For project owners and firms involved with design and construction, contractual options have increased significantly in recent months. Last November, shortly after the ConsensusDOCS program released its Standard Form of Tri-Party Agreement For Collaborative Project Delivery (ConsensusDOCS 300), The American Institute of Architects (AIA) distributed a report titled Integrated Project Delivery: A Guide. At that time, the AIA Board of Directors also required that new documents promoting integrated project delivery (IPD) be prepared by the AIA’s May convention. The AIA’s contracts program met that mandate on May 15 by releasing two standard forms that are at both extremes of IPD contracting options.

As with ConsensusDOCS 300, the new AIA contract forms are based on the use of building information modeling as a tool for design development, construction evaluation, and project communication. But the AIA standard forms bracket the ConsensusDOCS approach in developing unique forms of contractual arrangements. While ConsensusDOCS 300 approaches IPD by having three parties sign the same contract, the AIA documents either stress collaboration through separate contractual commitments or have three or more parties form a separate project-specific company. All of these new IPD forms strive for pre-determined sharing of project risk and reward, and seek to improve the communication and cooperation that have been featured in alliance contracting in other countries.

New AIA Forms Are U.S. Versions of Alliance Contracts

Alliance contracting creates a contractual relationship as well as a working relationship among the project owner, design team, and construction entity. The alliance not only establishes the basic rights and duties necessary to establish legal privity of contract, it shares the profits and losses of the project. Alliance contracting has been tested in Australia, where construction litigation is rampant, to break down the process and communication barriers that lead to disputes. In “pure” alliance contracting the owner, designer, and constructor all share in any savings or cost overruns. The AIA forms do not share profits and losses on a “pure” basis.

AIA Develops Transitional IPD Approach

The AIA used existing construction manager agreements as a model for a contractual arrangement that would enable the early collaboration of the architect, contractor, and owner. The contracts preserve separate relationships between the owner and architect and the owner and contractor. The project delivery is “integrated” because the contractor participates during the design phase of the project. Many of the construction means and methods that are usually developed after the design is complete are incorporated into the design documents.

The AIA considers this arrangement as transitional. It is possible, however, that the concept of fostering collaboration through separate design and construction agreements within a contractual framework may become a preferred and common form of project delivery. The AIA’s IPD documents family currently includes:

- A195-2008—Standard Form of Agreement between Owner and Contractor for an Integrated Project
- A295-2008—General Conditions of the Agreement for Integrated Project Delivery
- B195-2008—Standard Form of Agreement between Owner and Architect for an Integrated Project

The separate design and construction contracts share a common set of general conditions, which create the basic services and relationships among the parties. The general conditions establish six phases for each project, assigning
duties to the project owner, architect, and contractor or construction manager. The six phases are: conceptual; criteria design; detailed design; implementation documents; construction; and closeout. During the first three phases the architect and contractor work together to develop a design that can be constructed to meet the owner’s program, budget, and schedule. At the end of the detailed design phase, the contractor provides the owner with a guaranteed maximum price proposal. When the owner accepts the proposal, a detailed construction schedule and implementation documents are prepared. They include the shop drawings that are not traditionally part of the contract documents. During construction and closeout, the work of the contractor and services of the architect are not significantly different from a typical design-bid-build project.

**Benefits to Architects Result in Challenges for Contractors**

While this approach to the integration of design and construction preserves separate contractual relationships, it could significantly alter the exposure of the contractor or construction manager. Many professional liability claims against architects are brought directly by construction entities or by them through project owners. A common industry practice, especially during highly competitive construction environments, is for contractors to first secure a contract and then find ways to gain additional compensation during the project. Case law has often been seen as a battleground of economic interests. In the traditional design-bid-build project delivery system, once the owner provides the contractor with the construction documents, the contractor has the right to rely on those documents. The Spearin Doctrine, a legal precedent that establishes an implied warranty of fitness of the design adequacy of the project, provides the basis for many contractor claims. With integrated project delivery, that concept may no longer be applicable because the contractor is involved throughout the design of the project and has a duty to determine the project’s constructability. Contractors may no longer be able to argue that they were harmed by their reliance on the construction documentation. Thus, claims should be reduced.

In addition, the design liability of the contractor can be significant. While the architect retains ultimate design responsibility in accordance with state licensing laws, the contractor and subcontractors participate extensively in design development. This makes the unlicensed parties subject to design liability claims. Although contractors are not licensed to provide design services, they could be held responsible for harm resulting from their design recommendations ranging from spatial requirements to the selection of systems and equipment.

**AIA Suggests a Single-Purpose Entity Approach**

The duties and relationships of the transitional forms published by the AIA are familiar to the design and construction industry and appear to accommodate existing legal and insurance concepts. But the AIA has also published an IPD form that challenges accepted business procedures, legal precedents, and insurance products. With C195-2008, *Standard Form Single Purpose Entity Agreement for Integrated Project Delivery*, the AIA has created an innovative business arrangement in which the project owner, architect, and construction manager become members of a limited liability company and transact project-related business as one legal entity. C195 establishes a separate project-specific entity that allows a more complete sharing of risks and rewards. Under this contractual arrangement, the limited liability company, which is governed by the three parties but always under the control of the project owner, carries out a project while meeting mutually agreed-upon goals and target costs.

The company is funded by the project owner and, as an entity, contracts with the architect to design the project and the construction manager to coordinate construction. Other parties, such as design consultants and specialty contractors, could be members of the company as well. Usually, however, they will be subcontractors to the architect or construction manager. The single-purpose entity subcontracts to its own members for services and construction to comply with licensing laws.

The most radical feature of the approach is the elimination of traditional concepts of compensation for services and profit. During the process, the architect and construction manager are compensated through payments of their
actual costs. In lieu of traditional profit, these parties receive payment for the achievement of specified goals and from a contingency above a target cost if the contingency is unused.

Currently, the single-purpose entity approach is only set out in the C195-2008 agreement. The AIA contract documents program will be publishing the subagreements in which the legal entity contracts with the architect, construction manager, and other parties.

AIA Encourages Comments on Contractual Concepts

As the new integrated project delivery documents were introduced, Christine McEntee, the CEO of the AIA, stated:

As the thought leader in IPD, we knew we were taking a position on an evolving subject that enjoys little consensus on approach and structure. We welcome and encourage the active debate and discussion already taking place with all members of the building and design community as we shape a vision for the future.

It is highly likely that discussion will be significant and will include comments from the legal and insurance communities. Lorna Parsons, Schinnerer’s President and Chief Underwriting Officer, has stated that while the AIA should be commended for preparing the two extremes of integrated project delivery options, architects and contractors should approach the concept of a single-purpose entity with care since there currently are no insurance products that clearly assist them in managing their contractual exposures. Parsons also commented that the transitional documents provide architects and owners with a system that should increase preconstruction dialogue and reduce claims from owners and contractors. She also notes that the forms do not require any changes to the professional liability insurance Schinnerer now provides.

Schinnerer has more information at www.PlanetRiskManagement.com. Additional details on the new AIA documents can be accessed at www.AIAContractDocuments.org/IPD.