COMPARISON OF INTEGRATED PROJECT DELIVERY AGREEMENTS

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INTRODUCTION

Last November, the AIA released a new 3-party Integrated Project Delivery contract ("AIA C191"). Hanson Bridgett participated in reviewing the AIA C191 and shared its Standard Basic IPD contract with the AIA documents committee for their use when developing the AIA C191. Although there are differences, both documents share a similar conceptual framework. Other available IPD form agreements[1] include the AIA C195 Family (single purpose entity) and ConsensusDOCS 300 multi-party agreement.

The following materials analyze and compare these 3 form agreements, as well as the Hanson Bridgett Standard Basic IPD contract. The Hanson Bridgett form has evolved based on principles from the AIA/AIACC IPD Guide and Hanson Bridgett's experience and involvement in actual IPD projects. The analysis provides a short narrative describing each contract form and then focuses on the key features of each agreement, and how each contract is structured. In addition, the attached spreadsheet compares how the 4 documents address the following key concepts:

- How project decisions are made;
- How and when the project target cost is set;
- How compensation and incentives are structured;
- How changes in the work and contingency are addressed;
- Risk allocation, including insurance, indemnity, and limitation of liability;
- Transparency and access to project documents and records; and
- Dispute resolution procedures.

The specific terms, provisions and mechanics of an IPD agreement vary from project to project, and what is appropriate for one situation may not be appropriate for another. This paper and the attached spreadsheet are designed to highlight differences in approach, but are not intended to provide legal advice. Moreover, all of the contract forms require modification for use on a specific project, which should only be done with the assistance of qualified construction counsel with experience in IPD projects.

OVERVIEW: HANSON BRIDGETT STANDARD IPD

The Hanson Bridgett IPD model is a multi-party agreement that seeks to succinctly state IPD principles within a readable and logical agreement. It is built on the key IPD concepts of early involvement of key participants, early validated target setting, joint sharing of risk and reward, joint project management and limitations on liability to increase creativity and reduce defensiveness. It follows the principles from the AIA / AIACC IPD Guide.

The compensation system is used to spur creativity and align the parties' interests. Essentially, the owner guarantees the direct and indirect project costs. The architect and contractor place all, or a portion, of their profit into a risk pool ("incentive compensation layer or "ICL") that is

[1] AIA has issued the A195/A295/B195 series that are also denominated integrated agreements. However, AIA considers them to be "transitional" documents, and although useful for some projects, we do not believe they qualify as true IPD agreements.

augmented or decreased depending upon project outcome (time and cost) and project quality. In the base agreement, the incentive compensation layer is distributed to the architect, contractor, and cost-reimbursable consultants and subcontractors, although we use variants that use disbursements at milestones to overcome cash-flow and other issues.

Risk of project overrun is managed by using the ICL as a “buffer” that pays project costs if the target cost is exceeded. If the ICL is exhausted, the owner continues to pay the architect’s and contractor’s actual costs without any profit. For the owner, this buffer greatly extends the range of successful outcomes while providing significant incentive for efficient performance.

Project success is measured against cost, time and scope/quality standards defined in a jointly developed project objective. Unlike ConsensusDOCS 300, the targets are set relatively early to allow true target value design and to ensure that the architect and contractor are fully involved in developing an efficient design. Target setting is preceded by a thorough validation process that establishes the targets, the amount of the ICL fund and the distribution percentages. If the parties cannot reach agreement, the project is terminated and the parties are paid their incurred costs without profit.

The project is managed by representatives of the parties (project management team), which serve as the executives for the project. Although the AIA C191 has similar procedures, under the Hanson Bridgett model, the project management team is authorized to make all project decisions, provided its decisions are unanimous. If a decision cannot be reached by the project management team, it can refer the decision to the senior representatives who will decide the issue either by consensus or a majority vote. Unlike the AIA C195, each party has equal representation at the project management team and senior representative level. Tthe owner does have the right to issue an “Owner’s Directive” that contravenes the senior representative decision, but if it does so, the target cost, target schedule and the ICL are adjusted.

All claims are waived between the parties except for certain excluded claims, such as warranty and project performance (leaky window, etc.) issues. This reduces liability risks that may arise from collaboration and allows parties to move outside traditional boundaries in an effort to achieve greater creativity and productivity.

In contrast to the AIA C-195 and ConsensusDOCS300, Hanson Bridgett’s IPD agreement has been drafted with little philosophical discussion because these discussions make it difficult to see the nature and structure of the parties agreement and do not increase the contract’s utility. IPD concepts are better placed in separate papers that describe the theory and goals. Similarly, we avoid requiring specific management techniques because we believe that the parties should determine which techniques are best suited to their organizations and their project. Moreover, this level of detail is best placed in the project manual, not in the body of the contract. Finally, the contract has been drafted using clean business English to increase precision and readability, which leads to a deeper understanding of the parties’ agreement and once clearly understood, enables intelligent adjustment of the contract structure to meet the project’s particular requirements and goals.

OVERVIEW: AIA C191

The new AIA C191 is a tri-party IPD agreement executed by the owner, contractor and architect and uses a fairly traditional attached general conditions. The AIA C191 is simpler and presents fewer legal and business challenges than the AIA C195 Single Purpose Entity agreement. For these reasons, it is likely to be used more frequently than the AIA C195. In general, it follows the principles established in the AIA/AIACC’s IPD Guide. That being said, in our opinion, there are some areas where the basic structure requires improvement. Moreover, the general conditions is not fully integrated with the AIA C191 and reflects a traditional approach to the general conditions, which is sometimes contrary to IPD philosophy.

Like ConsensusDOCS300 and the Hanson Bridgett model, the project is managed by members from each of the 3 parties -- owner, architect, contractor. However, unlike the other two models, the AIA C191 has two levels of management: A project management team ("PMT") and a project executive team ("PET"). Both seem to have the ability to bind their respective companies and both have voting power, which is confusing because the agreement does not clearly designate which team has control and authority over what tasks. It appears that the PMT is responsible for the day to day operations of the project and for execution of the decisions made by the PET, but the PMT does not have authority to make decisions that impact target cost or contract time. Issues impacting target cost or contract time must be unanimously approved by the PET or through an owner's directive. Also, despite the fact that they have a PMT and PET, the remainder of the documents fail to refer to either the PMT or the PET and generally gives the "parties" responsibility, control, and authority over the Project.

It is clear that issues that are not resolved by the PMT may be referred to the PET. If the PET cannot unanimously agree, any PET member may refer the matter to a dispute resolution committee, which consists of a senior representative from each of the parties and a project neutral. If the matter is not resolved at the senior representative level, the parties have a choice to either arbitrate the matter with the project neutral; arbitrate the matter through the American Arbitration Association; or can specify another method of resolution.

Similar to the Hanson Bridgett model and the AIA C195, the target cost is set very early in the design process. Under both the AIA C191 and C195, the contractor and architect develop a target criteria proposal before the conclusion of the criteria design phase. If the owner approves the criteria design proposal, a target criteria amendment is executed establishing the target cost, the project definition, the project goals, and the project schedule. If the owner rejects the target criteria proposal, the project is terminated and the architect and contractor are compensated either through an agreed guaranteed maximum cost for preparing the target criteria proposal or some other amount, which is not really specified anywhere in the documents.

One key distinction between the Hanson Bridgett IPD Agreement and the AIA C191 is that incentive compensation is not defined in the target criteria amendment and there is nothing in the agreement that discusses participation of key subcontractors and consultants sharing in the risks or incentives established for the project. We believe this is a fundamental flaw in the AIA C191 framework because those key participants are very important in the collaboration process and are necessary for achieving design optimization and efficiency. Another distinction between the two documents is that under the Hanson Bridgett model, project success is based on cost, schedule and quality. The AIA C191 appears to base success of the Project primarily on cost.

Under the AIA C191, profit is earned through either "goal achievement" or "incentive compensation." Incentive compensation is determined upon final completion of the project and each party shares in a percentage of the difference between the actual cost and the target cost. Goal achievements are based on the project goals set forth in the target criteria amendment and are paid upon achievement regardless of whether the actual cost exceeds the target cost. Arguably, the parties could tie the contract time or quality into a goal achievement but this is not mandatory. And, under such a scenario, it would be possible to receive compensation for achieving a milestone in the project schedule, or for quality, while exceeding the target cost. Because the AIA C191 does not directly tie the contract time or quality of construction into the risk or incentive, project success is determined primarily on cost rather than the total project outcome.

The architect and contractor's fee is 100% at risk if the project is not delivered within the target cost. In addition, under the AIA C191, the parties may elect to place the contractor's and architect's salaried employee costs ("labor costs") at risk if the target cost is exceeded. Because the risk of overrun is greatest when construction is being completed, the architect and design consultants will already have been paid for most of their services. Therefore, the contractor may end up bearing a disproportional amount of the risk because not only will 100% of their fee be at risk but the contractor's continued general conditions will also be at risk through project completion.[2]

The AIA C191 and Hanson Bridgett model have similar insurance requirements, indemnity and waiver of claims. However, the AIA C191 waiver does not extend to claims covered by insurance. This creates a substantial hole in the liability waivers, especially as to the design professionals. The increased potential for claims can quench the parties willingness to freely collaborate. Both agreements include waiver of consequential damages and subrogation but the AIA C191 does not preclude the owner from recovering liquidated damages, which can be a consequential damages substitute. In our opinion, allowing liquidated damages undermines the waiver of consequential damages and encourages negative behavior, which is also contrary to IPD principles.

OVERVIEW: CONSENSUSDOCS 300

ConsensusDOCS 300 was developed by a consortium headed by AGC and draws heavily from earlier Sutter Health agreements. The "Standard Form of Tri-Party Agreement for Collaborative Project Delivery" is signed by the owner, architect, and contractor at the outset of the project. The 3-party agreement takes a "check the box" approach and attempts to align the interests of the parties through collaborative processes, including a project management group that makes project decisions, and through incentive and risk sharing. However, because the incentive and risk sharing program outlined in the agreement is based on a target cost estimate set after 100% "Construction Documents" are completed, the agreement takes a very traditional approach to pricing and therefore fails to optimize design, which is one of the key IPD concepts. Moreover, because the financial interests of the participants may not be aligned before Construction Documents are completed, the contractor and architect may actually be encouraged to defer cost saving suggestions until after the target cost is set, when those parties can potentially share in savings. The Hanson Bridgett IPD and the AIA C191 and C195 all set the target cost very early in the project development allowing the parties to work collaboratively to design the project to the target cost rather then taking a "wait and see approach" and then attempt to bring the project within the owner's budget through value engineering.

All three of the parties - owner, architect, and contractor - are the initial members of the project management group that has ultimate decision-making authority on the project. Decision making is based on consensus, but if agreement is not reached, the owner decides.[3] Thus, similar to the AIA C195, the owner maintains ultimate control over project decisions. Therefore, the AIA C191 and Hanson Bridgett's IPD are the only agreements where all parties have equal control because all decisions are made through consensus of the project management team or, in the case of the AIA C191, through the PET. Under the Hanson Bridgett model, if a consensus cannot be reached, the matter is referred to the senior management representatives, where all parties are equally represented, and the decision is either reached through consensus or a majority. Under the AIA C191, if consensus is not reached by the PET, the matter is referred to the dispute resolution process, which involves senior management and a project neutral.

The compensation structure under the ConsensusDOCS 300 is fairly traditional, but includes incentive and may include risk sharing. The target cost, which is set after Construction Documents are completed, is the benchmark for determining if the project has realized savings

[2] The general conditions to the AIA C191 distinguish subcontractor costs from labor costs so the owner will continue to compensate the contractor for all subcontractor costs.
[3] Except as to discrete life/safety design issues in which case the architect decides.

from the collaborative effort: Here, the AIA C191 is similar to ConsensusDOCS 300 because the incentive is realized based on savings after project completion. Under both documents the savings are shared as determined by the parties. However, the ConsensusDOCS 300 takes a "check the box" approach with respect to whether or not to share risk. If the project cost exceeds the target cost, the owner may bear the entire cost of the project overruns, or the parties may share in the overruns, in which losses can either be limited to architect's and contractor's profit (as part of their basic compensation) or not. While this may be a better solution then the AIA C195, which is really a guaranteed maximum cost with savings participation, it still leaves the parties with an option that is truly not in the spirit of IPD – owner bearing all cost overruns. The AIA C191 is superior to both the ConsensusDOCS300 and the AIA C195 in this respect because the owner also shares in the risk but under the AIA C191 the owner has an option to either compensate the architect and contractor for all costs of the work or can chose to only continue to compensate the contractor for all material, equipment and subcontractor costs. In contrast, the Hanson Bridgett model manages the risk of project overruns or project savings through the incentive compensation layer and if the project cost or schedule exceeds the target cost or target schedule, the parties share in the risk until the incentive compensation fund is exhausted and only after the fund is exhausted, does the owner continue to bear the financial risk for the architect's and contractor's direct costs.

With respect to liability waiver, the parties may choose between a traditional approach or safe harbor. Under the traditional approach, each party remains fully liable for its own negligence and breaches of contract and warranty, but there is an option to cap architect's and contractor's liability to a specified amount for uninsurable risk. If the safe harbor option is selected, the parties waive liability against each other for joint decisions made in good faith with the exception of willful default. Although the safe harbor seems equitable, it may create more problems than it solves. There is no specific mechanism for documenting when decisions are "jointly" made, which can lead to disputes over whether a discussion at a project meeting is a "decision" that grants protection. This circumstance could be resolved by having all "joint decisions" issued in writing, but this would bog down project administration and would undoubtedly still leave areas of dispute.

OVERVIEW: AIA C195 FAMILY (SINGLE PURPOSE ENTITY)

The AIA C195 family of documents represents one of the AIA's contractual models that embraces the principles promoted by Integrated Project Delivery. To accomplish this goal, the AIA creates a Limited Liability Company ("Company") whose sole purpose is to plan, design and construct a project. Establishing a separate entity is a very different approach from the more common 3-party IPD agreement. Also, while this family of documents attempts to replace the more traditional approach to compensation, with a goal-oriented compensation structure designed to promote collaboration, risk sharing, and efficiency, we believe the owner controlled decision process and the risk structure makes these goals difficult to accomplish.

Through the use of the AIA C195-2008 Standard Form Single Purpose Entity Agreement for Integrated Project Delivery, the owner, architect, construction manager, and other key project participants become members of the Company whose sole purpose is to plan, design and construct the project.[4] The AIA C195-2008 document "provides the framework for a collaborative environment in which the Company will operate in furtherance of its goals" by defining parameters for governing the Company, as well as establishing guidelines for capital contributions, members' funding obligations, target cost and actual cost, incentive compensation allocations and distributions, and risk allocation.[5]

Once the Company is formed, it contracts under a separate agreement with the owner through the use of the AIA C196 for funding and to establish other owner obligations and rights. Likewise, the Company separately contracts with non-owner members through the AIA C197,

[4] AIA C195 Instructions.
[5] *Id.*

which establishes non-owner members' rights and obligations. The construction manager and architect will also contract separately with Company for their respective services, rights and obligations but the AIA has not yet created these separate agreements.[6]

The AIA C195 differs from other IPD agreements. For example, it is the only one that establishes a separate entity to facilitate the project. This creates additional licensing, tax, and corporate complexities. Also, unlike the AIA C191 or Hanson Bridgett's IPD, in the AIA C195 scheme the owner has a majority interest in the "Governance Board," which makes all decisions for the Company and the project, and also resides as the chair. While some decisions are to be made unanimously, others are made by a majority vote. In either case, the owner has a majority of the votes giving the owner more control over project decision making. Moreover, similar to the AIA C191, the target cost is evaluated and either approved or disapproved solely by the owner. Under both the Hanson Bridgett IPD and ConsensusDOCS 300, the target cost is agreed to by the project management team.

The compensation structure in the AIA C195 is also very different. Under the AIA C195, the architect and construction manager may earn incentive compensation if the actual cost of the project is less than the target cost but, if the target cost is exceeded, the architect, construction manager and other non-owner members will continue to perform their respective work without further compensation, including compensation for direct or indirect costs. In other words, the owner does not have any financial risk for project cost overruns. Essentially, the target cost under the AIA C195 is akin to a guaranteed maximum cost for performing design and construction with savings participation. Therefore, the AIA C191 is an improvement over the C195 because, similar to the Hanson Bridgett IPD, under the AIA C191 the owner shares in the risk of cost overruns.

CONCLUSION

In conclusion, we believe that the AIA C191 is an improvement over the AIA C195 Family of documents and is much more in keeping with the AIA/AIACC IPD Guide. The AIA C191 eliminates any licensing concerns and tax complications associated with formation of a separate entity and the owner's control over the project. Also, the owner now shares in the risk if the target cost is exceeded rather than the more traditional approach espoused under the AIA C195 documents.

ConsensusDOC300 is an older document that has not been updated and although it has many IPD principals it takes either a mixed approach or traditional approach to certain key concepts such as setting an early target cost to optimize the design, continuing to have owner control over decisions if a consensus in not reach by the project management group, and a check the box approach to risk sharing and waiver of liability. Although this document may be appropriate for some projects and could be modified, it is not really in keeping with many of the key IPD concepts as drafted.

[6] Contractual arrangement anticipates a multi-prime delivery method rather than use of a general contractor.

IPD Contract Comparison Spreadsheet

Hanson Bridgett Standard Basic IPD