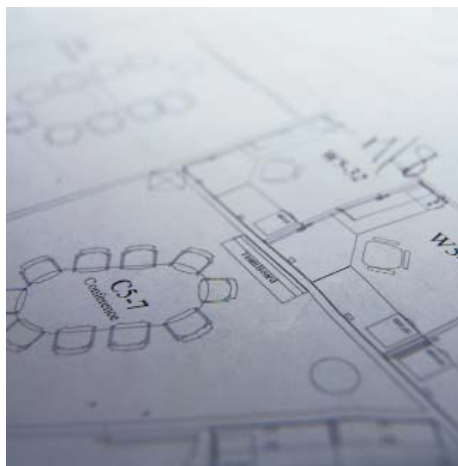
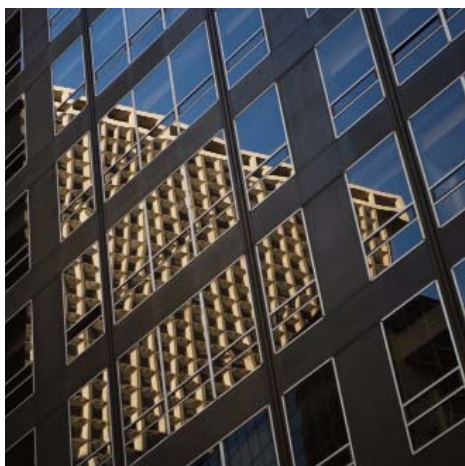


# New Standard Contracts for Integrated Project Delivery: An Analysis of Structure, Risk, and Insurance



by Kristin Ballobin  
2008 Milton F. Lunch Research Fellow

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Integrated project delivery (IPD) is an industry-changing process that offers reduced waste and optimized efficiency throughout the design and construction phases of building. These attributes are especially important to clients, but are also favorable to design professionals and contractors because they encourage a reduction in disputes and claims. Since clients are responsible for about two-thirds of all claims against design firms, design professionals should greatly benefit from the reduction IPD has to offer. Despite the benefits of integrating design with the construction process, IPD has equal challenges, many of which have lasting effects or are yet to be solved.

### Blurring of Traditional Roles

In traditional delivery methods like design-bid-build, the roles of the design professional and contractor are clearly defined. The architect or engineer is responsible for design, the contractor for construction means and methods. But what happens to those roles when each party is selected early in the project to contribute their expertise and experience to the design? The design professional is no longer solely responsible for the design, but incorporates input from the contractor and subcontractors. The contractor has then, in effect, designed, and should retain liability for such acts. The legal system will see more integrated design cases in which an architect and contractor differ on who ultimately made design or construction means and methods decisions. The legal interpretation of design and construction roles in IPD will be a defining moment for lawyers and insurers in managing liability exposure for their clients. Integrated project delivery will affect the liability of each party differently, and some parties may need to modify their business methods and insurance coverage.

### The Decline of the Spearin Doctrine

Since 1918, following a landmark case for the construction industry, the United States Supreme Court has upheld the precedence of the Spearin Doctrine. In *United States v. Spearin*, 248 U.S. 132, 136 (1918), the Court held that a contractor bound to build according to plans and specifications prepared by the owner or the owner's consultants, "will not be responsible for the consequences of defects in the plans and specifications." Further, the Court determined that an implied warranty was attached to plans and specifications that specifically described the character, dimensions, and location of items to be constructed. Therefore, if the contractor complied with the plans and specifications, the constructed items should be adequate. Clauses that required the contractor to examine the site or assume responsibility for the work until completion did not overcome this implied warranty. But what effect does integrated project delivery have on the Spearin Doctrine?

The goal of IPD is to reduce waste and optimize efficiency by bringing all of the key parties into the project right after its inception. Therefore, a construction manager or contractor will be a member of the IPD team during design and will offer advice on constructability, equipment and systems selection, and price effects. This integration of the design and construction roles effectively eliminates the implied warranty given by the owner. As a result, the contractor could be partially responsible for defects in the design and cannot carelessly rely on the adequacy of the plans and specifications.

### **A Comparison of Integrated Project Delivery Contract Forms**

Construction project clients, design firms, and construction entities in the United States have, until recently, used custom-generated contracts that restructured the communications, decision-making, risk shifting, and risk sharing with which the design and construction industry is familiar. In many cases these contracts were adaptations of contracts used in other legal systems, or were developed by clients or construction counsel without any attempt to achieve a consensus on the project delivery characteristics. Starting in late 2007, however, new “standard” contracts were introduced to give project owners and design and construction firms baseline legal arrangements for integrated project delivery.

### **Contract Arrangements**

Although integrated project delivery systems are perceived as beneficial to the design and construction industry, transitioning the industry into new relationships and methodologies could prove difficult. One such challenge is overcoming the opposition between the design professional and the contractor to form a truly collaborative team. One of the best places to neutralize this tension is within the design and construction contracts.

The onset of integrated project delivery has produced a variety of contract arrangements. The American Institute of Architects (AIA) offers two choices: the formation of a single purpose entity (SPE), or a traditional arrangement with embedded integrated principles. The ConsensusDOCS, developed by the Associated General Contractors of America (AGC) with a coalition of construction industry groups, also offer a tri-party agreement to encourage IPD goals.

### **Insurance Implications**

Ultimately, the effects IPD will have on insurance depend on the contract arrangement chosen by the parties. The ConsensusDOCS 300 and AIA A295 IPD contract arrangements are closer to traditional methods making them more manageable by insurance standards. Each party will be responsible for obtaining typical insurance coverage required in design and construction. However, the contractor may benefit from contractor’s design liability insurance with the use of IPD because of increased participation during the design phase. Also, as

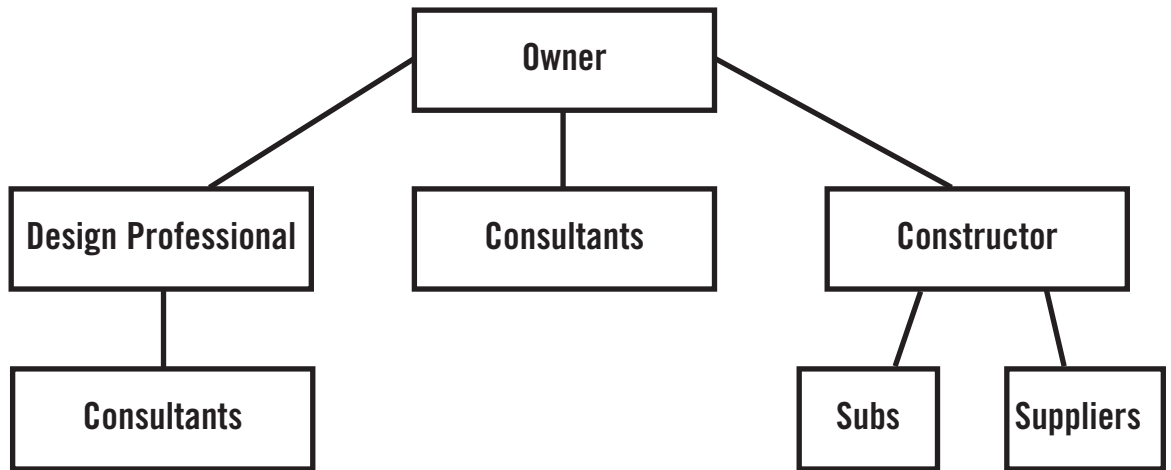
discussed above, insurance coverage may be difficult to discern for decisions that were the result of collaboration made during design and construction phases.

No insurance product currently exists to efficiently manage loss for the company or the parties if the AIA C195, Standard Form Single Purpose Entity for IPD, is chosen. Of course, each party will be responsible for obtaining the standard insurance packages required in other delivery methods. But if each company member waives claims against other members, and a design defect is realized near construction completion but before the company is dissolved, difficult questions arise: who is responsible and whose insurance will cover the loss if incentive compensation is insufficient? Additional uncertainties exist after company dissolution such as: which insurance coverage is responsible for design choices made by consensus? The bottom line is that many questions posed by the insurance industry have yet to be answered so insurance coverage is not yet ready for projects arranged in this manner.

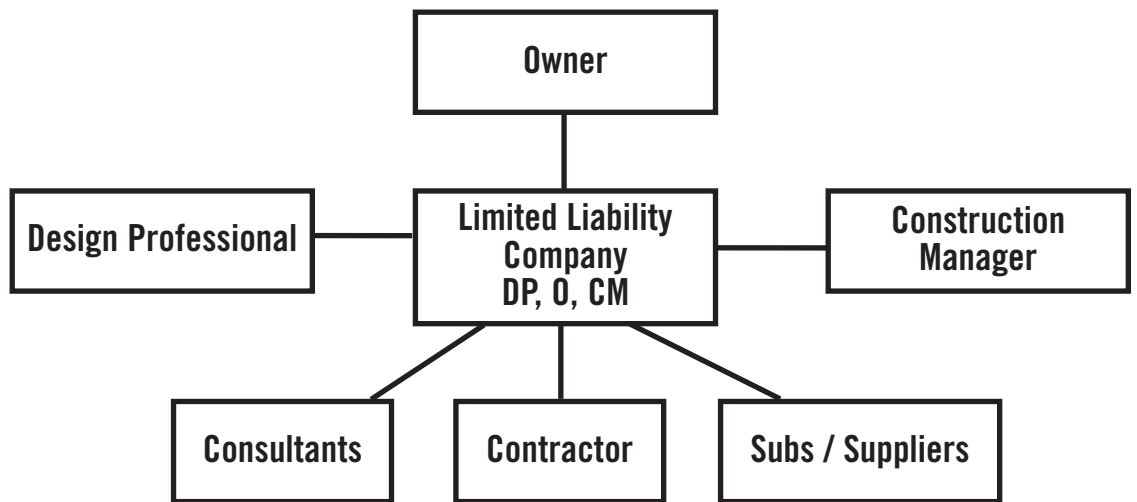
### **About This Study**

The following analysis was prepared as a research project based on the documents as published or as available in draft as of July 2008. The descriptions and comments by the 2008 Milton F. Lunch Research Fellowship, Kristin Ballobin, represent her opinions based on her assessment of the text, application of the law, and discussions with lawyers and others involved in the drafting process and the insurance industry. A chart appears at the end of this study comparing selected provisions of documents that establish the structure of integrated project delivery relationships.

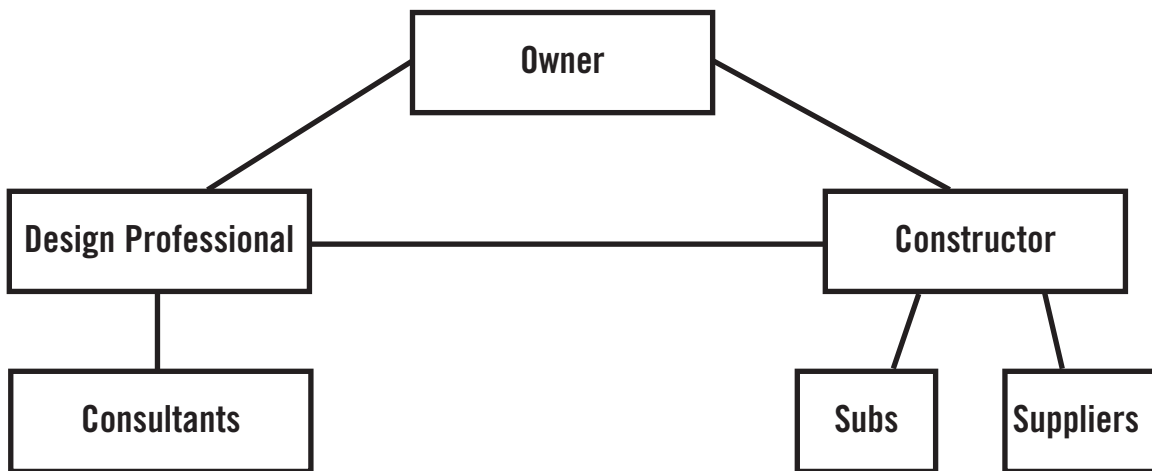
*AIA A195/B195/A295 Standard Form of Agreement Between Owner and Contractor/Owner and Architect for Integrated Project Delivery*



*AIA C195 Standard Form Single Purpose Entity Agreement for Integrated Project Delivery*



**ConsensusDOCS 300 Standard Form of Tri-Party Agreement for Collaborative Project Delivery**



**Decision Makers**

*AIA A195/B195/A295*

This group of documents allows an easy transition from traditional design deliveries to a basic form of integrated project delivery. Instead of establishing a governing body, or three-party contract, these documents rely on the owner, architect, and contractor to provide a collaborative team throughout the design and construction phases. The owner and architect will be bound by the terms of AIA B195 and A295. As a part of the architect's general services, it will assist the owner in establishing a list of prospective contractors. Once a guaranteed maximum price has been negotiated with the contractor the terms of their agreement are established in AIA A195 and A295. During the detailed design phase the architect meets with the owner and contractor to review the design documents. The architect is also responsible for the integration and coordination of the model sections provided by the contractor, design consultants, and subcontractors. The owner's approval is required for major decisions regarding the project program, schedule, and price, but with consultation from the architect and contractor.

*AIA C195/C196/C197*

The members of a single purpose entity limited liability company (LLC)—the owner, design firm, and construction manager—direct the business affairs of the company through the governance board as provided in Article 8 of C195. The

governance board consists of an odd number of members, and each non-owner member is allowed to appoint at least one representative. The owner must always have one more representative than the total of the non-owner member representatives. For example, if the total membership of the governance board is five, the construction manager will appoint one representative, the architect will appoint one representative and the owner will appoint three representatives. The owner will appoint one of its representatives to act as the chairperson of the board. All authorizations made by the board members require unanimous affirmative votes, unless otherwise designated under section 8.2.4, which allows a majority vote.

In addition, the LLC members establish a project management team that is responsible for the integrated planning, design and construction activities of the project. The project management team consists of one representative from each member who is authorized to act on behalf of that member with regard to project decisions. The team may choose to include non-members on certain matters, but their authority is limited to that of an adviser. The team will meet at least weekly and all decisions shall be made unanimously. If the members are unable to reach a unanimous decision, the dispute shall be referred to the dispute resolution procedures discussed in Article 18 of C195.

### *ConsensusDOCS 300*

The predominant decision maker under the ConsensusDOCS is the management group. The management group comprises representatives of the owner, designer, and constructor, and additional members may be invited to become members. The management group is responsible for reviewing the owner's program and setting project goals. Collaboration is encouraged within the group by requiring major decisions to be made by consensus. When no consensus can be reached the owner will make the decision. During the preconstruction phase the management group will meet twice a month and when construction commences the management group will meet once a month.

Also, the management group establishes a meeting schedule for the collaborative project delivery team (CPDT). The CPDT includes the owner, designer, and constructor, and later the team will also include design consultants and trade contractors. The design consultants and trade contractors should be selected early in the preconstruction phase to advance integrated services and will be required to sign joining agreements that support the goals and services offered with IPD. During the preconstruction phase the CPDT will meet weekly to facilitate collaboration regarding the site, building materials, systems and equipment. During construction, the CPDT will meet weekly to review upcoming work and discuss any forthcoming impediments.

## Project Cost

### *AIA A195/B195/A295*

The contractor is responsible for developing a contractor's estimate that is submitted to the architect for review and must be accepted by the owner. After the criteria design documents have been developed, the contractor must update the contractor's estimate and project schedule. Then, upon the owner's acceptance of the detailed design documents the contractor prepares a guaranteed maximum price (GMP) proposal for the owner's review and acceptance. The GMP proposal includes a list of allowances, the contractor's clarifications and assumptions, the proposed guaranteed maximum price organized by trade categories, and the anticipated date of substantial completion. When the architect has reviewed the GMP and the owner has accepted it, the GMP is set forth in Exhibit A, which serves as an amendment to the agreement between the contractor and owner. Once the GMP amendment has been signed it serves as a guarantee by the contractor that the contract sum will not exceed the GMP. The guaranteed maximum price may be adjusted due to change orders or construction change directives. If the cost of work exceeds the GMP, the contractor is responsible for those costs without reimbursement or compensation from the owner.

### *AIA C195/C196/C197*

In consultation with the owner and architect, the construction manager shall create a target cost proposal before the conclusion of the criteria design phase. The target cost includes the company's cost to plan, design, and construct the project, a contingency for uncertainty, expected costs of insurance, goal achievement compensation, and other costs, such as legal, accounting, or licensing costs. If the owner accepts the target cost proposal it will be added to the agreement by amendment. If the owner does not accept the target cost proposal the members of the LLC will meet to arrive at a mutually acceptable project scope and target cost.

Once the target cost has been established it can only be adjusted by a unanimous agreement of the LLC members for specific reasons listed in section 5.6 of the agreement. If the members cannot agree on an adjustment to the target cost, the discussion will move to the dispute resolution procedures listed in Article 18, outlined further below. Also, the company must monitor the actual cost on a monthly basis to ensure the expenditures are in line with the project goals and target cost. If a member believes that the target cost will be exceeded, the company will develop a recovery plan to maintain the target cost. The recovery plan can alter the project definition and project schedule, and must be reviewed and approved by all members. If the owner refuses to approve a recovery plan, the company can proceed with the work but must make reasonable efforts to mitigate the resulting cost escalation.

If the actual cost of construction exceeds the target cost, no incentive compensation will remain to distribute among the members. In this circumstance the owner will pay for the cost of the work plus any goal achievement compensation, totaling to no more than the target cost. Any costs over the target will be shared by the members, corresponding to their respective percentage of interest in the company.

### *ConsensusDOCS 300*

When the project design is sufficiently complete, the owner, designer, and contractor will jointly develop a project target cost estimate (PTCE). The PTCE includes the owner's own design and construction costs, the designer's costs for design and implementation, and the constructor's construction costs. If the PTCE exceeds the owner's project budget the owner may give permission to increase the budget, the management company may direct a modification to the PTCE, or the owner may terminate the project. At the formation of the agreement, the parties must elect one of two choices regarding losses when actual cost of the project exceeds the PTCE, either: the losses will be borne by the owner or losses will be shared by the parties. If the parties choose to share losses, the designer and constructor must make a unified decision about whether their fees will be at risk and whether their fees represent their limit of liability.

## **Incentives**

### *AIA A195/B195/A295*

This set of documents does not contain a formal incentive program. The guaranteed maximum price amendment does contain a note to insert specific provisions if the contractor is to participate in any savings that occur when the contract sum is less than the GMP. However that choice would be solely up to the owner and the rest of the project participants would receive no incentive compensation.

### *AIA C195/C196/C197*

This agreement offers two types of incentives to project participants. The first is incentive compensation, which grants members a portion of any savings realized when the actual cost is less than the target cost. If incentive compensation is possible, the company shall pay the project members a lump sum following the final completion of the project. Each non-owner member's portion of the savings is listed in the AIA C197 agreement under Article 5.

The second type of incentive offered is goal achievement compensation, which is authorized by an amendment to the standard agreement. In this program the company pays non-owner members upon achievement of mutually agreed upon project goals. A table is included in the amendment where project

goals are listed with an amount of goal achievement compensation. Under each goal is a description of how the compensation will be apportioned among the non-owner members and how the achievement of each goal will be measured. If a project goal is not achieved, the target cost shall be decreased in an amount equal to the goal achievement compensation that was not awarded by the company and the agreement will be amended as necessary.

### *ConsensusDOCS 300*

Article 11 of the tri-party agreement offers a financial incentive program to support collaborative project delivery that is to be developed by the management group. The incentive program should encourage superior performance and reward the CPDT for successfully exceeding project goals and meeting schedule deadlines. The details of the incentive program should be specified in an amendment to the agreement. The program should be funded with project savings achieved through the preservation of contingencies and reduction in the cost of work.

## **Risk Allocation**

### *AIA A195/B195/A295*

Risk is allocated somewhat differently under the transitional IPD agreements by indicating each party's responsibilities in the owner-architect agreement, owner-contractor agreement, and the general conditions document. Both parties will be held liable for indicated services, but some of those services are less defined and more fluid. For example, the contractor is to provide the owner and architect with recommendations on constructability during the design phases. Due to the collaborative nature of IPD, the contractor will be providing services earlier than in traditional delivery methods, and the architect may be continuing its services during later phases. This means that the contractor will be providing advice during the design phase and sole liability can no longer rest with the architect and its consultants. Essentially, the only risk allocated by the agreements is the contractor's responsibility for expenses when the actual cost of construction exceeds the guaranteed maximum price. The remaining risks are not necessarily delegated to just one party and the contractor and architect may share more liability, especially in the design phases.

### *AIA C195/C196/C197*

One of the preconditions to establishing a target cost is that the company members will jointly develop a risk matrix. The risk matrix identifies the principal risks of planning, designing, constructing, and commissioning, and then determines which member of the single purpose entity has the primary responsibility for managing each risk. The risks identified will be allocated to the member who is best able to control that risk. The construction manager is

responsible for updating the risk matrix, but the risk matrix is not incorporated into the agreement, member agreements, or agreements with non-members. Therefore a particular member may manage the risk, but if a failure arises from that risk, each member will be liable due to the waiver of claims between the members.

### *ConsensusDOCS 300*

The parties to the tri-party agreement must elect one of the two risk allocation approaches. The first is the safe harbor decisions provision, which waives all claims between the parties that arise from a mutual decision of the management group. The parties agree to release each other from liability that arises from any non-negligent act, omission, mistake, or error in judgment, whether negligent or not. The waiver does not apply to acts or omissions that are the result of willful conduct.

The other risk allocation approach is the traditional risk allocation provision. Under this method each party is fully liable for its own negligence and breaches of contract and warranty arising out of the performance of the agreement. If this approach is selected the designer must list an aggregate limitation on the designer's liability to the owner, contractor, or anyone making a claim against the designer, in relation to the project or the agreement, resulting from negligence or breach of contract. The contract must list a similar amount as a limitation of liability to the owner, designer, or other similar parties resulting from the contractor's express or implied warranty, negligence, or breach of contract. Each of the previous limits, however, can be exceeded if losses are reimbursed pursuant to a professional liability policy of other insurance policy.

Several other provisions are included throughout the agreement that either allocate risk to a particular party or attempt to spread the risk among the parties. The first provision, under section 12.9, requires the designer to coordinate and be responsible and liable for the services provided by the design consultants. This means that even though the management group has approved of the design consultant's credentials, the designer will be responsible for any vicarious liability caused by the consultants. A similar provision applicable to the contractor can be found in section 13.1.2. Responsibility here falls on the contractor for acts or omissions of parties performing portions of the work for the contractor or subcontractors. A last provision worth mentioning is section 13.9.1, which departs from traditional roles by assigning responsibility for safety during construction to the owner, constructor, and designer. However, the provision also states that the contractor will have overall responsibility for safety precautions and programs. The effect could implicate the owner and designer in safety claims that occur during the construction phase, a liability not typically found in standard delivery contracts.

## Limitation of Liability Provisions

### *AIA A195/B195/A295*

Liability is limited differently in the transitional IPD documents. None of the agreements contain an amount to which liability is limited, like the single purpose entity agreement and ConsensusDOCS agreement. Instead, A295 includes limitations of liability provisions that define the responsibilities of the parties, indemnification obligations, and requirements of insurance and subrogation.

### *AIA C195/C196/C197*

The standard agreement for the SPE requires member agreements to contain limitations of liability. Each non-owner member's liability will be limited to the amount of incentive compensation received under the SPE and member agreement. If that amount is insufficient, the member's additional liability will be limited to the amounts of available insurance proceeds.

### *ConsensusDOCS 300*

Liability limitations are established twice in the agreement, both as elective provisions. The first was explored under risk allocation. If the parties choose the traditional risk allocation approach, the designer and constructor must set a limit of liability for essentially all claims. However, this limit can be exceeded when losses are reimbursed from an insurance policy obtained by the designer or constructor. Also, as discussed previously (under project cost), a limitation of liability is contained in section 11.6 of the tri-party agreement. When the parties have elected to share costs in excess of the project target cost estimate, this provision allows the designer and constructor to limit the extent of their losses to their respective fees.

## Waivers

### *AIA A195/B195/A295*

The standard IPD agreements utilize several types of claim waivers. Unique to this set of documents is the establishment of a contractual liability on the timing of claims—essentially a private statute of repose. The owner, architect, and contractor must commence all claims related to contractual agreements within the time specified by law, but not more than ten years after the date of substantial completion. All claims or causes of action that commence after ten years are waived. The owner, architect, and contractor also agree to waive claims against each other for consequential damages arising out of their respective agreements. Lastly, typical of most AIA agreements is a waiver of subrogation for damages caused by fire or other loss covered by property insurance applicable to the work between the owner, architect, contractor, consultants, subcontractors, etc.

### *AIA C195/C196/C197*

A few waivers are incorporated into the SPE agreements. The most notable is the waiver of claims provisions. The first of these waivers must be included in the member agreements and states that the company members waive all claims against other members and against the company. The second waiver must be included in the owner agreement and requires that the owner waive all claims against other company members. An additional waiver is contained in AIA C197 that compels the company to waive all claims against any member. These waivers do not apply to claims that arise from the willful misconduct of a member or the company. The other waiver of significance is a waiver of subrogation that is required by C195 to be included in the owner and member agreements. At this time the owner agreement does contain a waiver of subrogation but the member agreement does not, a void that may be remedied in the future.

### *ConsensusDOCS 300*

The waivers contained in the agreement will depend upon which risk allocation approach is selected, as discussed above. However, generally, if the parties choose the safe harbor risk allocation, all claims arising from decisions made by a mutual decision of the management group will be waived. If the traditional risk allocation is selected, the parties do not waive claims between them. Regardless of which risk allocation approach is selected, the parties agree to waive consequential damages. The owner, designer, and constructor waive claims against each other for consequential damages arising out of the agreement for any cause.

## **Dispute Resolution**

### *AIA A195/B195/A295*

Most claims, except those excluded under section 13.2.1 of AIA A295, must first be referred to the initial decision maker as a condition precedent to any other dispute resolution procedure. The architect generally serves as the initial decision maker, unless otherwise indicated in the A195 agreement in section 6.2.2, and has approximately 30 days to render a decision. A decision made by the initial decision maker is considered final and binding on the parties, but subject to mediation and later arbitration. If the initial decision maker is unable to resolve the claim, it will be subjected to mediation as a condition precedent to any binding dispute resolution procedures. The mediator's and all filing fees will be shared equally among the parties. If the claim is not resolved within approximately 60 days through mediation, a party can make a demand for arbitration. The demand must be made within the applicable statute of limitations, and the decision must be made by the arbitrator(s) is final and binding.

### *AIA C195/C196/C197*

Article 18 of the single purpose entity agreement establishes the dispute resolution procedures that begin with the member representatives. A member with a dispute must notify the representatives of all affected members in an attempt to reach a mutual resolution within 15 days of such notice. If a resolution cannot be reached, the dispute will be submitted to the governance board who will issue a mutually agreed-upon decision within 30 days of their written notice of the dispute. If the governance board fails to make an agreeable resolution, the claim will be submitted to the dispute resolution committee. The committee will consist of the chief executive of each company member and be chaired by a neutral party. If a mutual resolution is not achieved within 60 days, a neutral party will make a decision regarding the claim.

### *ConsensusDOCS 300*

If a dispute arises and the parties cannot reach a resolution, the parties' representatives shall endeavor to use direct discussions to resolve the matter. If within five days the dispute has not been resolved it will be submitted to the management group. The management group can take one of three actions: (1) request additional data; (2) request a technical analysis of the dispute; or (3) proceed to achieve a negotiated resolution of the dispute. If a solution cannot be reached, the dispute will be passed along to either dispute mitigation or dispute resolution procedures. If the parties elect a dispute mitigation procedure, they must also select a project neutral or a dispute review board to consider the dispute and issue a nonbinding decision. The project neutral or dispute review board has five days from the referral of the dispute to submit their conclusion. If the dispute remains unsolved or the parties do not elect dispute mitigation, the disagreement will be submitted to mediation. The mediation proceedings must conclude within 45 days of being first discussed. If mediation still does not present an agreed-upon solution, the dispute will be submitted to either arbitration or litigation, the parties may only designate one. The tri-party agreement departs from the U.S. legal system by assigning the cost of any binding dispute resolution procedures to the non-prevailing party.

## **Liability and Insurance**

### *AIA A195/B195/A295*

The AIA A295 IPD contract arrangement is closest to traditional delivery methods, making it more manageable by insurance standards. Each party is responsible for obtaining typical insurance coverage required in design and construction. However, the contractor may face a requirement for contractor's design liability insurance with the use of IPD because of increased participation during the design phase. As discussed above, insurance coverage will be difficult to discern for decisions made during design and construction phases

that were the result of collaboration. Therefore the legal outcome of disputes arising from collaborative decisions is unknown because they depart from single-point responsibility and traditional negligence standards. Lastly, parties hosting a website for the integration of BIM models will likely need software errors and omissions coverage and possibly other technology coverage.

### *AIA C195/C196/C197*

The single purpose entity established by the owner, architect, and construction manager is a limited liability company (AIA C195). Each company member also must sign an agreement binding themselves to the LLC and to the principles of IPD (AIA C196 and C197). Then the company, or each member directly retains the consultants, subcontractors, and suppliers for the project. This contractual arrangement was devised to advance collaborative design and construction through several mechanisms. One is a contractual provision, requiring the LLC members to waive all claims against each other and against the company, except those claims arising from willful misconduct. Additionally, the company waives all claims against the members. Because claims are waived and the parties share in the project's gains and losses, a limitation of liability is defined as the amount of incentive compensation paid to the member, and if insufficient to sums recovered from the insurance. However, as parties gain more experience with IPD the incentive compensation will begin to decrease and then the legal effect of the limitation of liability may be lost.

If the AIA C195 *Standard Form Single Purpose Entity for IPD* is chosen, no insurance product exists to efficiently manage loss for the company or the parties. Of course each party will be responsible for obtaining the usual insurance packages required in other delivery methods. But if each company member waives claims against other members, and a design defect is realized after substantial completion but before the company is dissolved, who is responsible and whose insurance will cover the loss if incentive compensation has been exhausted? Additional uncertainties exist after company dissolution such as who is responsible for design choices made by consensus? Consequently, carriers of professional liability insurance are unsure of how to respond to the speculative risk and moral hazard issues present in the SPE arrangement. The bottom line is that many questions posed by the insurance industry have yet to be answered so insurance coverage is not yet ready for projects arranged in this manner. Also, software errors and omissions insurance may be necessary for parties who are hosting a website to facilitate collaboration and BIM integration.

### *ConsensusDOCS 300*

The ConsensusDOCS agreement's legal and insurance implications derive primarily from the risk allocation method chosen in Article 3. If the traditional risk allocation approach is selected the risk and insurance consequences are

very similar to those in the AIA A295 agreement discussed above. Under this approach, both parties will be liable for negligence and breaches of contract and warranty. The parties will be responsible for obtaining similar insurance as in traditional delivery methods such as professional liability and commercial general liability. Unlike the AIA A295 agreement, however, the ConsensusDOCS do define limitations of liability for the designer and contractor if the traditional risk allocation method is chosen. The liability for the designer and contractor is set at a specified amount unless such claims are reimbursed by an insurance policy.

If, alternatively, the parties choose the safe harbor decision method of risk allocation, the legal and insurance implications will resemble those of AIA C195 discussed above. This approach allows the parties to release each other from any liability arising out of non-negligent acts, as well as omissions, mistakes, or errors in judgment that are negligent or not. As a result, the legal standard of negligence is eroded significantly because the parties have waived claims and may be sharing losses that were not caused by their failure. Standard insurance coverage is required of the constructor, designer, and owner. However, the agreement does not establish how liability will be divided when a dispute arises over a decision made by a consensus of the parties. Insurance carriers will have difficulty in pricing policies for parties in this arrangement because the risk is speculative and moral hazards may become enticing to struggling parties.

## Positive and Negative Perceptions of the IPD Agreements

### *AIA A295-2008 General Conditions of the Contract for Integrated Project Delivery*

#### Generally

- ↑ Easiest to implement because it most closely resembles traditional delivery methods
- ↑ Construction scheduling is set cooperatively

#### Architect

- ↑ No longer working with a contractor who offered the lowest project bid
- ↑ Spearin Doctrine protections for contractor diminished
- ↑ Constructability reviews performed by contractor during design (fewer RFIs and change orders)
  
- ↓ Possible defamation claims or interference with the contract from contractor
- ↓ Architect is no longer the sole adviser to the owner

#### Contractor

- ↑ Additional compensation early in the design process for consulting services
- ↑ Use of GMP (can build in profit and use some negotiation in reaching the GMP)
  
- ↓ Loss of Spearin Doctrine protection
- ↓ Offering design services requiring additional insurance protection
- ↓ Contractor pays costs when actual cost of construction exceeds the GMP

*AIA C195-2008 Standard Form Single Purpose Entity Agreement  
for Integrated Project Delivery*

Generally

- ↑ Waiver of claims between SPE Members (less expenses lost to resolving disputes)
- ↑ Incentive compensation and goal achievement compensation offered
- ↑ Consensus made decisions foster a collaborative and efficient design
- ↑ A & CM losses limited to incentive compensation and insurance proceeds
- ↑ Construction scheduling is set cooperatively
  
- ↓ Legal and insurance reactions unknown
- ↓ Negligence standard diminished
- ↓ Moral hazards in compensation and insurance
- ↓ Contingency likely to be minimal as system develops

Architect

- ↑ Relationship with contractor not founded on lowest bid
- ↑ Constructability reviews performed by construction manager during design (fewer RFIs and change orders)
  
- ↓ Architect is no longer the sole adviser to the owner
- ↓ Profit is not guaranteed
- ↓ Losses shared if target cost is exceeded

Construction Manager

- ↑ Compensation basically for consulting services
  
- ↓ Profit is not guaranteed
- ↓ Losses shared if target cost is exceeded

*ConsensusDOCS 300 Standard Form of Tri-Party Agreement for Collaborative Project Delivery*

Generally

- ↑ Flexible agreement (offers the parties many choices so it fits their wants and needs)
- ↑ Consensus made decisions foster a collaborative and efficient design
- ↑ Development of incentive compensation is negotiated by the management group
- ↑ Construction scheduling is set cooperatively
  
- ↓ Legal implications of a multi-party agreement unknown

Architect

- ↑ Constructability reviews performed by contractor during design (fewer RFIs and change orders)
- ↑ Possible waiver of claims if safe harbor risk allocation chosen
- ↑ Limitation of liability set if traditional risk allocation chosen
- ↑ Choice if profit/losses shared
- ↑ Spearin Doctrine protections for contractor diminished
  
- ↓ Architect is no longer the sole adviser to the owner
- ↓ Unknown impact of being in contractual privity with the contractor

Constructor

- ↑ Compensation includes the constructor's fee which is comprised of overhead and normal profit
- ↑ Possible waiver of claims if safe harbor allocation chosen
- ↑ Limitation of liability set if traditional risk allocation chosen
- ↑ Choice if profit/losses shared
  
- ↓ Loss of Spearin Doctrine protection
- ↓ Offering design services requiring additional insurance protection



## AIA and ConsensusDOCS Integrated Project Delivery

AIA A295-2008	AIA C195-2008	ConsensusDOCS 300
<b>Contractual Relationships</b>		
<ul style="list-style-type: none"> <li>❖ AIA A195: <i>Agreement between Owner and Contractor</i></li> <li>❖ AIA B195: <i>Agreement between Owner and Architect</i></li> <li>❖ Owner agreements with consultants</li> <li>❖ Architect agreements with consultants</li> <li>❖ Contractor agreements with subcontractors and suppliers</li> <li>❖ Parties share the terms of A295, <i>General Conditions of the Contract for Integrated Project Delivery</i></li> </ul>	<ul style="list-style-type: none"> <li>❖ Single-purpose entity formed as a limited liability company (LLC)</li> <li>❖ LLC members: owner (C196); architect (C197); construction manager (C197)</li> <li>❖ Separate contracts (either with the LLC or directly with an LLC member) for design consultants, contractor, subcontractor, suppliers, etc., with early involvement sought so they can contribute knowledge and experience in early design decisions</li> </ul>	<ul style="list-style-type: none"> <li>❖ Tri-party agreement: owner, contractor, and architect</li> <li>❖ Owner agreements with consultants</li> <li>❖ Architect agreements with consultants</li> <li>❖ Contractor agreements with subcontractors and suppliers</li> </ul>
<b>Project Cost Determination</b>		
<ul style="list-style-type: none"> <li>❖ Guaranteed maximum price (GMP) (A195 Exhibit A)</li> <li>❖ Upon the owner's acceptance of the detailed design documents the contractor develops the GMP (A295 §7.6)</li> <li>❖ The contractor guarantees the contract sum (A195 §A1.1.1)</li> </ul>	<ul style="list-style-type: none"> <li>❖ Target cost proposal defined before completion of criteria design phase (C195 Article 5)</li> <li>❖ Must be approved by the owner</li> <li>❖ Can only be adjusted by unanimous agreement of the LLC members</li> </ul>	<ul style="list-style-type: none"> <li>❖ Project target cost estimate (PTCE)(§8.3)</li> <li>❖ The owner, designer, and contractor jointly develop the PTCE once the management group has determined the project design is sufficiently complete (§8.3.1)</li> <li>❖ The project budget is the owner's estimate of the total cost to design and construct the project and cannot be revised without the approval of the owner (§8.1.1)</li> </ul>
<b>Decision-Making Bodies</b>		
<ul style="list-style-type: none"> <li>❖ Owner, in consultation with architect and contractor</li> </ul>	<ul style="list-style-type: none"> <li>❖ Governance board (C195 Article 8)</li> <li>❖ Project management team (C195 Exhibit D)</li> </ul>	<ul style="list-style-type: none"> <li>❖ Management group (Article 4)</li> <li>❖ Collaborative project delivery team (§3.3)</li> </ul>
<b>Contractual Liability Provisions</b>		
<ul style="list-style-type: none"> <li>❖ Statute of repose set at 10 years for owner, architect, and contractor, any subsequent claims are waived (owner—A295 §12.6 and B195 §5.2; architect—B195 §5.2; contractor—A295 §12.6)</li> <li>❖ Waivers of subrogation for damages caused by fire or other loss covered by property insurance (A295 §11.3.7)</li> <li>❖ Waiver of consequential damages (owner—A295 §13.1.6 and B195 §5.3.1; architect—B195 §5.3.1; contractor—A295 §13.1.6)</li> <li>❖ No limitation of liability provisions are included</li> </ul>	<ul style="list-style-type: none"> <li>❖ Waiver of claims: member v. company and other members (C195 §6.2.1.11); owner v. members (C195 §6.2.2.9; C196 §5.4); company v. members (C197)</li> <li>❖ Members not liable to the company or other members for any loss, damage, or claim incurred by an act or omission of the member on behalf of the company and performed in good faith (C195 §12.2; C197 §7.1)</li> <li>❖ The company and members' liability limited to the amount of incentive compensation received and if insufficient, to sums recovered from insurance (company—C195 §6.2.2.6; members—C195 §6.2.1.6)</li> <li>❖ The company indemnifies a member for any loss, damage, or claim incurred by an act or omission of the member on behalf of the company performed in good faith (C195 §12.3.1)</li> <li>❖ Waivers of subrogation (C195 §§6.2.1.10 and 6.2.2.8; C196 §8.2)</li> <li>❖ No general waiver of consequential damages</li> </ul>	<ul style="list-style-type: none"> <li>❖ Selection of one of two risk allocation methods: (§3.8.2) "Safe Harbor" decisions—a release from liability for an omission, mistake, or error in judgment whether negligent or not, but performed in good faith, or Traditional risk allocation—each party fully liable for its own negligence and breaches of contract and warranty (a limitation on the designer's and contractor's liability can be established under this approach)</li> <li>❖ Waiver of consequential damages (§3.83)</li> <li>❖ The designer is responsible and liable for the services provided by its consultants (§12.9)</li> <li>❖ The contractor is responsible for acts or omissions of parties performing portions of the work for the contractor or any of its subcontractors (§13.1.2)</li> <li>❖ Indemnification clauses for negligent acts or omissions (owner—§21.1.1; designer—§21.1.3; contractor—§21.1.2)</li> </ul>

# Side-by-Side Document Comparison

AIA A295-2008	AIA C195-2008	ConsensusDOCS 300
<b>Liability Considerations</b>		
<p><b>Common to All</b></p> <ul style="list-style-type: none"> <li>❖ Spearin Doctrine—The protection traditionally offered by the implied warranty that the plans and specifications are adequate is eliminated by the contractor's contribution to design decisions.</li> <li>❖ Insurance—Potential need for software errors and omissions insurance for companies providing website design and hosting for projects where BIM is used collaboratively by design and construction parties. Due to the collaborative nature of IPD, consensus decisions are often made and the question of which insurance carrier coverage is applicable remains uncertain.</li> <li>❖ Role Blurring—The added involvement of the contractor and trade contractors in the design phase potentially increases their liability. Professional liability insurance may be required for contractors.</li> </ul>		
<b>Target Costs</b>		
<ul style="list-style-type: none"> <li>❖ The contractor bears costs in excess of the GMP without reimbursement or additional compensation from the owner (A195 §4.2.2)</li> </ul>	<ul style="list-style-type: none"> <li>❖ The members are responsible for expenses when the actual cost exceeds the target cost (C195 §§1.2.3 and 10.2.2; C196 §5.1; C197 §7.2)</li> </ul>	<ul style="list-style-type: none"> <li>❖ If the PTCE is exceeded, parties indicate loss allocation approach</li> <li>❖ Borne by the owner, OR (§11.5.1) shared by the parties on an agreed percentage or other basis (§11.5.2)</li> </ul>
<b>Delays and Extras</b>		
<ul style="list-style-type: none"> <li>❖ Because the contractor assumes greater responsibility throughout the development of the GMP, the owner and architect probably will not be liable to the contractor for damages resulting from errors, inconsistencies, or omissions the contractor reports (A295 §9.2.4), virtually eliminating delays and extras claims</li> </ul>	<ul style="list-style-type: none"> <li>❖ Because the contractor is involved early in the design phase and has greater knowledge of the project schedule, the ability to claim delays and extras during construction is severely limited</li> </ul>	<ul style="list-style-type: none"> <li>❖ Because the contractor is involved early in the design phase and has greater knowledge of the project schedule, the ability to claim delays and extras during construction is severely limited</li> </ul>
<b>Insurance</b>		
<ul style="list-style-type: none"> <li>❖ Owner's liability (A295 §11.2) <ul style="list-style-type: none"> <li>❖ Property (A295 §11.3)</li> <li>❖ Boiler and machinery (A295 §11.3.2)</li> <li>❖ Loss of use (A295 §11.3.3)</li> </ul> </li> <li>❖ Architect (B195 §1.4) <ul style="list-style-type: none"> <li>❖ Professional liability</li> </ul> </li> <li>❖ Contractor (A295 §§11.1.1.1 - 11.1.1.8) <ul style="list-style-type: none"> <li>❖ Coverage for claims specifically stated in general conditions agreement</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>❖ Availability of an insurance product is limited to market conditions and no effective coverage tool exists to insure this SPE arrangement</li> <li>❖ Upon dissolution of the SPE, the company ceases to exist and has no insurance coverage; subsequent claims may fall on the insurance coverage of the members' policies</li> </ul>	<ul style="list-style-type: none"> <li>❖ Owner <ul style="list-style-type: none"> <li>❖ Property (§21.4)</li> <li>❖ Owner's liability (§21.5)</li> </ul> </li> <li>❖ Contractor <ul style="list-style-type: none"> <li>❖ Elective professional liability (§21.3.2)</li> </ul> </li> <li>❖ Designer <ul style="list-style-type: none"> <li>❖ Insurance for claims arising out of performance of the agreed upon services (§21.2.2)</li> <li>❖ Professional liability (§21.3.1)</li> </ul> </li> </ul>
<b>Dispute Resolution</b>		
<ul style="list-style-type: none"> <li>❖ Initial decision maker [30 days] (A295 §13.2)</li> <li>❖ Mediation [approximately 60 days] (A295 §13.3)</li> <li>❖ Arbitration (A295 §13.4)</li> </ul>	<ul style="list-style-type: none"> <li>❖ Mutual decision [15 days] (C195 §18.2)</li> <li>❖ Governance board [30 days] (C195 §18.3)</li> <li>❖ Neutral and dispute resolution committee [60 days] (C195 §18.4)</li> <li>❖ Neutral reaches final and binding decision (C195 §18.4)</li> </ul>	<ul style="list-style-type: none"> <li>❖ Direct discussion through parties' representatives [5 days] (§23.2)</li> <li>❖ Management group (§23.2)</li> <li>❖ Elective method: dispute mitigation using a project neutral or dispute review board [5 days] (§23.3)</li> <li>❖ Mediation [45 days] (§23.4)</li> <li>❖ Arbitration or litigation (§23.5)</li> </ul>
<b>Incentive Compensation Programs</b>		
<ul style="list-style-type: none"> <li>❖ Voluntary choice of owner to share any savings generated when the actual cost of construction is less than the GMP (A195 Exhibit A, §A.1.1.1)</li> </ul>	<ul style="list-style-type: none"> <li>❖ Incentive compensation when actual cost of construction is less than the target cost (C195 Article 10)</li> <li>❖ Goal achievement compensation (C195 Exhibit E)</li> </ul>	<ul style="list-style-type: none"> <li>❖ The management group develops a financial incentive program to encourage collaborative project delivery and specified in an amendment to the agreement (§11.2)</li> <li>❖ If actual cost of the project is less than the PTCE the parties can share the savings on a specified percentage or other basis (§11.4)</li> </ul>