimbursable Costs/ Contingency /Contractor Fee/Risk Pool*

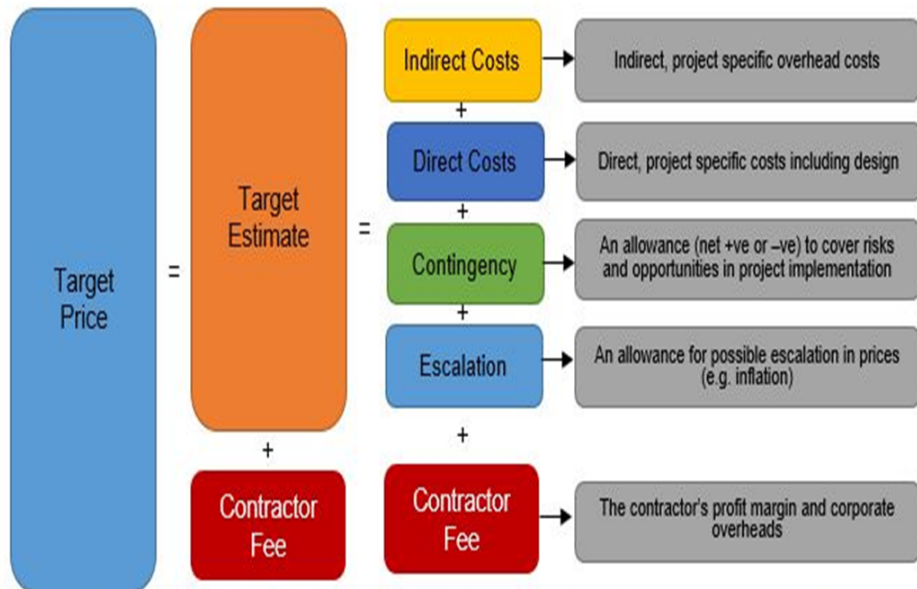


Figure 3 - Target Price Breakdown (Australian Government Department of Infrastructure and Regional Development, 2015)



3. Compensation: Risk Pool/ Contractor Fee

- The pain/gain share is derived from the Contractor Fee / Risk Pool
- The Fee /Risk Pool is fixed upon agreeing the Target Price.
- The Fee/Risk Pool can only be adjusted in limited circumstances



4. Scope Allocation and Change

- Principle– Scope allocation is based on a best for Project decision
- Work scopes can be moved/amended between the parties if it:
 - reduces the Estimated Final Costs,
 - improves schedule or quality, or
 - benefits the Project
- The Contractor Fee/Risk Pool may need amended as necessary in response to reallocation of work scope
- The Scope split between the parties is included in the Contract.
 - In CCDC30 this takes the form of the Contract Tasks Matrix which is included in Validation Report.



4. Changes

- Nature of the Change
 - Traditional Collaborative Contract scope documents are usually based on a performance specification
 - This allows the generation of innovative ideas rather than prescriptive requirements in achieving the project outcome
 - Design development and execution methodology changes, are generally considered within the scope of the original target price as needing to be “best for project” decisions
- Traditional Change Management procedures remains in place but a level of level of materiality is higher than in a traditional model.
- Often only a prescriptive list of “Adjustment Events” will be considered a Change and amend the Target Price



5. Warranty and Rework

- The obligation to perform warranty work and remedy defective work is, as per the principle, in most contracts.
- The compensation for warranty work and defective work (whether pre or post completion) in most models is considered a reimbursable cost.
- This is due to;
 - No blame culture
 - Poor performance is a shared risk
- However, with warranty as a reimbursable cost the true pain/gain share cannot be fully allocated until the end of the warranty period.



6. Termination

- Failure to achieve Validation—an “off-ramp”
 - When contract or participation is terminated, members are entitled to Reimbursable Costs, without profit
- Owner can terminate Contract where :
 - Member does not perform work to a substantial degree and does not correct the default within 5 days of notice
 - Member is entitled to Risk Pool earned up to date of termination less costs of loss and damage caused by termination
- Other Member can terminate its participation where:
 - Owner is bankrupt
 - Owner fails to make payments or is in willful default of its obligations and does not correct the default within 5 days of receiving notice



6. Suspension

- If the Owner fails to make payment as due under the Contract or is in willful default of its obligations under the Contract, any member of the Design/Construction Team may give the Owner Notice in Writing that the Owner is in default
- Owner has 5 days to correct, upon which applicable member may suspend work



7. Waiver of claims and Liability

- GC 11.1.1 The IPD Parties **WAIVE ALL CLAIMS** against each other, **EXCEPT** solely for direct loss and damages arising from a list of items:
 1. willful default
 2. express warranty obligations
 3. payment
 4. IP violations
 5. failure to provide insurance
 6. claims for which indemnification under policies of insurance is available
 7. third party claims
 8. damages from substantial defects /deficiencies
- GC 11.1.2 The IPD Parties waive claims against each other for indirect, special, punitive or exemplary damages...consequential damages ...



7. Indemnification

- Each party shall indemnify other parties for:
 - Arising out of one of the exceptions in GC 11.1.1
- Limitation to amount of insurance where available, otherwise may set out limits in Validation Report



8. Insurance

- Collaborative Contracts often less risky, but still need insurance
- Different contract approach = a different insurance approach
- Most will require project-specific evaluation/policy
- Some projects may need to self-insure



9. Issue and Conflict Management

- Traditional Contracts ineffective to Manage Issues without Conflict
- Collective profit/loss relies on/forces super-effective communication
- Collaborative Contracts have communication machinery:
 - Escalation framework for resolving issues/disputes;
 - If cannot be resolved -> Mediation per specific rules
 - If not resolved after Mediation → refer to arbitration (unless forborne)
 - If no Arbitration → Court (unless forborne)



Questions?



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Questions?

Thank you for attending

Visit <https://www.coaa.ab.ca/library/> for more resources

