

INTEGRATED PROJECT DELIVERY: *And Now for Something Completely Different*

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I. Introduction

In the famous BBC sketch comedy series *Monty Python*, the line, “And now for something completely different,” was a catchphrase used as a lead-in to the opening titles and a simple way to link the various sketches. We are reminded of that catchphrase when pondering the concept of integrated project delivery (“IPD”), as one of the questions often asked with respect to IPD is whether it truly is “something completely different” when compared to the other project delivery systems currently in use. If IPD is actually implemented in the manner intended, the answer to that question is yes, it is completely different. In practice, however, often the underlying IPD contract has been structured in such a manner that it effectively functions as a design/build or construction manager at risk contract.

II. What is IPD?

IPD is a project delivery method whereby the principal project participants (consisting at a minimum of the owner, contractor and project designer) enter into a multi-party agreement that addresses how they will jointly share responsibilities for the design and construction of the project. There are five major structural elements to an IPD contract: (1) early involvement of key participants; (2) shared risk and reward based on project outcome; (3) joint project controls; (4) reduced liability exposure; and (5) jointly

developed and validated project goals (targets).¹ These elements are discussed in various contexts throughout this paper.

IPD is a derivative of the project alliance delivery method that was first utilized in the United Kingdom in the 1990s for the design and construction of offshore oil and gas facilities. An alliance-type approach also has been used on more than fifty infrastructure projects in Australia and New Zealand over the past fifteen years.² From its inception through present date, the alliance/IPD systems appear to be best utilized on highly complex, fast-track projects. Because those projects are often very risky, the use of a collaborative approach allows the project participants to assume collective responsibility for project delivery and, thus, collective ownership and sharing of the associated risk.³

The hallmark of an IPD project is a collaborative approach to decisions making. During the decision making process, the primary focus is on the best interests of the project, which may not necessarily be the same as the respective best interests of the individual project participants. Because of that change of focus, one of the most challenging aspects of IPD is incentivizing the project participants in such a way that encourages those collaborative efforts and thereby facilitates decision making that is best for the project. After so many years of using a silo approach to responsibility and liability with regard to construction projects, it is often difficult for project participants to climb out of their individual silos and feel confident and secure enough to embrace the IPD paradigm of relying upon group decisions to achieve mutually established project goals.

¹ Howard W. Ashcraft, Jr., *Negotiating an Integrated Project Delivery Agreement*, THE CONSTRUCTION LAWYER, 31:3 at 17 (Summer 2011).

² Michael Wilke, *Project Alliancing – Sharing Risks and Rewards Through a Collaborative Agreement*, (ABA 2008), at p.2.

³ *Id.*

III. Benefits of IPD

One of the major benefits of the IPD project delivery method is the team approach discussed above, as such an approach provides participants with an atmosphere of mutual respect and trust, shared risk and reward, and collaborative and innovative decision making through open lines of communication. What follows is a brief discussion of a few additional benefits that typically flow from the IPD method.

IPD promotes the use of advanced technology that is supportive of collaboration. Technology systems are agreed upon at the outset of an IPD project and are designed to “maximize functionality, generality and interoperability.”⁴ Building Information Modeling (“BIM”) is perhaps the most quintessential example of the IPD system’s utilization of advanced technology. BIM is defined as “an innovation in project delivery tools wherein a model-based technology is used to create a digital representation of the building process to facilitate the exchange and interoperability of project information in a digital format.”⁵ Although BIM is a tool that can be used in conjunction with traditional project delivery methods, IPD best leverages the capabilities BIM offers, as “BIM decisions and protocols are best developed through joint workshops”⁶ amongst the project participants. Joint development of BIM protocols allows the IPD project team to reach a common understanding with regard to development and operation of the model and the access, transmission and use of information incorporated therein by the various members of the project team.⁷

⁴ *Integrated Project Delivery: A Guide*, AIA National/AIA California Counsel (AIA CC 2007), at section 3.8.

⁵ THE ANNOTATED CONSTRUCTION LAW GLOSSARY, (ABA 2010), at p. 31.

⁶ See, note 5, *supra* at section 4.1.4.

⁷ *Id.*

Another benefit often attributed to IPD projects is an enhanced level of quality and performance. This benefit often results from early involvement of project participants and early identification of project goals, which allows for more efficient and effective project planning. The rationale behind the increased level of project planning can be summarized as follows:

The IPD approach recognizes that increased effort in planning results in increased efficiency and savings during execution. Thus the thrust of the integrated approach is not to reduce design effort, but rather to greatly improve the design results, streamlining and shortening the much more expensive construction effort.⁸

Increased planning ties into two other positive outcomes commonly resulting from a collaborative approach to project delivery: better functionality at lower costs and reduced likelihood of budgetary overruns.⁹

The IPD method discourages disputes between members of the project team. Most IPD agreements not only reward collaboration by incentivizing communication and cooperation between the project participants, but typically they also contain broad waivers of liability by and among the project participants. This allows the parties to focus on what is best for the project, as opposed to focusing on how best to avoid individual liability. Under most industry-standard IPD contract forms¹⁰, the designer and the contractor are only at risk with respect to their respective profits, as well as certain increased overhead costs. There are, however, a few exceptions to these mutual waivers of liability, such as claims arising out of a party's willful misconduct.

⁸ See, note 5, *supra*, at section 3.6.

⁹ See, note 2, *supra*, at p. 9. See also, Mark C. Friedlander, *Advantages of Integrated Project Delivery*, at slide 3.

¹⁰ Examples of industry-standard IPD agreements include the documents that form the AIA's Integrated Project Delivery (IPD) Family (Transitional Forms - A195, A295, B195; Multi-Party Agreement - C191; and SPE Agreements C195, C196, C197, C198, C199), as well as the ConsensusDOCS 300 (Tri-Party Agreement).

IV. Practical Issues Associated with IPD

Perhaps the first critical issue that arises on IPD projects is the selection of project team members. It is essential for the project team members to buy into the open and collaborative project delivery approach that forms the basis of IPD. This is very much the case where one bad apple can ruin the entire barrel (i.e., one team member that is less than fully committed to the collaborative approach can undermine the overall intent of the IPD method). Accordingly, the parties must utilize great care when assembling the project team, recognizing that not all individuals and companies possess the degree of cooperation and trust required for successful IPD ventures. This concept applies not only with respect to the designer and the contractor, but also to the owner. Unless the project owner is fully committed to all of the IPD concepts (such as waiving liability against the designer and contractor, assuming the larger share of risk from cost overruns, actively participating in the joint decision making process, etc.), IPD cannot be effectively implemented.

Equally as important as selection of the project team members is the establishment of the project goals. Because the project goals will drive the design and construction of the project, as well as the monetary incentives for the project participants, it is critical that they be both challenging and achievable. Ideally, project goals should be as unambiguous and objective as possible. The establishment of realistic, quantifiable goals will assist the project team in focusing their time and resources on the best interests of the project.

Another issue that must be considered on an IPD project is the potential for deadlocks amongst the decision makers. Hopefully such deadlocks will be the rare exception, but nonetheless, they should be anticipated and addressed in the agreement so there is a resolution process in place in the event of a deadlock. Many of the standard

industry forms have a tiered resolution process whereby decision deadlocks are taken up through increasing levels of management of the team members. If a deadlock is not resolved through that process, it is typically resolved by an owner directive that is subject to further appeal by any of the other project team members, in accordance with the dispute resolution procedures of the IPD contract.¹¹

Because of the uniqueness of the IPD method, the following are certain project operational issues that merit special consideration:

- (1) Document Ownership: With joint input and decision making being utilized with respect to the development of the project design, the IPD contract must take special care and attention to address the respective rights of the parties in the design documents.
- (2) Relationships with Non-Team Members on the Project: How will the collaborative approach be passed down to consultants, subcontractors and suppliers that are engaged via a traditional silo-type contract? The intersection between a team approach and silo approach to project delivery will need to be carefully monitored and managed, so as not to derail the IPD efforts of the team members.
- (3) Insurance and Bonding: Insurance and bonding requirements will need to be re-evaluated in light of an IPD approach, to ensure they are designed to

¹¹ For further information, refer to *Summary Comparison of Integrated Project Delivery Agreements*, (Hanson Bridget LLP 2009, 2010), at p.1 and p. 6.

support and facilitate the IPD process, as opposed to encouraging and rewarding non-IPD behavior.¹²

- (4) **Financing Issues:** It may be challenging to convince the construction lender that the IPD method is in its best interest. Most commercial lenders are very conservative and focused on risk avoidance, and many of the IPD concepts will be inconsistent with their long-held beliefs as to how construction project risk should be allocated and assigned.

Finally, it is important to note that public works projects can create additional issues in the IPD realm. Complications can occur if there is a lack of clear authority (usually statutory in nature) for an IPD project delivery method. Even if IPD is a permitted delivery method, public contracting laws and corresponding requirements for public access to information, as well as competing political considerations within the hierarchy of the public entity, may adversely affect the ability of the project team members to truly implement the key principles behind IPD.

V. IPD: The Lawyer's Role

As can be seen from this discussion, IPD is a non-adversarial approach to design and construction. Rather than an “us against them” mentality, it requires a “we are all in this together” approach to be successful. Accordingly, the lawyers for the project participants will need to act more as counselors and mediators that foster the team environment rather than aggressive advocates who view their responsibility solely in terms of their client’s individual interests. Just as a certain mentality is required of the project team members themselves, a similar mentality will be required of the members’ lawyers if they are to

¹² For a more extensive discussion on insurance, *see*, Douglas C. Green, *Insurance and Integrated Project Delivery* (ABA 2009); *see also*, J. Kent Holland, *Insurability of Risks in the Marriage of IPD and BIM* (ABA 2009).

effectively and successfully counsel their clients on an IPD project. Just as the project participants will need a new set of tools to successfully navigate the IPD process, the lawyers likewise will need to develop a new set of tools that emphasize their ability to support collaboration. For the lawyers, that support needs to begin with the negotiation of the IPD contract. Rather than being focused on drafting extensive contract provisions that seek to push onto others the consequences associated with the occurrences of some highly unlikely risk event, the lawyers need to focus on creating an agreement that facilitates and promotes the team approach and the best interests of the project. With this proper focus in mind, the lawyers can draft a truly collaborative IPD agreement that reflects “something completely different” from the traditional approaches to project delivery.