

Legal Corner

Design-Phase Collaboration Provisions in the New AIA and ConsensusDOCS Contracts for Integrated Project Delivery

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Tantalized by reports of significant cost savings, increased quality, and reduced completion time, some facility owners are clamoring for their next project to be fully collaborative, using building information modeling (“BIM”) and entering into innovative multi-party contracts for integrated project delivery (“IPD”). Of course, the technological wizardry BIM offers is only as effective as the collaborative effort of the team using it.

That’s where the IPD contract can support the project’s goals, by clarifying the approach to the project and making each team member’s responsibilities explicit. Many foresee a future where construction managers with expertise in this new delivery method will have a competitive advantage. To help construction managers hit the ground running on their next collaborative project, a thorough understanding of the provisions regarding early design-phase collaboration found in the model IPD contracts issued by the American Institute of Architects is essential.

The Critique of the Design Phase in Traditional Project Delivery Methods and IPD’s Collaborative Solution

An age-old gripe about the traditional design-bid-build delivery method is the inevitable finger-pointing between the designer, contractor, and subcontractors over errors in the plans and constructability. For example, if a mechanical design calls for a duct going through structural steel, work must stop, and the design must be amended in the heat of battle. The work is impeded, costs increase, and performance of the mechanical system may suffer.

In contrast, IPD calls for the owner, architect, general contractor, and the key subconsultants and trades to convene as early as possible during the design phase and work as a team to create a digital three-dimensional model. With each participant providing unique knowledge and experience, the team in essence builds the project digitally before anyone orders materials and starts construction. Instead of discovering collisions, other errors, and opportunities for improvement during construction, the team identifies issues and collaborates to solve them in the 3D model during the design phase.

The AIA’s Transitional Documents and Single Purpose Entity Agreement for IPD

The AIA offers two packages of contract documents for IPD projects. The Transitional Agreements consist of A295-2008 (general conditions), B195-2008 (owner-architect agreement), A195-2008 (owner-contractor agreement), and an amendment to A195-2008. While these agreements differ sharply from traditional construction contracts, they stop short of clearly obligating all of the project participants to collaborate as a team in the design-phase.

Generally, the contractor must “advise” the owner and the architect during the entire development of the design documents, on constructability, the availability of materials and labor, and construction costs. Additionally, the contractor must “obtain information” from subcontractors regarding the proposed systems and products, but only to validate estimates, schedules, tolerances, and prefabrication opportunities. During the initial conceptualization and criteria design phases, no provision explicitly requires the architect, contractor, and key subcontractors to exchange ideas and collaboratively develop the design.

In the following detailed design phase, the agreement mandates the architect to work “in consultation” with the contractor. These terms do not invoke a high level of collaboration. In the final implementation documents phase, however, the agreement requires both the architect and contractor to prepare the design documents. This provision, more than the others, implicitly contemplates the architect and contractor collaborating. Additionally, the contractor is required to coordinate with the subcontractors and suppliers, at the implementation documents phase, to ensure the design documents “include sufficient and unambiguous information for completion of the work.” This provision addresses the goal of spotting design errors before construction, but it does not declare outright that the key subcontractors must collaborate during the design phase.

The second AIA form contract for IPD is C195-2008, Standard Form Single Purpose Entity Agreement for Integrated Project Delivery. Just as collaborative construction projects mark a distinct break with tradition, so does this form contract. Under this agreement, the owner, architect, and contractor form a limited liability company, of which they are all members. The company is then funded by the owner and all design and construction activities are conducted under separate contracts with the company.

This contract goes further than the Transition Documents in declaring the participants’ duties to collaborate during the design phases of the project. For instance, the parties must prepare a matrix termed an Integrated Scope of Services, listing the tasks required to plan, design, and construct the project. While the participants must assign to one member the primary responsibility to complete the task, all of the other members agree to

“assist in the performance of the task to the extent of the [participant’s] knowledge, skill, and expertise.”

Also, all parties acknowledge in the agreement that everyone must “provide services in a highly collaborative and integrated environment envisioned for the Project and the requirement to obligate similarly any subcontractor and consultants retained.” While these terms admittedly are new to construction contracts and have not been subject to an extensive history of judicial interpretation, they certainly go a long way toward making the collaborative nature of the project explicit.

The ConsensusDOCS 300 and 301 for Collaborative Project Delivery and the BIM Addendum

The ConsensusDOCS 300 Standard Form of Tri-Party Agreement for Collaborative Project Delivery also differs sharply from the traditional design-bid-build agreements. It is a multi-party agreement between the owner, architect, and contractor and it dedicates a four-page section to the

topic of collaborative principles. In the section the parties agree to “integrate their respective roles, responsibilities, and expertise” and commit to “proactive and non-adversarial interaction, problem-solving, the sharing of ideas, to continuously seek to improve the Project planning, design, and construction processes....”

Going a step further than either AIA contract, ConsensusDOCS 300 explicitly requires both the designer and the contractor to work collaboratively during the design process. In another provision regarding preconstruction services, the designer again promises to work collaboratively with the other members of the project team. For the contractor and trade contractors’ part, they agree to notify the management group of any errors and omissions they discover in the design documents.

A similar provision requiring the contractor and trades to promptly notify the project participants of errors in the digital design model is found in ConsensusDOCS 301, Building Information Modeling (BIM) Addendum. Finally, another provision of ConsensusDOCS 300 provides the

contractor the discretion to bring trade contractors into the project in the early design phase to collaborate with the other project participants. Owners looking to maximize the benefits of IPD and BIM may be interested in making the trade contractors’ early involvement in the design phase mandatory.

Conclusion

In addition to design-phase collaboration using BIM, IPD contemplates several other sea changes from traditional project delivery methods. The list is long, but it includes aligning the participants’ interests to share in the risks and rewards of the project, open communication, and collaborative budgeting and scheduling. By understanding these principles, and being aware of the contractual provisions invoking them, construction managers can position themselves to meet owners’ demands to use IPD in their next projects. **CM**

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How much?

Normally, the award fees should not be a windfall. Very large amounts will attract attention from multiple sources, draw significant pressures to justify paying it and force the owner’s management team to justify some subjective decisions.

Even a modest award fee will still have a good effect. The people working on the project are now conscious that there is a report card. If they earn the bonus, there is clear evidence of their good performance within their organizations.

Flexibility

Incentives are complex business. What “should” work may not, or it may not work on the next project even if it did on the last. The owner and IPD team should be flexible regarding the incentive program so they can adjust it mid-project to address changed project conditions. Otherwise, incentives that motivated good behavior under one set of circumstances may motivate problematic behavior under a new set.

The biggest incentive

Perhaps the biggest incentive has nothing to do with cost savings or award fees. In many cases, the biggest incentive is repeat business. Good people want repeat work and will work hard to build or uphold their reputation. But since repeat work is unlikely to be a matter of contract, there must be a strong perception that repeat work will follow good performance. **CM**

This Professional Practice Corner article was adapted from the White Paper, *Managing Integrated Project Delivery* written for the CMAA College of Fellows by Chuck Thomsen, FAIA, FCMAA; Joel Darrington, Esq.; Dennis Dunne, FCMAA; Will Lichtig, Esq. Joel Darrington is the principal author of the Incentives section. The entire White Paper can be found [online](#). Comments on the paper and the topic are welcome, and should be sent to [John McKeon](mailto:John.McKeon@CMAA.org) at CMAA.