Meeting the Standard of Care in an Evolving Project Delivery Environment

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Gray Reed & McGraw

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- Prior to law school, Tim worked as a civil engineer for over four years, gaining experience in both the private and public sector.

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Gray Reed & McGraw

- Over 130 attorneys
- Full-service, commercial law firm
- Offices in Dallas & Houston
- Opened in 1985
- The Construction Law section includes three 2017 Rising Stars (Texas Super Lawyers Magazine- a Thomson Reuters company)

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Standard of Care

The standard of care for all professional engineering and related services performed or furnished by Engineer under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing under similar circumstances at the same time and in the same locality. Engineer makes no warranties, express or implied under this Agreement or otherwise, in connection with the Engineer's services.

EJCDC E-500; Section 6.01A

Integrated Project Delivery (IPD) Defined

- As a Delivery Method:
  - A delivery methodology that fully integrates project teams in order to take advantage of the knowledge of all team members to maximize the project outcome. IPD is the highest form of collaboration because all three parties (Owner, Design Professional, Constructor) are aligned by a single contract.

From AGC

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Integrated Project Delivery (IPD) Defined

- As a Philosophy:
  - When integrated practices or philosophies are applied to more traditional delivery approaches such as CM at-Risk, Design-Build or Design-Bid-Build (where the owner is not party to a multi-party contract). In addition to not having a multi-party contract, IPD as a Philosophy is characterized by "traditional" transactional CM at-Risk or Design-Build contracts, some limited risk-sharing (e.g. savings splits), and some application of IPD principles.

From AGC

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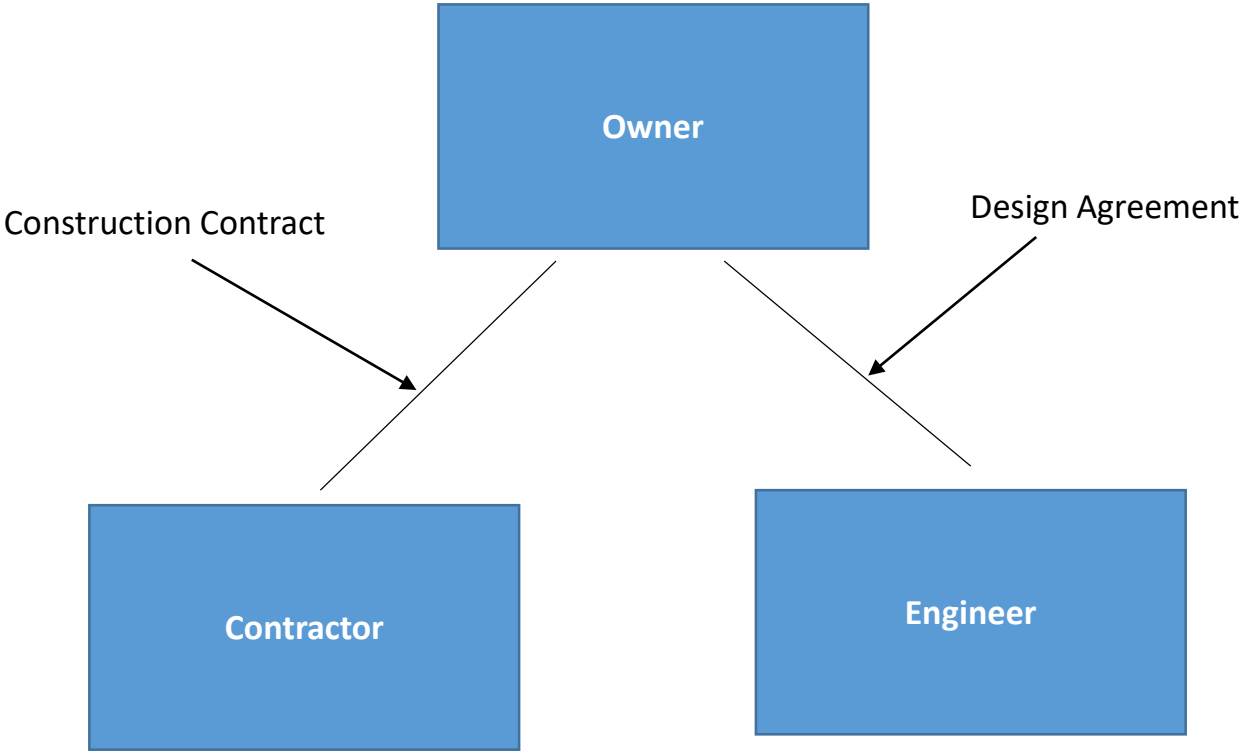
The Status Quo: Design-Bid-Build



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The Status Quo for the Design Professional: Design-Bid-Build

The Upshot: Status Quo is Not So Bad for the Design Professional

- Cost
  - Can often contract for professional services on an hourly rate, not stipulated sum basis
  - Reimbursable expenses often not included in the amount of a stipulated sum
- Control
  - Design Professional is often advisor to the Owner and they often work together. Now teaming up with Contractor for IPD.

The Status Quo for the Design Professional: Design-Bid-Build

- Liability Considerations
  - Often have a limitation of liability in contract with owner.
  - Anti-indemnity statutes.
  - “Betterment” or “Added Benefit” defense.
  - No Contractual liability to Contractor for economic losses.

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Anti-Indemnity Statute

Texas Civil Practice and Remedies Code 130.003(b)

A covenant or promise in, in connection with, or collateral to a construction contract other than a contract for a single family or multifamily residence is void and unenforceable if the covenant or promise provides for a registered architect or licensed engineer whose engineering or architectural design services are the subject of the construction contract to indemnify or hold harmless an owner or owner's agent or employee from liability for damage that is caused by or results from the negligence of an owner or an owner's agent or employee.

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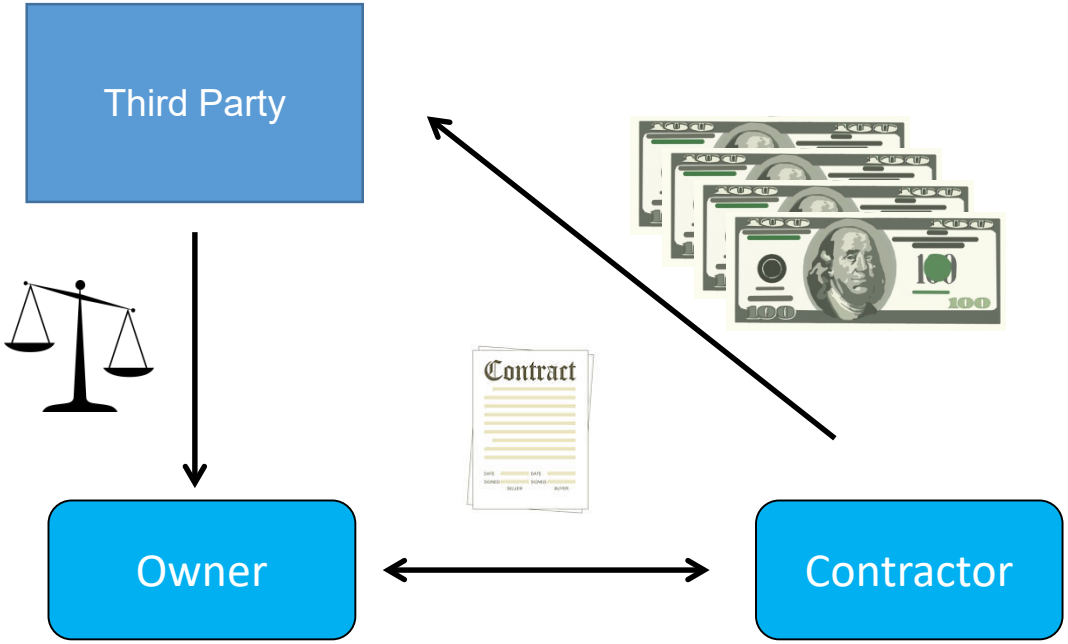

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Betterment

- Guiding Principle: Plaintiff is entitled to damages that would place plaintiff in same position he would have been had the contract been performed.
- What happens when an element is missing from the Design?
  - Underdesigned septic system. 1,000 sq. ft. drainage field design, 1,200 sq. ft. required. Engineer not liable for cost of constructing the additional 200 sq. ft.
- Still may be liable for increased cost of performing needed work. (i.e., contractor premium pricing, removal of inadequate work)

Economic Loss Doctrine

- Difficult to define, but: Economic Loss is loss that is the subject of a contract.
- System of Contracts
- No liability to Contractor for Contractor's increased cost of performance due to engineer mistakes.

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Why Integrated Project Delivery?

- A Better Mousetrap?
  - 30% of projects do not make schedule or budget
  - 92% of project owners said that architect drawings are typically not sufficient for construction
  - 37% of materials used in construction industry become waste
  - According to BLS, construction industry productivity has decreased since 1964 while other industries have increased.
- The owner wants it
- Technical and budgetary challenges
- Technical ability
- Integrated Project Delivery
  - AIA (A195, A295, B195; C191) and ConsensusDocs (300)

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IPD: Case Studies and Surveys Evidence Positive Results

- One case study had no change orders that resulted in an increase to the contract sum on $46mm hospital project on congested urban campus.
- Only 63 RFIs
- No disputes or claims
- Project finished 45 days ahead of schedule even with additional work
- Results indicate that IPD was significantly better in following categories:
  - Schedule predictability
  - Cost and budget control
  - Quality of outcome
  - Quantity and handling of changes
  - Morale of project stakeholders
  - Overall value delivered

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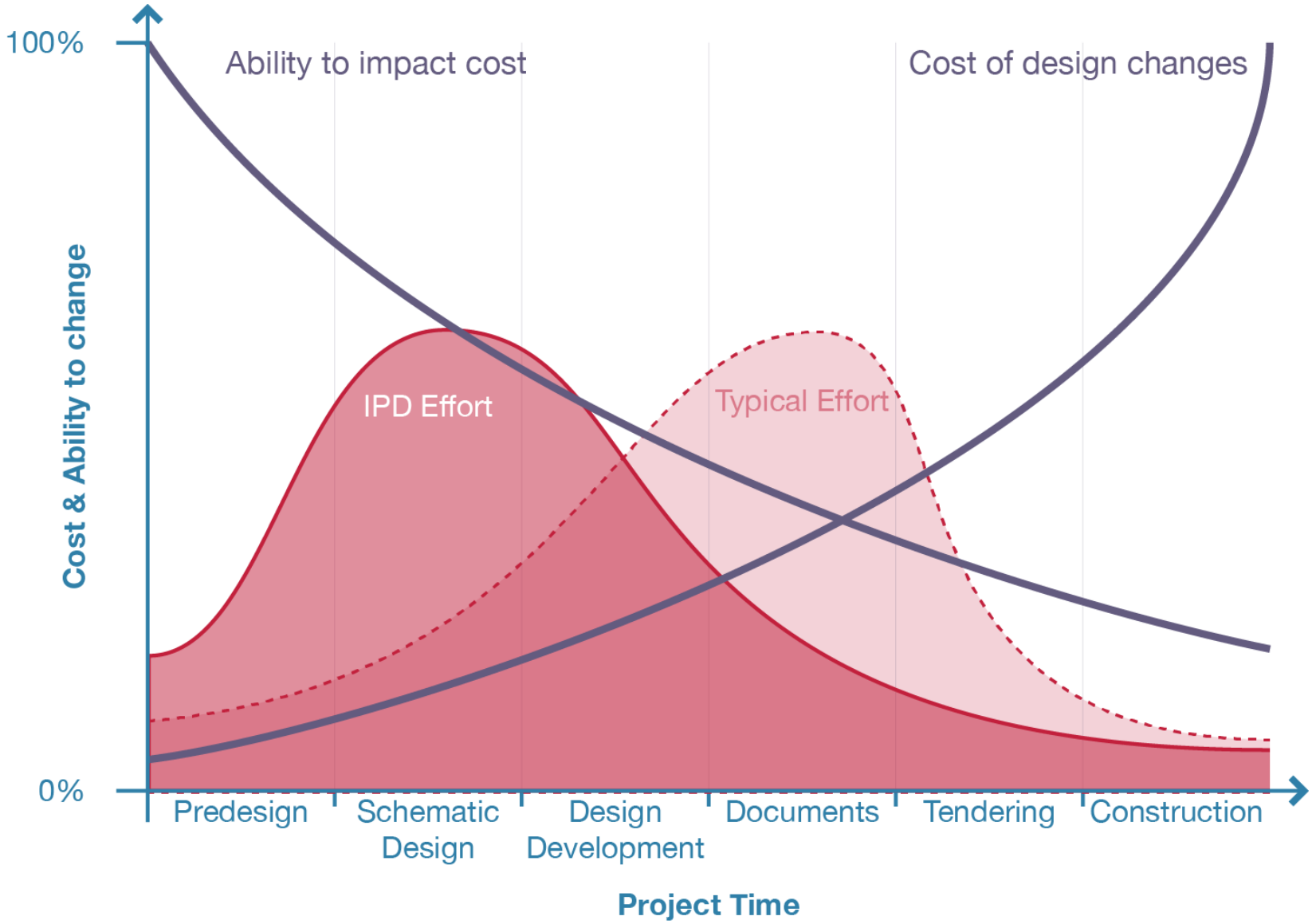

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What is Integrated Project Delivery?

IPD Distinguished From Traditional Project Delivery

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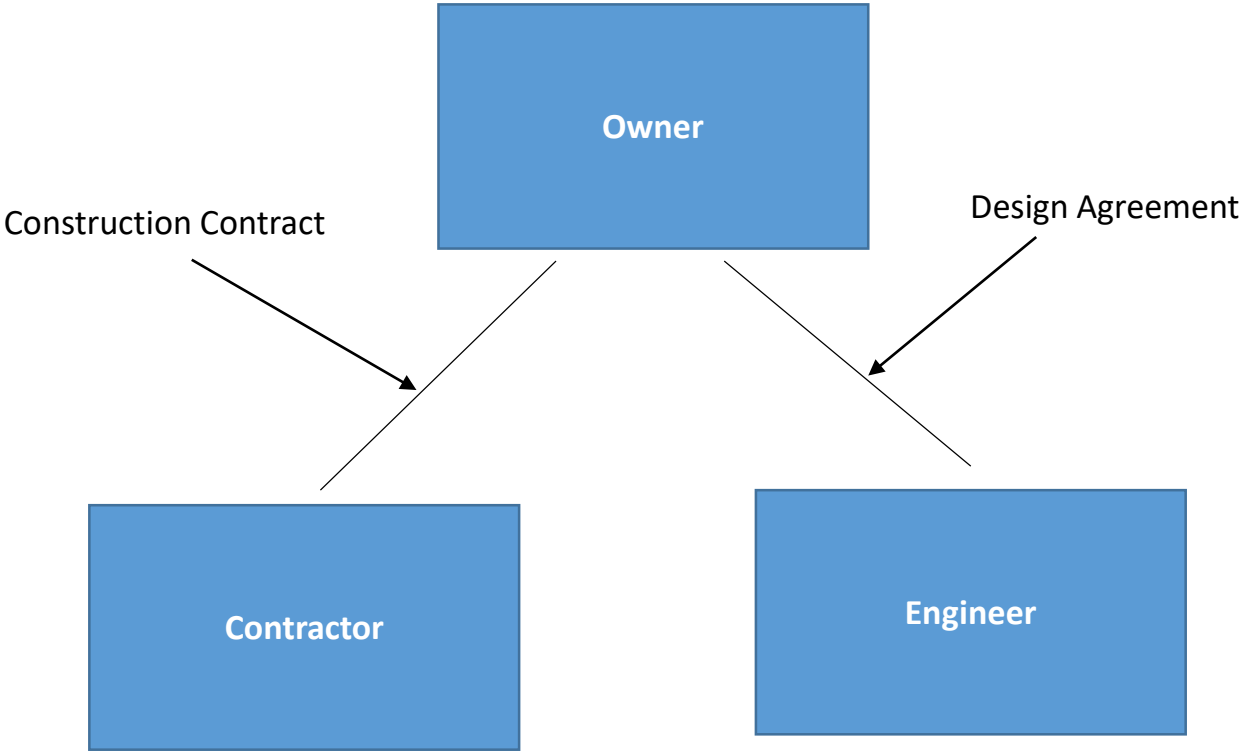
Design-Bid-Build



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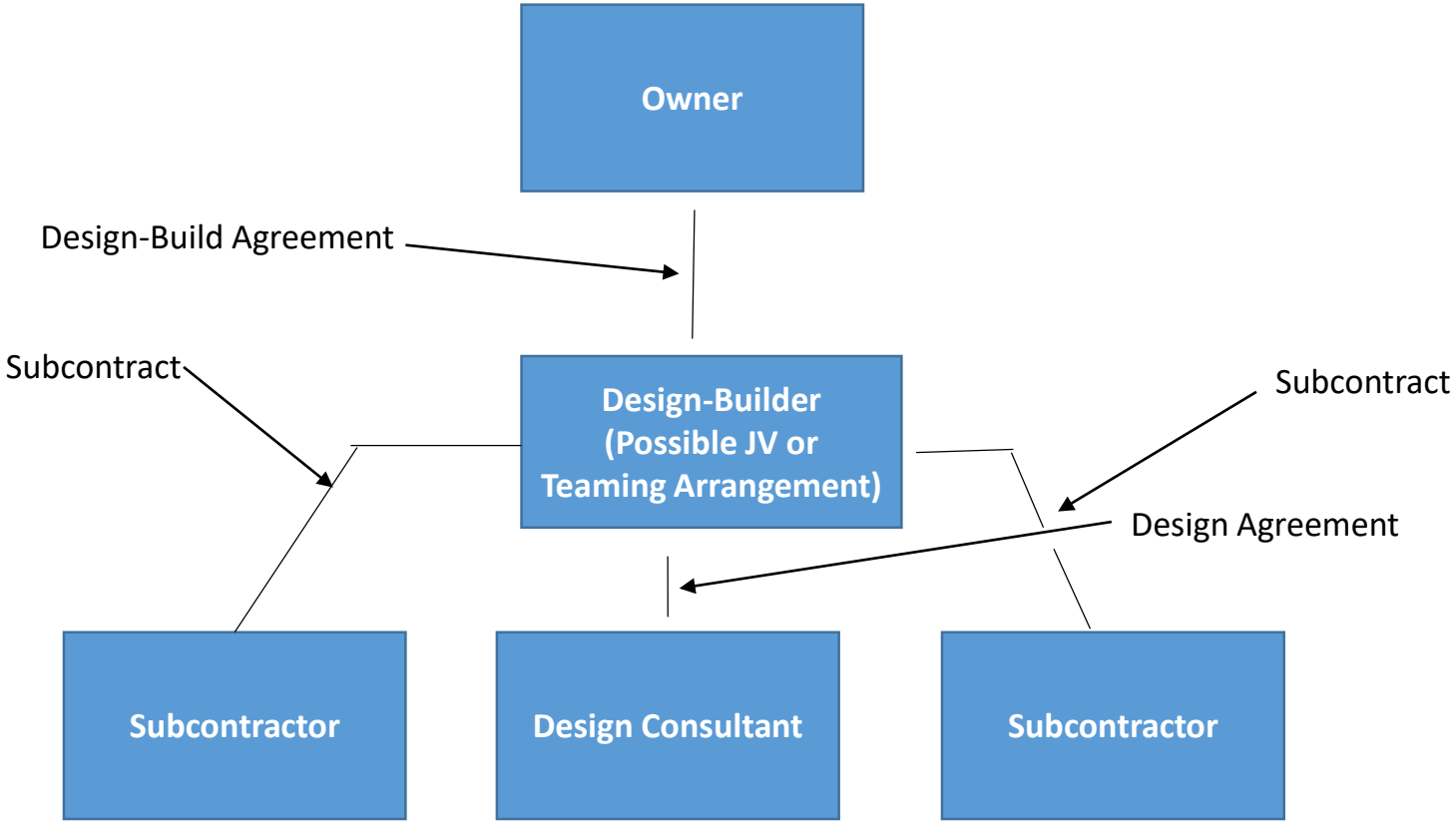
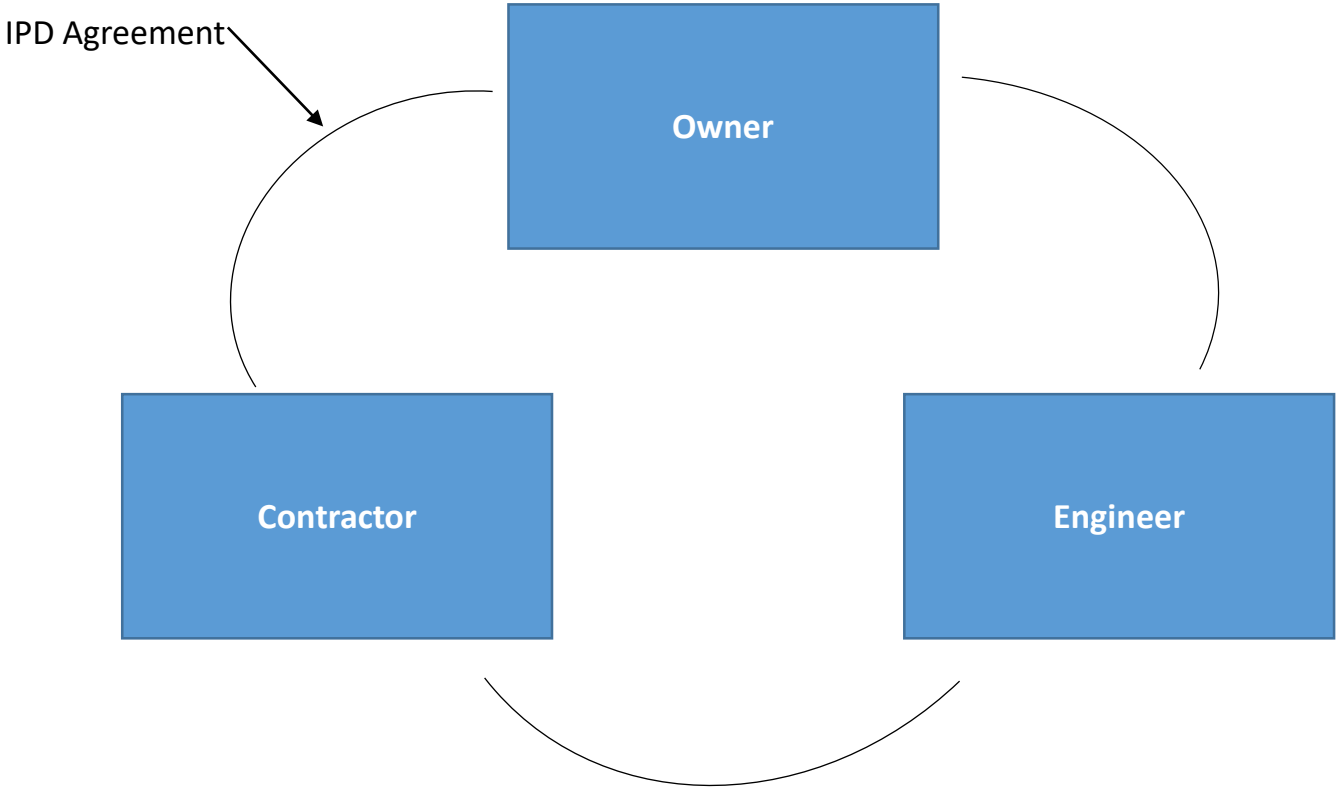
Design-Build



Integrated Project Delivery



What is Integrated Project Delivery?

IPD Distinguished From Traditional Project Delivery

Traditional Project Delivery		Integrated Project Delivery
Individually managed and transferred	**Risk**	Collectively managed and shared
Individually pursued; can be distributive in nature	**Compensation**	Value based; Team success
2 dimensional	**Communications/Technology**	BIM
Allocate and transfer risk	**Agreements**	Risk sharing
Minimal	**Collaboration**	Integrated team entity
Individual Success (Profit/minimizing losses)	**Goal**	Achievement of Project Goals

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What is Integrated Project Delivery?

Accepting and Managing Risk Instead of Avoiding and Transferring It

Not This	Instead, This
Complaints about Conflicting Documents	**Validate and Optimize**
No responsibility for design	**Joint Acceptance of responsibility**
Not reasonably inferable or Stupid RFIs	**Supplement and Detail**
Not E&O	**Joint Owning of Design Intent**
Minimal	**Collaboration**
Individual Success (Profit/minimizing losses)	**Goal**

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How Does IPD Work Contractually?

- Off-the-Shelf Documents
  - AIA (A195, A295, B195; C191)
  - ConsensusDocs (300)
  - No EJCDC document yet
- At the Highest Level…
  - Single, tripartite agreement between owner, design professional and contractor
  - Additional parties can be added later
  - Agreements function like a JV Agreement
    - (sharing of profits/losses, describes how decisions will be made)

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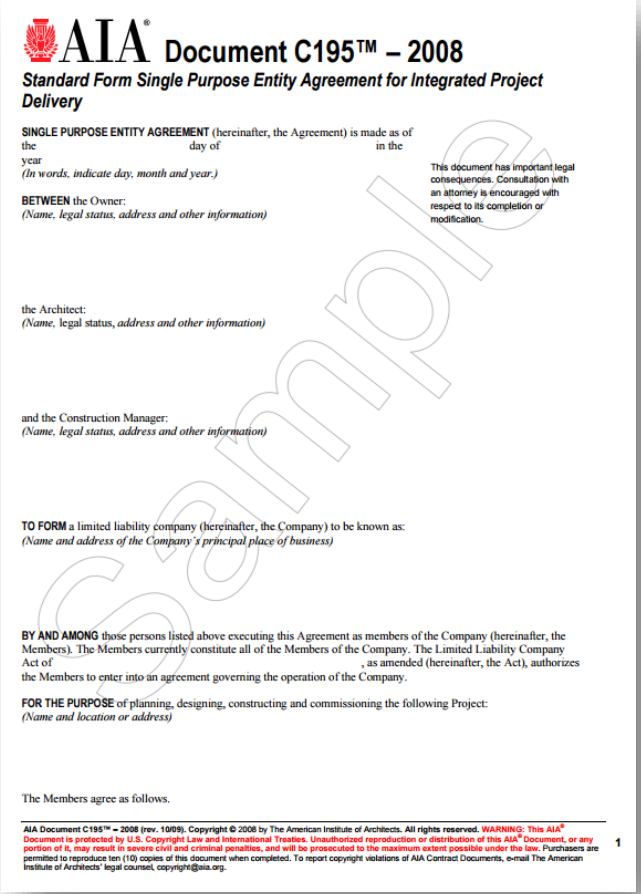
AIA C195

- Single purpose entity (SPE) formed by owner, design professional and contractor
- Each party enters into agreement with SPE



AIA Document C195™ – 2008

Standard Form Single Purpose Entity Agreement for Integrated Project Delivery

SINGLE PURPOSE ENTITY AGREEMENT (hereinafter, the Agreement) is made as of the day of in the year
(In words, indicate day, month and year.)

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

BETWEEN the Owner:
(Name, legal status, address and other information)

the Architect:
(Name, legal status, *address and other information)*

and the Construction Manager:
(Name, legal status, address and other information)

TO FORM a limited liability company (hereinafter, the Company) to be known as:
(Name and address of the Company's principal place of business)

BY AND AMONG those persons listed above executing this Agreement as members of the Company (hereinafter, the Members). The Members currently constitute all of the Members of the Company. The Limited Liability Company Act of , as amended (hereinafter, the Act), authorizes the Members to enter into an agreement governing the operation of the Company.

FOR THE PURPOSE of planning, designing, constructing and commissioning the following Project:
(Name and location or address)

The Members agree as follows.

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Sample

AIA C195

- Contractual timeline
  - Conduct a Collaboration Standards Workshop
  - Conceptualization and Criteria Design Phase
  - Develop a Target Cost Proposal
  - Negotiate Target Cost Amendment
  - Detailed Design Phase
  - Implementation Documents Phase
  - Agency Review Phase
  - Construction Phase
  - Closeout Phase

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AIA C195 – Cost Control

- Target cost v. GMP
- Amounts parties can get paid:
  - Actual costs up to the target cost
  - Incentive compensation (target cost less actual cost)
  - Goal achievement compensation (e.g., timely completion)
- If target cost is exceeded, then compensation limited to target cost + goal achievement compensation
- Target cost reduced to extent project goal set in target cost amendment not achieved
- Company audit rights to verify party cost information

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AIA C195 – Project Controls and Governance

- Two-tiered Management System
  - Governance Board
    - Handles high-level decision-making
    - Owner generally has majority
  - Project Management Team
    - Handles day-to-day
    - Develops goals
    - Creates work plans

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AIA C195 – Risk Control

- Big picture: Risk sharing instead of risk transfer
  - No recovery of costs when actual cost exceed target cost
  - Limited right of recovery against other members for tort
    - Limits of available insurance
  - Indemnification by the Company for damages, except for claims related to willful misconduct.
  - Assignment of claims against non-members to the Company
  - SPE structure shields individual members from breach of K claims from non-members
  - Internal arbitration process

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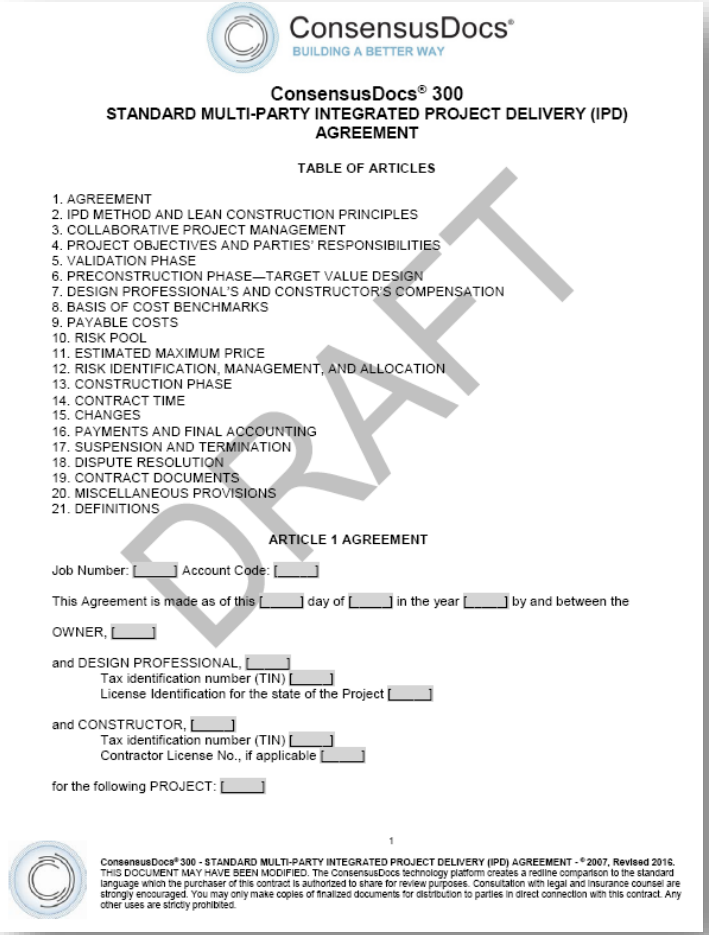
ConsensusDocs C300

- Tripartite Agreement but No SPE
- No separate party agreements-50+ pages
- Contractual Timeline
  - Owner develops owner's program
  - Validation Phase
    - Evaluation of owner's program
    - Expected cost vs. allowable cost
  - Preconstruction Phase
    - Develop a project schedule
    - Responsibility matrix
    - Work plan
  - EMP Amendment



ConsensusDocs®
BUILDING A BETTER WAY

ConsensusDocs® 300
STANDARD MULTI-PARTY INTEGRATED PROJECT DELIVERY (IPD) AGREEMENT

TABLE OF ARTICLES

1. AGREEMENT
2. IPD METHOD AND LEAN CONSTRUCTION PRINCIPLES
3. COLLABORATIVE PROJECT MANAGEMENT
4. PROJECT OBJECTIVES AND PARTIES' RESPONSIBILITIES
5. VALIDATION PHASE
6. PRECONSTRUCTION PHASE—TARGET VALUE DESIGN
7. DESIGN PROFESSIONAL'S AND CONSTRUCTOR'S COMPENSATION
8. BASIS OF COST BENCHMARKS
9. PAYABLE COSTS
10. RISK POOL
11. ESTIMATED MAXIMUM PRICE
12. RISK IDENTIFICATION, MANAGEMENT, AND ALLOCATION
13. CONSTRUCTION PHASE
14. CONTRACT TIME
15. CHANGES
16. PAYMENTS AND FINAL ACCOUNTING
17. SUSPENSION AND TERMINATION
18. DISPUTE RESOLUTION
19. CONTRACT DOCUMENTS
20. MISCELLANEOUS PROVISIONS
21. DEFINITIONS

ARTICLE 1 AGREEMENT

Job Number: [_____] Account Code: [_____]

This Agreement is made as of this [_____] day of [_____] in the year [_____] by and between the

OWNER, [_____]

and DESIGN PROFESSIONAL, [_____]
Tax identification number (TIN) [_____]
License Identification for the state of the Project [_____]

and CONSTRUCTOR, [_____]
Tax identification number (TIN) [_____]
Contractor License No., if applicable [_____]

for the following PROJECT: [_____]

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DRAFT

ConsensusDocs C300 – Cost Control

- Expected Maximum Price ("EMP") v. GMP
- Amounts Parties Can get Paid
  - Payable Costs (even if they exceed the EMP)
  - Profits (Risk pool)
  - Savings Actual Cost less than Expected Cost
- Payment for Cost Overruns.
  - Could have to return Risk pool amounts previously paid
- Audit Rights to Verify Party Cost Information

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ConsensusDocs 300 – Project Controls and Governance

- Two-tiered Management System
  - Team Management Group
    - Handles high-level decision-making
    - Decision-making by consensus, but Owner breaks ties
    - Less than unanimous decisions are subject to dispute resolution provisions
  - Project Management Team
    - Handles day-to-day
    - Develops goals
    - Creates work plans

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ConsensusDocs C300 – Risk Control

- Big picture: Risk sharing instead of risk transfer (but to a lesser extent)
  - Optional release of parties from liability
    - Waiver of Consequential Damages and
    - Waiver of Subrogation
  - Equitable adjustment to Target Cost for delays caused by Owner and Type II DSC.
  - Cross indemnity (narrow form)
  - No SPE structure to shield individual members from breach of K claims from non-members

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General Concerns with IPD

- Weak link can impact the whole team
- Significant upfront investment to get on the same page
- Highly dependent upon quality of staff
- Need to establish trust
  - Honesty
  - Ability to handle assignment
- Communication is key
- Performance bond and lien claims?

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Is IPD Right for My Project?

- Is the Project unique and technically complex?
- Are there job site constraints making close coordination necessary?
- Are there budgetary constraints?
- Do we have the right personnel to engage in IPD?
- Do the other parties have the right personnel to engage in IPD?
- Do we trust the Contractor/Owner/Design Professional to complete their tasks?
- Do we trust the Contractor/Owner/Design Professional to honestly report costs?
- Do we have the facilities/resources necessary to properly carry out?

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Is IPD Right for the Design Professional?

- Cost Considerations
  - Reimbursable expenses and reasonably clear profit opportunity for design development put at risk based on cost of entire project.
  - Relatively low design cost lumped in with relatively higher construction costs
- Control Considerations
  - Because of IPD structure, at risk of losing some influence over the owner

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Is IPD Right for the Design Professional?

- Liability Considerations
  - Potential taking on of liability through sharing of profits in Consensus Docs agreement
  - Minimal gain in reduction of liability through IPD agreement
    - Limitation of liability
    - Economic loss doctrine prevents liability to contractor
    - Betterment defense could already stave off liability to owner for under-designed items.
    - Indemnity from a thinly capitalized entity
  - Potential hampering of lien rights (AIA IPD Agreement arbitration)

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Best Practices:

- Vetting of Owner and Contractor to verify they will live up to their respective obligations ("pre-qual").
- Vetting of Project to verify that it is an appropriate candidate for IPD?
- Software compatibility and open lines of communication (office in one location?)
- Verify that you are appropriately staffed for the Project

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Questions?

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Thank you!

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