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TOP TEN RISKS FOR DUAL-LICENSED ATTORNEYS

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With the advent of reciprocity between the Oregon and Washington bars, there is an increased likelihood that a practitioner, particularly one located in the Portland/Vancouver metro area, will be dual-licensed. While being licensed in both Oregon and Washington enables counsel to serve a broader range of clients, or provide a full range of services to an existing client, it also offers traps for the unwary. After almost a decade of dancing through the multi-state minefield, the following are my top 10 tips/traps for dual-licensed construction law practitioners:

1. Oregon has a Construction Contractor's Board ("CCB"). Washington does not. Contractors in Washington are registered with the Bureau of Labor and Industries ("BOLI"). Both states require contractors to post a bond (or other securities). In Oregon, you file a lawsuit against the contractor and a separate claim with the CCB. The CCB processes the claim with the bond surety after the entry of judgment in the lawsuit. In Washington, you sue the contractor <u>and</u> the surety in the same superior court lawsuit. BOLI does not process the payment claim; you deal directly with the surety that posted the contractor's bond. Obviously, both states' claim procedures have rules and processes that must be followed.

2. In Washington, a material supplier's right to file a construction lien against a residential project can be extinguished if the homeowner pays the general contractor. No such rule exists in Oregon.

3. In Washington, absent some exceptions, you likely will not be entitled to file a construction lien if the party you contract with does not have a valid contractor's license. No such rule exists in Oregon.

4. The deadlines and dates relating to construction lien claims in Oregon and Washington are <u>completely</u> different. Moreover, a Washington lien cannot obtain super-priority over existing encumbrances against the improvement as some Oregon liens can. In Oregon, the distinction between new construction and alteration/repair work can be important in determining the lien's priority.

5. Washington statutes allow a potential lien claimant to send a stop payment notice to the construction lender. This notice requires the lender to withhold the amount claimed from a construction loan disbursement or risk being at least partially subordinated to the claimant's lien.

6. Oregon statutes allow owners and/or mortgagees to make information demands upon the lien claimant that have fairly short response deadlines. The failure to timely respond to these demands will likely result in a claimant not being entitled to seek its attorney fees and/or foreclosure costs or a loss in the lien's priority to the mortgagee's encumbrance.

7. Oregon statutes provide for the posting of a "Completion Notice" on a project. If this procedure is properly followed, it may "start the clock" regarding the lien recording deadline, regardless of the claimant's last day of work.

8. The rules for service of process differ in each state. Oregon's requirement for personal service is stricter. Washington does not require a plaintiff to file suit before it is served. The defendant can make demand upon the plaintiff to file the suit. In Washington, an answer or appearance typically must be filed in 20 days from the date of service. In Oregon, an appearance is usually due in 30 days. In Washington, you file a notice of appearance with the court to protect a defendant from a default. In Oregon, you send an ORCP 69 letter to plaintiff's counsel.

9. Oregon has Uniform Trial Court rules, which govern most of the "nuts and bolts" of case management, etc. at the trial court level. Washington relies much more heavily on each county's local rules to cover this area. In particular, King County, Washington, has voluminous local rules that a practitioner must be *very* familiar with to practice in that court. King County has two divisions, one located in Seattle and the other in Kent.

10. Washington court deadlines generally count backward from the end date. Oregon deadlines generally count forward from the first event. You must officially "note" a motion in Washington, and orders must be presented in open court or approved and signed by opposing counsel. Many Washington courts require you to confirm your motion prior to the hearing date.

11. Bonus: In both Oregon and Washington, the courts do not take kindly to the butchering of local town or county names. Know how to say Willamette and Puyallup before you enter the courtroom.

STANDING TO PROTEST BIDS UNDER ODOT AGENCY RULES

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Commonly a bid protest involves a second lowest bidder challenging the responsiveness of the lowest bidder. But how about reversing the roles: Can the lowest bidder challenge the responsiveness of the second lowest bidder? This article analyzes this unusual situation in the context of an ODOT solicitation.

Consider the following: Contractor A submits the lowest bid on an ODOT project. However, Contractor A's bid is found to be nonresponsive and it is disqualified. Proceeding on, ODOT considers Contractor B's bid, finds it responsive, and gives notice that it will award the contract to Contractor B.

Contractor A submits a protest on two bases: First, Contractor A protests on the basis that its bid is responsive. In the alternative, Contractor A protests on the basis that Contractor B's bid is not responsive with the upshot being that there are no responsive bids and the project should not be awarded to either contractor.

Contractor B responds that Contractor A, by virtue of ODOT having found its bid to be nonresponsive, lacks standing to challenge the responsiveness of Contractor B's bid.

In applying its rules, ODOT will award a contract to the lowest responsible bidder. ORS 279C.375(1). In order to be a responsible bidder, the bidder's bid must be responsive, *i.e.*, the bid must be in compliance with all prescribed public bidding procedures and requirements. ORS.279C.395. If not in compliance, ODOT shall reject the bid as not being responsive. *Id.*; OAR 731-005-0670(1)(b). In this scenario, the issue of responsiveness relates only to bid requirements for the specific project rather than a general issue with the contractor's qualifications.

Pursuant to ODOT rules, the right to protest a Notice of Intent to Award Bid, *i.e.*, standing, is limited to a certain class of bidders. OAR 731-005-0690(4). The bidder must be an "adversely affected Offeror" and must be one of three apparent low Bidders on an Invitation to Bid. OAR 731-005-0690(4)(a) and (c).

Whether or not Contractor A has standing turns on the definitions of Bidder and Offeror, including variations thereof. A Bidder is an entity that submits a Bid in response to an Invitation to Bid. OAR 731-005-0430(3). An Offeror is a Bidder or Proposer as applicable. OAR 731-005-0430(27). A Responsible Offeror, also a Responsible Bidder or Responsible Proposer, as applicable, is an entity that has submitted an Offer that meets the standards of OAR 731-005-0670 (standards specific to the project) and has not been disqualified pursuant to OAR 731-005-0710 (general standards). OAR 731-005-0430(34). Similarly, a Responsive Offer, also a Responsive Bid or Responsive Proposal, as applicable, is an Offer that substantially complies with applicable solicitation procedures and requirements and the Solicitation Document. OAR 731-005-0430(35).

In writing the rules, the agency chose to give standing to any adversely affected Offeror. The agency could have limited the right to protest to just Responsive Offerors, but it did not. Further, the agency places no limit on the subject matter of a protest. The adversely affected Offeror is allowed to protest all aspects of the Notice of Intent to Award Bid without limitation.

It then follows that Contractor A can simultaneously attack ODOT's rejection of its bid as nonresponsive while at the same time attacking ODOT's decision that Contractor B's bid was responsive. Indeed, if the situation were reversed, it would not raise an eyebrow for a second lowest bidder to attack the responsiveness of a lowest responsive bidder.

In sum, this article highlights the importance of a bidder to take care to make sure its bid is responsive in order to avoid the time, expense, and uncertainty of a bid protest. This article is written in the abstract without guidance from any court decision. Indeed, it's unclear how a court would handle this fact scenario if it were fully briefed. Further, rules vary from agency to agency, so the analysis in this article might not apply to a bid protest for a project administered by another agency. It would be best for a bidder to be responsive and avoid the dispute.

NEW CERTIFICATE OF MERIT LAW

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In 2005, Oregon joined several other states in requiring that a "certificate of merit" be filed with any claim against certain design professionals, with the enactment of what is now ORS 31.300. The law was championed by the American Institute of Architects Oregon (AIA) and the American Council of Engineering Companies-Oregon (ACEC). Their concern was that design professionals were being brought into litigation for matters beyond their control, and outside their scopes of professional responsibility. The "certificate of merit" statute was intended to provide an additional check on the purported liability of a design professional from a practitioners' perspective.

A certificate of merit law with clear standards and processes is more likely to achieve the goal of limiting actions against design professionals to meritorious claims. Now, the AIA and others have proposed additional amendments to ORS 31.300. As this edition goes to print, the amendments have passed the Senate, and they are headed to a work session before the House Consumer Protection and Government Effectiveness Committee. The amendments raise issues of statutory drafting and the intersection between special pleading requirements like this and Oregon's underlying rules of Rules of Civil Procedure and pleading practice.

According to the written testimony submitted by the American Institute of Architects Oregon (AIA) and the American Council of Engineering Companies-Oregon (ACEC), the changes proposed in SB 383 A would require the following:

- That the expert be licensed in Oregon,
- That the expert has the same license and corresponding experience as the design professional in question, and
- That the expert has discussed with the attorney the alleged conduct, which the lawyer than "summarizes" in the pleading itself for filing.

The Bill's proponents wish to clarify that only an Oregon-registered architect should be allowed to testify to a claim against an Oregon-registered architect, and an Oregon-registered engineer against an Oregon-registered engineer. However, the current proposed language states only that "a design professional with similar credentials" may testify against another design professional. This may invite further litigation over who has "similar credentials" without addressing the problem. The legal community should stay tuned to see if the plain-spoken specifics of the Bill's proponents make it into the final statute.

Of potentially greater interest is that the Bill would require that any Complaint filed against a design professional include a "summary of the alleged conduct of the design professional that failed to meet the standard of professional skill and care ordinarily provided by other design professionals with similar credentials, experience and expertise and practicing under the same or similar circumstances." This additional pleading requirement brings the statute into potential conflict with Oregon's Rules of Civil Procedure and pleading practice, as well as the Federal Rules of Civil Procedure should the statute need to be applied in that forum.

Soon after the original statute was enacted in 2005, at least one federal court noted this emerging potential conflict. In *Mastec North America, Inc. v. Coos* County, 2006 WL 1888928 (D. Or., Case No. 04-278-AA, July 6, 2006), the defendant asked the court to dismiss an action because the claimant did not include a certificate of merit statement in the pleading. In what was ultimately *dicta*, the court noted:

> I agree that § 31.300 arguably constitutes a pleading requirement, because a certification regarding the standard of care "applicable to the alleged facts" must be filed with or made part of the original complaint, suggesting that the complaint itself must contain particular allegations of fact. *See Boone v. Knight*, 131 F.R.D. 609, 611 (S.D.Ga.1990). If so, § 31.300 is inconsistent with Federal Rule of Civil Procedure 8 which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a).

Other courts have held that "certificate of merit" requirements are not pleading requirements, but serve a separate purpose of limiting frivolous claims. Therefore, these courts conclude, the certificate of merit statutes are not in conflict with the base pleading requirements in those jurisdictions. *See, e.g., Lewis v. The Center for Counseling and Health Resources*, 2009 WL 2342459 (W.D. Wash., Case No. C08-1086, July 28, 2009).

Oregon law does not otherwise require that evidence be included in written claims, but rather "[a] plain and concise statement of the ultimate facts constituting a claim for relief * * *." ORCP 18 A. The Supreme Court in *Adams v. Oregon State Police*, 289 Or 233, 240-41 (1980) wrote that:

> The purpose of requiring an exchange of pleadings is not to produce perfection in the statement of the issue but only to bring forth into the light the points that are in dispute.

> When those points are sufficiently revealed so that the opponent is apprised of what he must meet and the trial judge is given sufficient information so that he can rule advisedly during the progress of the trial, the pleadings have performed their function.

Thus, a pleading is sufficient if it contains allegations which permit the introduction of evidence which will satisfy the elements of a claim, and additional information can be obtained through the discovery process. *Dahlen v. Oregon Transfer Co.*, 180 Or App 599 (2002). The Bill may ultimately do the certificate of merit statute a disservice by requiring a summary of evidence in the Complaint unless it gives direction to the courts and litigants about how that is supposed to harmonize with the Rules of Civil Procedure itself.

Further, Oregon is unique in that there is no mechanism in the Rules of Civil Procedure for discovery of experts hired by the parties, or of their opinions. That is why the current certificate of merit statute tracks the language of ORCP 47E, which describes how a party may oppose summary judgment by submitting an affidavit stating that it has consulted with an expert on a given topic, and the expert will testify to evidence raising a question of fact. This new requirement of a "summary" in SB 383 would exceed that, and require not only that evidence be included in the court papers, but expert opinions themselves. Oregon is unique in the United States in that it does not require litigants to disclose their experts' identities or opinions. To the contrary, Oregon has a clear policy against this, affirmed by many Court of Appeals and Supreme Court rulings, as well as the Legislature's removal of expert discovery mechanisms from the Rules of Civil Procedure. This proposed bill would conflict with that unless it gives the courts or litigants guidance on how to harmonize these requirements.

Finally and most practically, this summary requirement may be too vague to be enforceable. The proposed language does not clearly state how a claimant is supposed to satisfy this requirement. If this is to be an absolute prerequisite to bringing a lawsuit, and punishable by dismissal of the claims, or could lead to sanctions against attorneys, or malpractice claims, it needs to be clear. It its current state, it lacks the specificity needed to give it teeth so that architects and engineers will have a real chance of defeating claims that do not comply.

The law governing the intersection of Oregon's pleading requirements, the certificate of merit statute applicable to design professionals, and the Oregon Rules of Civil Procedure continue to evolve. Practitioners representing design professionals, or property owners and other claimants, will need to pay attention to these developments in the months ahead to ensure their clients are poised for success, either in the defense or prosecution of these claims.

CONTRACTUALLY CLARIFY THE SOL ON CONSTRUCTION CLAIMS

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Construction contract forms specify many important elements of an agreement, including scope of work, scheduling, contract price, payments, and changes, in an effort to allocate risks and responsibilities among the parties. However, when it comes to provisions affecting the time to file claims, construction contracts typically defer to the jurisdiction of the project location and its statutes, no matter how convoluted or complex. In Oregon, deferring to the statutory framework can lead to more questions than answers and threatens potential waiver of otherwise meritorious claims.

The Oregon Revised Statutes ("ORS") contain several statutes of limitations that have been argued as applicable to construction claims on private projects. For example, ORS 12.080(1) provides that an action upon a contract or liability, express or implied, with certain exceptions must be commenced within six years. Similarly, ORS

12.080(3) provides that an action for injury to real property or land must be commenced within six years. Yet, ORS 12.110(1) states that any injury to the person or rights of another not arising on contract or otherwise addressed by statute must be commenced within two years.

As one might imagine, interpreting and applying the statutes is far from easy. Last October's decision in *Riverview Condominium Association v. Cypress Ventures, Inc.*, 266 Or. App. 574 (2014) ("*Riverview*"), is only the latest example of the seemingly constant evolution of Oregon law regarding the time to file construction claims.

In *Riverview*, the Court of Appeals considered a case involving water intrusion at the Riverview Condominium Complex in Multnomah County. Construction of the condominiums was completed with certificate of occupancy in May 2000, although a notice of completion was not filed until December 2000. In subsequent years, the individual unit owners experienced varying but increasing degrees of water intrusion from allegedly leaking windows. In November 2008 an inspection service report for the owners concluded that the siding assembly was not performing, that water was entering wall cavities with no place to escape, and that parts of the substrate were rotting. The report recommended extensive siding repair. In July 2010 the Association filed suit against various parties.

On appeal from summary judgment, the Court of Appeals wrestled with the question of which statute of limitations applied to the Association's negligence-based construction defect claims. The Association argued the claims were subject to a six-year statute of limitations set forth in ORS 12.080(3) because they interfered with and injured the Association's interest in real property running from discovery of the injury (the "discovery rule"). The builder countered first that the claims were subject to the two-year catch-all statute of limitations in ORS 12.110(1), and alternatively, if the longer statute did apply, that there was no discovery rule.

The *Riverview* Court of Appeals engaged in considerable discussion of prior case law, including a much-debated footnote in a 2011 Supreme Court case, before concluding that construction defect claims alleging damage to real property are governed by the six-year statute of limitations in ORS 12.080(3). The Court further debated when such claims "accrued" and whether a discovery rule applied. Citing to an earlier 2014 Supreme Court decision, the Court of Appeals confirmed that the Association's construction defect claims that were characterized as tort actions under ORS 12.080 were in fact subject to a discovery rule. Ultimately, the Court found conflicting testimony as to whether the Association knew or should have known of (1) the harm, (2) causation, and (3) the tortious nature of the conduct within six years prior to filing suit in July 2010. The Court reversed the lower court's summary judgment ruling on that issue and remanded the case for further proceedings.

In light of the competing statutes and evolving case law governing claims periods in Oregon, parties to a construction agreement would be wise to clearly designate a limitation period for such claims. In 2007, the court in *Reedsport School District No. 105 v. Gulf Insurance Co.*, 210 Or. App. 679, 687 (2007), held that a statutory limitations period in the ORS "is not exclusive, but is, instead, effectively a 'default' provision – that is, the statutory limitation period governs '[a]n action upon a contract' unless the contracting parties have specified a different limitation period."

Accordingly, in negotiating contracts for any private construction project, the attorneys and parties should consider specifying both their own time limits on construction claims and the accrual of such causes of action. The provision should specifically define the applicable period of limitations for claims, be it six years, ten years, or some other period. For accrual, the parties should specify the triggering event under which the period of limitations will start to run. Key consideration should be given to some or all of the following before the limitations period begins to run: (1) the identity of the party or part(ies) responsible, (2) the magnitude of the damage or injury, and (3) the cause of the damage or injury. An additional goal would be to contractually specify that all parties to the project are under the same limitations period so that contractors and design professionals, for example, are not subject to differing time periods, as often is the case under the Oregon statutes.

Specifying the time limits and accrual periods on claims in a construction contract can help manage risk and promote collaboration rather than sowing adversity among the contracting parties. The parties should consider designating the statute of limitations in their agreements at the time of contracting for construction rather than leaving matters up to the "default" statutory rules and the law of unintended consequences.

AIA Updates to A141 and B143 Design-Build Documents

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In 2014, the AIA updated and published seven new design-build contract documents, including updates to the main design-build forms the A141 and B143. These contracts are familiar to design-builders and are commonly utilized to govern the relationships among parties to design-build projects. AIA A141 covers the Agreement Between Owner and Design-Builder while B143 covers the Agreement Between Design-Builder and Architect. These documents were last updated in 2004, and this article discusses some of the critical changes found in the new 2014 versions.

AIA A141

The new A141-2014 structure differs from the old A141-2004 structure in a few significant ways. The most notable change is that the form has reverted to a two-part format similar to what existed before the 2004 revisions.

In 2004, the AIA merged the design development portion (previously Part 1) with the construction phase portion (previously Part 2) into one document signed at the outset. This merger into one design-build contract has the practical effect of locking an owner in early in the process. The new A141-2014 version reverts back to a two-phased approach as it contains a new Design-Build Amendment, Exhibit A, meant to be executed after the design-builder completes the design phase and provides the owner with a design-build proposal. Once the proposal has been agreed upon, the design-builder and owner must execute the Design-Build Amendment, which then becomes a part of the Agreement. The prior single part agreement effectively prevented an owner from shopping the design once it was sufficiently complete to be priced; the new form renews the risk of design shopping to the design-builder.

Additional changes to the A141-2014 include its terms and conditions being integrated into the Agreement instead of having them as a separate exhibit incorporated by reference. A141-2014's Exhibit A, Insurance and Bonds, attempts to avoid duplication of insurance requirements in the General Conditions, provides blanks to fill in the insurance limits, and sets forth the insurance and bonding requirements for the owner and design-builder.

The A141-2014 also includes an Exhibit B, Sustainable Projects, which was developed for use on projects where the owner has identified a sustainable objective. The intent of the sustainability exhibit is to address the industry's concerns regarding risk allocation associated with failing to achieving a sustainability objective over which no party to the contract has control. The Exhibit includes a mutual waiver of consequential damages resulting from failure to meet sustainability goals.

AIA A141-2004	AIA A141-2014
Agreement	Agreement (with integrated terms and conditions)
Exhibit A: Terms and Conditions	Design-Build Amendment (executed when Contract Sum is agreed upon, includes Determination of the Cost of the Work)
Exhibit B: Determination of the Cost of the Work	Exhibit A: Insurance and Bonds
Exhibit C: Insurance and Bonds	Exhibit B: Sustainable Projects

AIA B143

AIA Document B143 establishes the contractual arrangement between the design-builder and the architect and provides a menu of services from which the owner and architect may select. It is a flexible document that can be used for a number of different contractual scenarios that may arise in the design-build project. The updated form has been integrated to include the initial information and the scope of the architect's services in the main body of the agreement, eliminating the need for separate exhibits. The 2014 changes to the B143-2014 were generally nominal providing a few new definitions and adding sustainability options to the menu of services on the Project. However, if you represent the design-builder, be aware that that the warranty of design and construction owed to the owner does not appear to flow down to the design professional in this standard form (*see* Section 2.2).

Design-Builders should familiarize themselves with the new documents with an eye towards understanding where risks were increased, and enter into the A141 with the intent of mitigating some of that risk.

LEGAL CONSIDERATIONS FOR INTEGRATED PROJECT DELIVERY

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With multiple projects valued at over $500M slated to be built in Portland over the next five years, all subject to Integrated Project Delivery (IPD) contracts, local design professionals and contractors need to be aware of the way IPD contracts allocate risk. While not every project participant will be subject to the same terms and conditions as the key stakeholders of the IPD contract - owner, architect and general contractor - the legal and liability issues related to these agreements need to be understood by all, as some of the unknowns in this project delivery method may have costly implications. This article identifies the key characteristics of IPD, compares four "standard" IPD contract templates, and summarizes the legal import of each contract's risk allocation methodology.

I. What is Integrated Project Delivery?

IPD is a project delivery method in which project stakeholders, generally the owner, architect, and contractor, contractually share both the risk and the reward for completing the project on time and on budget. Ambitious IPD projects also join major subcontractors and design consultants to the primary contract. Stakeholders' profit depends upon successfully achieving jointly-developed goals negotiated at the outset of the project. IPD differs from other project delivery methods because it necessitates early and continued collaboration of all the parties involved in the design and construction process. Contract terms provide various liability waivers to offset risks related to group collaboration during design and construction.

Although this type of project has been predominantly limited to large (>$50M) improvements in the healthcare sector, the popularity of this vehicle is growing as industry participants observe both the quality of the building and the cost at which it is constructed. While IPD projects report higher first cost because more parties are involved at the beginning of the project, savings resulting from fewer change orders and a shorter schedule easily offset first costs. IPD project owners report substantial cost savings over traditional project delivery methods.[1]

II. IPD Collaboration Erodes Distinction Between Design & Construction Liability

Traditional delivery methods clearly define the roles, and therefore the liability, for design professionals and contractors. In general, architects and engineers design the building, and contractors provide the means and methods to build it, leaving architects liable for design errors and omissions, and contractors liable for construction defects. By requiring collaboration between owner, architect and contractor from project conception through completion, IPD blurs the roles of design professional and contractor, eroding, if not completely erasing, the line which has traditionally separated designer liability from contractor error.

Early collaboration also diminishes the protections afforded under the *Spearin Doctrine*, the Supreme Court precedent which holds that a contractor required to build according to detailed plans and specifications can rely on the implied warranty of the fitness of the plans, thereby shifting defect liability to the plan designer. 248 US 132, 136 (1918). As a member of the IPD team during the design phase, a contractor provides feedback on constructability, equipment and systems selection, thereby altering the design and eroding *Spearin Doctrine* warranties.

No court has yet interpreted the effect of shared decision-making between design and construction professional in the context of an Integrated Project Delivery contract, which makes it difficult for attorneys or insurers to accurately assess liability exposure of IPD project participants. IPD standardized contracts offer a variety of risk allocation methods, from those which utilize typical insurance coverage models, to the “purest” form of IPD, the Single Purpose Entity, which, if it’s even possible to insure the project, requires a negotiated project-specific insurance package. Given the project-specific focus of IPD, standardized contracts will require a high degree of customization to appropriately allocate risk for a specific project.

III. Standardized IPD Contract Models

IPD contract models have been published since 2007. ConsensusDOCS and AIA both offer contracts which together, provide a wide spectrum of IPD offerings. AIA provides three IPD packages: the “transitional” IPD, which borrows heavily on a construction management at-risk model (A295); a multi-party agreement similar to the ConsensusDOCS 300 contract (C191); and the Single Purpose Entity (SPE) family, considered the truest form of IPD (C195). ConsensusDOCS was first to market with its multiparty contract commonly referred to as ConsensusDOCS 300, and, along with AIA C191, comprises the middle-ground between traditional project delivery methods and pure IPD.

Each contract allocates risk differently, using a mix of decision-making authority, project costs and incentive controls, and limitation of liability provisions and waivers to buffer issues related to the integration of design and construction roles. The agreements also require parties to collaboratively resolve disputes, which makes sense because the parties collaborate on all major project decisions.

A. AIA A295 – Transitional Documents

AIA A295 provides parties a remedial first step towards IPD. Although its contracts are

[1] AIA, AIA Minnesota, School of Architecture – University of Minnesota Construction Engineering and Management, *IPD Case Studies* (March, 2012).

structured similarly to traditional design/bid/build agreements, AIA A295 compels collaboration by combining the scope of work for both the architect and the general contractor in the general conditions. The contractor is heavily involved in the design phase, and negotiates a guaranteed maximum price (GMP), much like AIA's Construction Management At Risk (CMAR) model. Although the parties do not pool and share profits in this model, the GMP addendum contains bonus provisions for the contractor if the project is completed under budget.

Risk allocation works similarly to traditional contracts, defining services for which each party is responsible, although the definitions are not as distinct as traditional roles. Unlike other IPD agreements, limitation of liability is not restricted to any amount, such as existing insurance coverage or earned incentives. Instead, the parties waive all claims or causes of action commenced after ten years of substantial completion, and waive claims for consequential damages. Given the structure and language of this contract, traditional insurance requirements and waivers of subrogation should sufficiently manage project risk, as long as the contractor obtains design liability insurance.

Dispute resolution under this agreement follows standard AIA guidelines, which require initial claims to be submitted to the architect, whose decision is considered final but subject to mediation and finally arbitration. This is the least collaborative dispute resolution process of any of the four IPD contract models.

B. Multi-Party Agreements: ConsensusDOCS 300 and AIA C191

Moving along the IPD continuum from separation to integration, ConsensusDOCS 300 and AIA C191 create collaboration using a multi-party agreement under which the owner, architect, and contractor execute a single agreement for the plan, design, and construction of a project. Under both contracts, this core group has joint decision-making authority and sets a "target cost" for the project; non-owner parties share incentive compensation tied to the target cost and other mutually negotiated project goals; contract terms offer various waivers and liability limits to mitigate risks associated with contract privity between contractor and architect; and defined dispute resolution procedures require parties to collaboratively resolve claims, and to seek mediation before resorting to arbitration or litigation. Despite these similarities, the contracts' approach to risk allocation and liability waiver differs markedly.

In keeping with other ConsensusDOCS models, ConsensusDOCS 300 takes a checklist approach to risk allocation and liability waiver. Although the team makes decisions jointly, the owner maintains tie-breaking authority. Commensurate with this control comes the financial risk, which under this contract can take two forms: either the owner assumes all risk of loss in the event costs exceed the target cost; or non-owner parties share the costs in excess of the targeted amount, limited to profit if negotiated as such. Key subcontractors and design consultants can also be added to the core team using joining agreements, which extend risk and reward incentives to these parties and effectively dilute the risk for the primary members.

The ConsensusDOCS 300 contract offers two approaches to liability management. The first approach utilizes a "safe harbor" clause in which the parties release each other from any liability resulting from collaborative project decisions. With the exception of willful conduct, the parties agree to release each other from liability arising from non-negligent acts, omissions, mistakes, or error in judgment, negligent or not. The second, more traditional approach keeps each party liable for its own negligence or breaches of contract and warranty, but with agreed upon limits. Under both approaches, parties waive claims for subrogation and consequential damages. Finally, it's worth noting that responsibility for safety throughout the project is assigned to the management team, possibly implicating owner and designer in safety claims, something not seen in traditional project delivery methods.

AIA C191 distributes decision-making more broadly, creating a project management team (PMT) responsible for day to day operations, to complement the primary decision-making body identified as the project executive team (PET). Both teams have voting rights and authority to bind their companies, although changes to target cost or contract time must be unanimously approved by the PET, or by owner directive. Unlike ConsensusDOCS 300 however, AIA C191 does not provide the capability to join key subcontractors or design consultants to the primary agreement, which could inhibit full collaboration with primary (MEP) contractors or designers and reduce the effectiveness of this delivery method. The owner under AIA C191 does not bear all of the financial risk; in the event the target cost is exceeded, both contractor and architect must contribute fees to shore up losses, and may be on the hook for their labor costs as well. Risk allocation for liability under AIA C191 resembles the "safe harbor" method provided in the ConsensusDOCS 300 contract, with the exception that waivers do not extend to claims covered by insurance, effectively subjecting the architect to both direct and third party claims under professional liability. As in the other models, claims for consequential damages and subrogation are waived.

C. AIA C195 – "Pure" IPD: Creation of the Single Purpose Entity (SPE)

Of the standard form approaches created for IPD, AIA C195 comes the closest to fully encompassing the "all for one and one for all" principles espoused by proponents of IPD. Here, owner, architect, construction manager, and key subcontractors and design professionals form an LLC (called a Single Purpose Entity) created specifically to plan, design and construct the project. The rights and responsibilities of owner, construction manager, architect, and key subcontractors and design professionals are defined in separate contracts with the SPE. These secondary contracts provide two benefits to members: provide the ability for contractor and design members to comply with licensing laws; and insulate members from third party claims. The owner retains majority vote on the SPE's Board, and has final authority to approve the proposed target cost, which essentially acts as a guaranteed maximum cost in terms of how non-owner members will be paid for work on the project. Similar in nature to the multi-party contracts discussed above, the SPE pays non-owner members for costs and negotiated bonuses for goal achievement as long as the project stays within budget. However, unlike AIA C191, the risk of cost overruns is borne solely by the non-owner members of the SPE. Once project costs exceed the budget, the members must complete the work without further compensation. Conversely, any savings accrued after project completion will be dispersed to non-owner members based upon pre-determined percentages.

AIA C195's approach to managing liability for the SPE and its members significantly departs from traditional contract insurance models. First, SPE member liability is limited pursuant to typical provisions found in LLC agreements. Members, acting in their capacity as members (distinguished from acting pursuant to the separate service contracts with the SPE), are not liable to the SPE or any other member for relying in good faith on terms of the SPE agreement. In turn, the SPE indemnifies each member for acts or omissions performed by the member, as long as they were acting within the scope of authority on behalf of the SPE.

Second, liability of members when acting pursuant to the service contracts each member has with the SPE is limited to insurance proceeds available, with the exception of willful misconduct. Members liability to the SPE and to each other for claims arising from the service contracts are limited to required and available insurance. Members (including owner) agree to assign all claims against both members and non-members to the SPE, and empower the SPE to resolve the claims and distribute recoveries at its discretion. The net effect of this risk allocation scheme is to funnel all claims through the SPE's dispute resolution process.

In keeping with its non-traditional approach to risk allocation, the dispute resolution process in AIA C195 follows a laddered approach. If resolved according to plan, most disputes will resolve in the field or within the Project Management Team (PMT). If the PMT doesn't resolve the dispute, it is submitted to a Governance Board, selected at the outset of the project by SPE members. Failing here, the dispute finally reaches the Dispute Resolution Committee, chaired by a neutral chose at the outset of the project, and chief executives of each member. The neutral first acts to facilitate a compromise, but will ultimately rule on the issue if no compromise occurs. The decision is final and binding, allowing any member to seek entry of judgment on behalf of the SPE in the applicable court having jurisdiction.

III. Insurance

The collaborative design of IPD presents significant obstacles for the insurance sector because the no-fault provisions seeking to encourage collaboration work contrary to traditional liability claim procedures. Liability insurance is underwritten and triggered on a basis of claims and fault; non-suit provisions in IPD contracts take away the fault, and therefore the trigger, under which a policy would cover a claim. The lack of legal authority assigning liability between design and construction parties subject to a no fault clause in an IPD contract makes it difficult for insurers to appropriately assess their risk. Finally, insurance companies tend to prefer issuing more generic policies which dilute the risk of coverage. Given the degree of customization of IPD contracts and projects, insurers who issue project-specific insurance face significantly higher risks. For this reason, the insurance industry has little motivation to provide policies specific to "pure" IPD projects, leaving project participants with little else to rely on than untested, scripted indemnification, liability and waiver clauses and an inefficient patchwork of traditional insurance policies.

Although parties to the IPD contract carry traditional insurance to cover third party claims, coverage for these claims is questionable under collaborative contracts, because it may not be clear which party to the IPD contract is responsible for the third party claim. Therefore, it's very important for third parties considering subcontracting on an IPD project to review the primary contract closely to make sure contract terms provide guidance as to third party liability. Also, the effect of non-suit provisions in the event of a significant design or construction defect on third party subcontractors or design consultants could be to substantially increase their risk as insurers are forced to look to lower tier parties to mitigate losses.

AIA Trust announced the availability of two kinds of IPD team coverage – project specific coverage utilizing the SPE concept, or broader coverage for all design team members on one policy on a multi-party IPD contract as in the C191. While this would cover third party claims, it would not cover claims between core members. Therefore, the AIA suggests an owner take out a separate policy that indemnifies the owner for first party losses resulting from the design professional's negligence, such as an "owners professional protective insurance." However, the caveat here is that issuance of these policies is project-specific, requiring highly experienced parties with a long track record. Even with these conditions, insurance policies will most likely be extremely expensive.

IV. Legal Considerations Beyond the IPD Contract

In addition to the insurance concerns noted above, additional legal issues serve to slow the progress of IPD. As noted, no court precedent assessing liability for collaborative design exists, which impacts architects' standards for approving and stamping designs, which are also unchanged. The advent of BIM presents issues related to software and technology errors and intellectual property concerns related to the interaction of BIM designs. The creation of the SPE under AIA C195 raises corporate and tax issues of the new entity which SPE members will need to address. Finally, many public procurement statutes preclude "no fault" clauses.

V. Conclusion

Despite these issues, the popularity of IPD continues to grow, for good reason. IPD is a proven project delivery method for delivering high quality buildings at a lower cost in less time with less defects. It leverages efficiencies created by collaboration of design and construction professionals and technology. Attorneys can support this process by continuing to improve the contract vehicles for IPD and by working with insurance professionals to obtain adequate coverage for these projects.

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