



IPD: The AIA Delivers a Multi-Party Agreement by David Abramovitz, February 2010

The introduction of Integrated Project Delivery (“IPD”) heralds a fundamental shift in traditional allocations of responsibility, risk and reward among project participants in the building process. The term Integrated Project Delivery is somewhat misleading; as opposed to a method of design delivery, IPD describes a project management and contractual structure. The premise of IPD is to introduce more efficiency into the design and construction process by creating early and ongoing collaboration among the owner, contractor and design team and aligning financial incentives for each of the project participants in order to foster common goals.

On November 3, 2009, the American Institute of Architects (“AIA”) introduced the new C191™-2009, Standard Form Multi-Party Agreement (“C191”), which provides for a “collaborative working relationship among parties involved in a design and construction project.” The C191 provides parties with a single “coordinated and integrated” agreement that delineates the parties’ roles and responsibilities in delivering a project under the IPD paradigm. The new form of agreement, however, presents numerous legal and business uncertainties in areas including risk management and allocation, compensation and project management. Set forth below is an overview of these issues.

MANAGEMENT OF RISK

As a primary concern, integrated design may subject design professionals to liability as a result of working with non-licensed professionals. Most states require a strict separation of the roles of the contractor and design team in the design and construction of a project due to concerns of profit-motivated business influences on technical decisions. These restrictions vary significantly from state to state, but if the design professional is found to have delegated traditional design work to a non-licensed professional in the name of project collaboration and in violation of this separation, participation in the IPD model could be considered an illegal act, jeopardize one's license, and could also render the design professional's errors and omissions insurance null and void.

Moreover, the design professional could be construed to be providing services outside of its traditional scope if, for example, the design professional participates in construction decisions, as could happen within the context of the Project Management Team described below. While the C191 adopts the traditional definition of the design professional's Standard of Care, it is unclear how this will be applied if the design professional is collaborating on issues and decisions that are traditionally the province of either the owner or the contractor. Again, this team approach, due to the blurring of traditional roles and responsibilities, could result in denial of the design professional's insurance coverage.

ALLOCATION OF RISK

In a traditional project structure, the owner contracts separately with each of the contractor and design professionals. The owner and contractor, on one hand, and the owner and design professionals, on the other, have obligations to each other which, if unmet, can result in litigation between them. Typically, however, the contractor and design team do not have direct responsibilities to each other due to the absence of privity. In the integrated design model, unlike the traditional model, the owner, contractor and design professionals all contract under a single document and owe responsibilities to one another. However, each waives liability of the other parties for non-intentional acts. For example, the design team will not be held liable for non-intentional errors, omissions and defects. Similarly, the contractor team will be free of liability relating to non-intentional errors and defects of planning, coordination, scheduling and construction. At the same time, the construction team waives its right to seek damages for poor design documents and related delays, which have historically been very significant claims. The goal is to reduce incentives for conflict and create real incentives for cooperation. Rather than the threat of potential liabilities, profits are at risk and incentive payments are agreed upon for achieving predetermined goals.

This waiver of damages set forth in the C191 is not applicable to claims by third parties, though such a waiver can be structured to include those claims brought by subcontractors. To the extent cross-indemnifications to cover third-party claims are referenced or inserted in the C191, liabilities and obligations to such third parties would most likely mimic the traditional structure. In addition, claims among the contract parties arising out of willful misconduct, express warranties, an owner's failure to pay and failure to procure required insurance would not be waived under the terms of the C191. Accordingly, the waiver does not waive all exposure for the parties, but limits claims among the parties.

COMPENSATION

Traditionally, the compensation provided to the contractor and the design team is unrelated, although one party's profitability could be affected by the actions and/or decision-making of the other. In the IPD framework, the profits of each party are based on a shared risk and reward system so that neither the contractor nor the design team benefits based on the failure of the other to perform.

In the IPD model, the basic compensation provided to the contractor and design team is "Cost Only," and additional payments are made for achieving certain defined "Project Goals" such as LEED accreditation, issuance of a Certificate of Occupancy, meeting schedule targets, etc. In addition, each of the parties will benefit financially if the total project cost comes in at less than an agreed-upon "Target Cost." However, the failure to reach any given Project Goal will result in a reduction of the project's Target Cost, so failure to meet a specific Project Goal will result not only in the loss of the specific incentive payment associated with that goal but will also reduce any benefits to be realized from the differential between actual project cost and the Target Cost.

While the IPD compensation system is meant to minimize economic self-interest in favor of shared goals, both Target Cost and compensation for meeting Project Goals are negotiated numbers. To that end, the owner and contractor may set those numbers according to their own agendas of importance, impact or control while the design professional is in the weakest position in terms of its ability to control any parties' achievement of Project Goals or cost savings. One other caveat with respect to compensation: the C191 should adequately define the profits that are at risk and separate those from the costs and expenses of the design professional and the contractor that are not at risk. Moreover, the document will need to be modified if, for example, a contractor wants compensation for changes in the scope of work and/or in order to create mechanisms to cover third-party claims.

PROJECT MANAGEMENT

In terms of project management, the collaborative model under C191 goes further than previous IPD form documents in creating contractual structures for collaboration, comprised of a Project Executive Team and Project Management Team.

One representative from each of the owner, design professional, and contractor comprise the Project Executive Team and “make decisions as well as plan and manage the Project.” This tier of management is analogous to a corporate board of directors, though what is unusual is that all of its decisions must be unanimous. If the parties’ representatives fail to reach unanimous decisions, an owner has the provisional authority to issue directives “within the general scope of the Contract with regard to the matter.” If the contractor and design professional representatives believe an owner’s directive is not within the “general scope,” they can refer the matter to the dispute resolution process set forth in the contract.

The other layer of management, the Project Management Team, is also made up of one representative from each of the owner, design professional and contractor and is responsible for “the day-to-day management of the project.” This Project Management Team is analogous to the role of the construction manager. The existence of this team raises the issue of whether a design professional, by participating in the Project Management Team, is taking on responsibility for and the consequent liabilities of means and methods or site-safety issues. Here again decisions must be unanimous but if the parties’ representatives fail to reach unanimous decisions, the matter is referred to the Project Executive Team.

DISPUTE RESOLUTION

The C191 seeks to create greater efficiency in resolving disputes by formalizing a process for resolving issues as they arise. Parties are required to continue performance pending resolution of disputes. The key exception is that services may be suspended or terminated if an owner fails to pay.

In addition, C191 calls for a Dispute Resolution Committee, comprised of high level representatives of the owner, design professional and contractor, plus a “Project Neutral” who is typically an AAA mediator. This Dispute Resolution Committee functions as an expedited mediation forum. This process, when the need arises, must commence within 15 days, but there is no time limit on actual adjudication. Every issue on which the Project Executive Team cannot agree unanimously must be resolved under this procedure. In sum, the changes that provide more structure in an IPD design model under C191, in an attempt to address many of the issues not dealt with or problems identified in earlier form agreements for IPD, may create new relationships and issues that design professionals should be aware of before engaging in its use. Before entering into an IPD relationship, design professionals should have the written contracts thoroughly vetted by both their lawyer and an insurance broker so that they do not unwittingly suffer what could be both adverse and costly

consequences.

The above article is an overview only, and should not be considered legal advice, which is dependent upon specific facts and circumstances. For more information, please contact David Abramovitz at 212-682-6800, dabramovitz@zdlaw.com.