NAVIGANT

CONSTRUCTION

# AVOIDING CONSTRUCTION CONFLICT AND DISPUTES WITH INTEGRATED PROJECT DELIVERY

## SUMMARY

Relationships in construction contracting are often characterized by divergent interests, compounded by uncertainty. These conditions often lead to conflict and disputes. However, conflict on construction projects is not inevitable. With the use of Integrated Project Delivery (IPD) techniques, conflict can be reduced or managed and at best can be avoided altogether.

## TRADITIONAL MODELS OF CONTRACTING

Reduced to fundamentals, the traditional construction industry contractual arrangement for project delivery has been the design-bid-build model, where the design professionals enter into a separate contract with the owner, who in turn separately contracts with the general contractor, who, in turn, contracts separately with the various trade contractors, suppliers and vendors. Variations on this basic arrangement have included contractors taking on the role of a program or construction manager, either with or without contractual risk for the delivery of the project; or, where the contractor or the design professionals take on design, construction and procurement roles in the nature of design-build or engineer-procure-vonstruct arrangements. Regardless of the project delivery structure, each of the parties to the traditional arrangement have had fragmented rights and obligations, and most often differing interests, goals, and objectives, all of which was a fertile ground for conflict and disputes.

## PARTNERING

Partnering, as conceived and implemented in the United States,[1] was more of an optimistic mind-set than a project delivery system.[2] It most often began with one- or two-day facilitated workshops at the beginning of the construction phase, sometimes enhanced by follow-up sessions during the course of construction. In these meetings, representatives of the owner, contractor, key subcontractors and design professionals would be led through a series of team-building exercises designed to sharpen their communication and conflict-resolution skills and to enhance their commitment to the project and to each other. The end result of the initial meetings would be a "partnering charter," reflected sometimes in the form of a flip chart that was signed by all those attending the meeting.

1. "Partnering" was said to have been conceived by Charles Cowen, then general counsel of the Army of Engineers. See, Ronco & Ronco, *Partnering Manual for Design and Construction,* (McGraw-Hill, 1996).
2. Construction Industry Institute, The Partnering Process — Its Benefits, Implementation and Measurement, Clemson University, Research Report, pp. 102-111 (September, 1996).

In the partnering charter, the parties would identify key concerns and determine how issues and problems would be addressed at the earliest opportunity and resolved at the lowest level. However, the charter was never binding on the parties, and, in effect, the parties, having discussed and hopefully "aligned" their goals and objectives, were simply aspiring to collaborate, cooperate, and communicate during the course of the project.[3]

While partnering had some successes, quite a few strong supporters and cheerleaders, and, while still used sporadically, it has not stood the test of time. Hard evidence is scant that partnering techniques alone really reduced conflict in the absence of strong financial incentives. And, the informal commitments to openly cooperate, collaborate, communicate and generally align one's interests with other parties were in implicit, if not explicit, tension with the strict contractual obligations of the parties. Today, except for historical mention, one hears or reads little about the current use of the partnering process. In fact, when the Engineering News-Record, the leading U.S. construction weekly periodical, published an assessment of Integrated Project Delivery in May, 2010, a prominent engineer was quoted as saying that IPD "may go the way of total quality Control [TQM] and partnering".[4]

## PROJECT ALLIANCING

Project Alliancing, first developed by British Petroleum in the early 1990s for North Sea offshore oil drilling projects, and implemented later in that same decade in Australia on similar oil drilling, pipeline and other large infrastructure projects, is generally considered a successful means of delivering large projects with a minimum of conflict.[5] Essentially, Project Alliancing is a true project delivery system, embodied in one or more contracts, whereby the key project participants, including the owner, design professionals, prime contractor and major sub-contractors mutually contract to develop, finance, design, engineer, procure materials, and construct the project under the following principles:

- Creation of a true contractual relationship whereby each party shares to a greater or lesser degree in the economic success or failure of the project, so that it is in all parties, economic and commercial interest to cooperate, collaborate, and communicate openly to resolve problems on the job.
- Each major party has a primary role in the governance and management of the project.
- The owner agrees generally to pay all costs of design and construction, including some overhead costs, regardless of whether there are cost overruns over and above a Target Cost.
- The non owner parties (NOPs) usually put only their anticipated profit at risk in the event that the cost of the project exceeds the target cost.
- Built-in incentives to encourage and reward the NOPs to meet certain project objectives other than budget and schedule, such as safety, diversity participation, environmental, and performance or operating standards.
- Provisions for no blame, no disputes, no arbitration, no litigation, and no internal claims by any party against another party, except for willful default or possible insolvency. Damage claims for defective work, schedule misses, negligence, inefficiencies, and other typical shortcomings are mutually waived.

For the most part, Project Alliancing has had an excellent track record in reducing conflict among the participants.[6] The reasons for less conflict and fewer disputes with Project Alliancing arrangements appear to be: (1) the structuring of the contractual relationships such that the parties have a common economic interest in completing the project on time and within or less than the target cost; (2) The risk of economic disaster is greatly reduced for the NOPs, who stand to lose only their anticipated profit; (3) The no blame, no claims, reduced liability, and no arbitration or litigation provisions further reduce the liability exposure of the parties. In short, the root causes of conflict — divergent interests, compounded by risk and uncertainty — are taken out of the Project Alliancing equation, and, instead, the participating parties' interests are truly aligned and the uncertainty and risk of loss for failure is drastically reduced.

## INTEGRATED PROJECT DELIVERY SYSTEMS

Integrated Project Delivery (IPD) is essentially the U.S. version of Project Alliancing, incorporating similar contracting concepts of:

- Active involvement of all key project participants from inception to completion of the project under a singular contractual arrangement, inclusive of at least the owner, design professionals and prime contractor;
- Shared risk and reward, based on project outcomes;

3. "Nobel, Friend of the Project — A New Paradigm for Construction Law Services in a 'Partnered' Construction Industry," Vol. 15, Pt. 1, The International Construction Law Review, p. 78 (January, 1998).
4. Engineering News-Record, p. 23 (McGraw-Hill Publications, May 10, 2010).
5. Wilke, Alliancing for Infrastructure Projects; Sharing Risks and Rewards With a "No-Blame" Agreement, J. Am. Coll. Constr Lawyers (Special Ed. May 2007), pp. 147 to 154, Appendix C.
6. Noble, C., "Can Project Alliancing Agreements Change the Way We Build?", 1 Architectural Record, p. 1–2 (July, 2007); A. Chew, "Alliancing in Delivery of Major Infrastructure Projects and Outsourcing Services in Australia — An Overview of Legal Issues," 21 International Construction Law Review, pp. 319–355 (2004); Rowlinson, S., Cheung, F. Simons, R., and Rafferty, A., "Alliancing in Australia — No-Litigation Contracts: A Tautology," 132 Journal of Professional Issues in Engineering, Education and Practice, pp. 77–81 (2006).

- Mutual development of the project cost, completion dates, performance specifications, and other target goals;
- Collaborative control of the management of the project and decision-making by the key participants
- Reduced liability of the parties for failure of performance[7]

IPD was clearly inspired by the successes of Project Alliancing, but did not make an appearance on the U.S. scene until about six years ago. A year or so later, in 2007 and 2008, two U.S. construction industry organizations published IPD contracting forms for the U.S. domestic market. The American Institute of Architects (AIA) published two separate families of documents, the so-called transitional IPD documents, which were built on the Construction Management model, and the Single Purpose Entity model, which was developed as the contract embodiment of the principles stated in the AIA document, "Integrated Project Delivery: A Guide."[8] Another set of IPD documents was published by a conglomerate of organizations known as ConsensusDOCS in their ConsensusDOCS 300 Series, first published in 2007.[9]

IPD differs from Project Alliancing in the following particulars:

- IPD is often used with Building Information Modeling (BIM)[10] and Lean Contracting[11] techniques and principles, which provide electronic platforms for instant design development and coordination and response times between the key project participants.[12]
- While the owner bears virtually all of the cost in Project Alliancing, some IPD agreements provide for partial or total cost-shifting to the contractor parties in the case of cost overruns; and some commentators have recommended a guaranteed maximum price arrangement.[13]
- While claims for delay and consequential damages as between the project participants are generally waived, other claims are not. For example, defective work and warranty claims may still be allowed; similarly, third-party claims against one or more of the key participants may not be waived or are transferred to builders risk insurance.
- Generally, only key subcontractors, e.g., structural, mechanical, electrical and plumbing trades, are included within the project IPD team; all other subcontracts and vendor supplier agreements are independent of the IPD system.

In summary, the American approach to collaborative construction contracting has taken a more conservative and tentative approach to risk sharing, by allocating at least some of the traditional construction risks in traditional ways and placing those risks on the responsible parties. The IPD model is more flexible than Project Alliancing in that under the current contracting forms the parties are given more options to adjust risk allocation to the particular interests of the owner, the project participants, and the project conditions. If this more limited risk allocation model is successful, it may be an antidote to the problems with cost overruns as experienced with Project Alliancing. Yet, the IPD process is still at the toddler stage of development in the U.S., with questions still being raised by construction industry leaders as to its future.[14]

7. See, generally, Ashcraft H., "Negotiating an Integrated Project Delivery Agreement," 31 The Construction Lawyer, No. 3, pp. 17–34 (Summer, 2011); and O'Connor, P., and Bomba, M. , "Integrated Project Delivery, Part I: Collaboration Through New Contract Forms," 3 Journal of the American College of Construction Lawyers, No. 2, pp.71–129 (Summer, 2009.
8. AIA national/AIA California Council, Integrated Project Delivery: A Guide, Version I (2007), available from the AAA website, http://www.aia.org/contractdocs/reference; AIA Document Commentary, AIA Document C 191–2009, Standard Form Multi-Party Agreement for Integrated Project Delivery.
9. ConsensusDOCS consists of 21 member organizations, including the Associated General contractors of America (AGC), the Construction Owners Association of America (COAA), the Construction Users Roundtable (CURT), Lean Construction Institute (LCI) and a large number of subcontractor organizations; see http://www.consensusdocs.org. For a discussion of the documents, see Perlberg, B., Gregory, D.W., and Orien, M.A., "The 2011 Comprehensive Update to ConsensusDocs", 31 The Construction Lawyer, No. 3, pp. 46 (Summer, 2011); and Peartree K., "The ConsensusDOCS 300 Standard Form of Agreement for Collaborative Project Delivery," Vol. 29, No. 1 The Construction Lawyer, pp. 25–32 (Winter, 2009).
10. The AIA California Council describes the BIM technology as follows: "A building information model is a digital representation of physical and functional characteristics of a facility. As such it serves as a shared knowledge resource for information about a facility forming a reliable basis for decisions during its life cycle from inception onward. A basic premise of BIM is collaboration by different stakeholders at different phases of the life cycle of a facility to insert, extract, update, or modify information in the BIM to support and reflect the roles of that stakeholder. The BIM is a shared digital representation founded on open standards for interoperability." AIA California, Integrated Project Delivery: A Working Definition, Version I, Updated, May 15, 2007. Both the AIA and ConsensusDOCS have published separate BIM documents. See, AIA Document E-202-2008, Building Information Modeling Protocol Exhibit, and ConsensusDOCS 301, BIM Addendum (2007); for a discussion of these documents, see Hurtado & O'Connor, "Contract Issues in the Use of Building Information Modeling, International Construction Law Review [2008], p. 262, et seq; Lowe, R. and Muncey, J.M., "ConsensusDOCS 301 BIM Addendum," Vol. 29, No.1 The Construction Lawyer, pp 17–24 (Winter, 2009).
11. For general information on "Lean Construction", see the Lean Construction Institute website: http://www.leanconstruction.org.
12. See Ashcraft, H., and Hurtado, K., "Developing Meaningful Contract Terms for Electronic Communications on Construction Projects," Vol. 29, No. 2, The Construction Lawyer, pp. 5–14 (Spring, 2009).
13. See, for example, Darriongton, J.W. and Lichtig, W.A., "Rethinking the 'G' in GMP: Why Estimated Maximum Price Contracts Make Sense on Collaborative Projects," Vol. 30, No. 2, pp. 29–39, The Construction Lawyer (Spring, 2010); Ashcraft H., "Negotiating an Integrated Project Delivery Agreement," Paper presented to the Canadian College of Construction Lawyers, Annual Meeting, Ottawa (2011); hashcraft@hansonbridgett.com.
14. See Post, N.M., "Integrated Project Delivery Boosters Ignore Many 'Flashing Red Lights'", Engineering News-Record, pp. 22–23 (May 10, 2010).

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## CONCLUSIONS

1. Traditional project delivery systems, including design-bid-build, construction management, design-build and engineer-procure-construct, have generally allocated risk on adversarial or arms-length principles. Construction risk was typically shifted whenever possible and placed on parties having the least economic leverage to avoid it. Hence the fundamental interests and objectives of the parties were divergent. This form of risk allocation has great potential for conflict and disputes.
2. Aspirational efforts, such as partnering, non contractual collaborative, and similar arrangements, which simply encourage parties to establish a "team attitude" and to collaborate, cooperate, communicate, and align their interests have not proven to be consistently effective in reducing conflict on construction projects. Hence, partnering and similar aspirational arrangements today are primarily of historical interest and are not a promising trend for reducing conflict on construction projects.
3. Because (a) the potential for conflict on construction projects is directly or nearly directly proportional to the divergent interests and objectives of the parties; and (b) conflict can be successfully avoided and managed in project delivery systems if and to the extent that the interests of the parties can be made concurrent; these two principles are clearly demonstrated with Project Alliancing and Integrated Project Delivery systems. When the key parties' interests are truly aligned in an enforceable contractual arrangement, and when uncertainty and the risk of economic loss is reduced, conflict and disputes are demonstrably reduced or avoided altogether. Whereas, in the traditional project delivery systems, when the parties' interests and objectives are not truly aligned, and when those divergent interests are compounded by the uncertainty of economic loss, conflict and disputes abound.
4. The U.S. version of Project Alliancing is IPD. While similar to Project Alliancing in many respects, IPD has taken a somewhat different approach to allocation of risk. At least some of the risk of cost overruns is typically placed on the non owner parties, and a greater degree of potential liability for project defects and failures is placed on the responsible parties. However, there is not enough experience with IPD and its variations to determine whether this method will be consistently successful in reducing the cost overrun risk and become a significant form of project delivery in the United States.