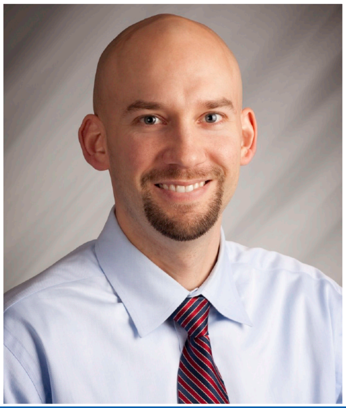
IDENTIFYING AND MANAGING THE RISK OF INTEGRATED PROJECT DELIVERY



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An increasing number of public and private construction projects in Massachusetts are utilizing collaborative methods of project delivery, such as Design-Build or Integrated Project Delivery (IPD). Collaborative project delivery brings all project participants together at the earliest stages of project conception and requires the participants to work as a "team" during design and construction. The "team" approach represents a significant change from the traditional design-bid-build approach in both the legal relationships and risk allocation between and amongst the project participants. Contractors should be aware of the various options for structuring the legal relationships between the parties and the contract terms necessary to appropriately allocate risk. This article identifies the significant differences between IPD and traditional methods of project delivery, the types of legal relationships that may exist for IPD, and the unique risks that should be addressed in the contract documents.

What is IPD?

The term "Integrated Project Delivery" or simply "IPD" is commonly used to refer to any method of project delivery based on a collaborative, cooperative, team-based approach. However, the specific collaborative process used under the heading IPD can vary greatly. IPD brings the owner, design professional, and contractors together at the earliest stage of project conceptualization to form a project "team." The team members exchange data and information during the design process and work together to identify conflicts, plan costs, and establish the project schedule. Typically, IPD aligns the participants' financial interests by linking compensation to the project's overall success. The team-work mentality and aligned financial interests allow the team members to jointly make informed decisions early in the project, where the most value can be created. Overall, IPD seeks to reduce waste, increase efficiency, and maximize value to the owner by identifying problems early and minimizing the need for costly changes during construction.

Significant Differences Between IPD and Traditional Project Delivery

In the traditional design-bid-build model, the roles, responsibilities, risks, and rewards for each project participant are separate and distinct. Each participant therefore focuses almost exclusively on their role on the project without considering the impact to the entire construction process. If problems arise, each participant will move quickly to distance themselves from liability in an attempt to protect their own financial interests.

In contrast, IPD requires the project participants to form a team and to work together from conception through substantial completion. Unlike traditional project delivery, IPD incentivizes teamwork by linking compensation to the achievement of project goals and milestones. If the project is completed on time and under budget, the entire team shares in the project saving. Similarly, if the project meets or exceeds certain milestones defined in the contract documents, the entire team may earn additional compensation. By aligning the parties' financial interests, the parties are incentivized to keep the aggregate project cost as low as possible.

Restructuring the Contractual Relationships

IPD principles generally expand the traditional contractual roles in Design-Bid-Build, Design-Build, and Construction Management methods of project delivery. For this reason, IPD requires a restructuring of the parties' contractual relationships, usually in the form of a Single Purpose Entity (SPE), a Project Alliance or Multi-Party Agreement (MPA) with Joinder Agreements, or the use of relational contracts.

The formation of an SPE represents a radically different approach than traditional project delivery because it requires the project participants to form a new company. The SPE usually consists of the critical project participants, including the owner, design professional and general contractor, but may include additional consultants or subcontractors. The legal structure of the company may vary, but the participants each have an equity interest in the company. Because an entirely new company is created, there may be tax, management, and regulatory issues associated with the creation of an SPE. This contractual arrangement has the greatest amount of risk, and therefore requires each party to have a high degree of trust and confidence in each member of the SPE.

A Project Alliance or MPA requires the parties to execute a single agreement that governs the rights, duties, and responsibilities of each team member. These arrangements allocate compensation, risk sharing, and decision making jointly between the owner, design professional, and contractor. Significant consultants or subcontractors may be added to the Project Alliance or MPA by executing a Joinder Agreement, which makes the consultant or subcontractor part of the project team and subject to the terms of the underlying agreement. Members of the team typically waive liability between each other and are usually jointly liable to third parties for injuries or damages. Project Alliances and MPA's accommodate owners who want a collaborative multi-party agreement but are reluctant to form separate companies with contractors and design professionals, as is required by the SPE option.

In instances where the parties desire to maintain the traditional owner/architect agreement and owner/contractor agreement, IPD may still be utilized through "relational contracts." Relational contracts implement the collaborative approach of IPD by allocating compensation, risk sharing, and decision making to project participants in separate contracts. Although decisions are developed by the team, the owner usually retains the right to make final decisions where there is no consensus amongst the parties. Parties may agree to limit their liability to each other but typically do not waive liability against each other, as in an MPA or SPE. This form of IPD is commonly referred to as "IPD Light," as it normally carries less risk, but also carries less reward.

Unique Risks and Legal Concerns for IPD

Contract Terms. The intent of any IPD agreement is to create a collaborative environment in which to deliver the project. Because this approach represents an ideological shift from traditional construction contracting, the terms of the underlying agreement must clearly identify the roles and responsibilities for each participant. The agreement must include, at a minimum, provisions that address scope of services, risk sharing, liability waivers, waivers of consequential damages, indemnification, shared project incentives and goals, insurance, and dispute resolution. Both the American Institute of Architects (AIA) and ConsensusDOCS now offer standard form IPD agreements that may be tailored to the participants' specific goals.

Assumption of Expanded Liability Exposure. Collaboration between the parties during design and construction raises the concern that the parties may be assuming liability for both design and construction functions. For example, contractors participating in IPD are required to provide data and information to the design professional for incorporation into the design. Contractors are also required to engage in conflict checks and compatibility reviews during the design process. Contractors may be concerned that they are taking on responsibility and liability for the design by providing such data and participating during the design phase. Although IPD does not require this type of risk shifting, the agreement must clearly identify the participants' roles, responsibilities, and scope of services and clearly delineate the extent of liability.

Waivers of Liability/Third-Party Liability. The liability waivers typically found in IPD agreements represent a major shift in construction contracting. The participants usually agree to waive claims against each other arising out of the performance of each team member's duties under the contract (except for willful default). This is consistent with the "teamwork" concept and allows the parties to freely exchange data, information, and ideas without fear of liability to other team members. IPD agreements typically also establish that the entire project team is jointly liable to third parties; team members are not individually liable to third parties for injuries or damages arising out of the project unless those injuries or damages arise out of one team member's negligence.

Project Incentives. IPD agreements typically require the participants to develop a financial incentive program that rewards the team for successfully achieving established performance goals, project expectations, and other benchmarks. The financial incentive program typically establishes that if the project is completed for less than the overall agreed-to project cost, the parties share in the cost savings. The distribution of the savings is determined by the project participants when the initial agreements are executed or at the time the overall project budget is established. The financial incentive program may also include incentives based on performance goals in the following areas: cost, quality, safety, schedule, planning system reliability, innovative design, construction processes and teamwork. The parties may also wish to allocate responsibility for the event that the project costs exceed the estimated cost or in instances where project goals or milestones are not achieved. In such circumstances, the financial incentive program must determine whether the parties lose the right to earn future profits or must return profits already earned.

Data Protocol and Copyright. Because IPD requires the free exchange of data and information, the agreement must address the use and ownership of this data and information, as well as provide protective measures for safeguarding access and distribution. Further, the agreement must address the fact that proprietary and/or confidential information will be part of the data and information exchanged between the project participants.

Dispute Resolution. The typical dispute resolution procedure in IPD agreements represents a substantial deviation from traditional methods of project delivery because it seeks to resolve all disputes in a collaborative manner, essentially allowing the parties to govern themselves. The procedures do provide for more traditional forms of dispute resolution, such as mediation, arbitration, or litigation, if the team is unable to resolve the dispute internally.

Conclusions

As the use of IPD gains traction in the industry, contractors should be aware that the fundamental differences between IPD and traditional methods of project delivery result in risks and rewards unique to IPD. Although there are various ways to structure the legal relationships between the project participants, the underlying agreements must take into account these risks and rewards. Standard form contracts published by the AIA and ConsensusDOCS may be used as a starting point, but should be tailored to the specific goals and expectations of the parties on a project by project basis.

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