



Constructive

COMMENTS

Risk Management Perspectives for the Construction Community

AIA Releases New Integrated Project Delivery Documents

Also In This Issue:

- Forms Released for Landscape Architects
- Overseas Insurance Coverage Now Available

For project owners and firms in design and construction, contractual options have increased significantly. 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*. The AIA Board of Directors also required that new documents promoting integrated project delivery (IPD) be prepared for release at the AIA's May convention. The institute's contract documents program met that mandate on May 15 by releasing two standard contract forms that are at both extremes of integrated project delivery options.

As with the 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.

Transitioning into an 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. They allow the contractor to participate during the design phase of the project so that much of the "means and methods" development is incorporated into the design documents during the preconstruction process of design collaboration and constructability analysis.

This contract family currently includes the following documents:

- A195-2008—*Standard Form of Agreement between Owner and Contractor for an Integrated Project*
- A195-2008—*Exhibit A: Guaranteed Maximum Price Amendment*
- 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 institute considers this arrangement as transitional, although it is highly likely that the concept of fostering collaboration through separate design and construction contracts will be a common and enduring form of project delivery. The separate design and construction contracts share a common set of general conditions. The basic services and relationships among the parties are created through the general conditions document. This document defines six phases for each project: the conceptualization phase, the criteria design phase, the detailed design phase, the implementation documents phase, the construction phase, and a closeout phase.

Each phase assigns duties to the project owner, the architect, and the contractor/construction manager. The conceptualization phase, for instance, involves the architect in developing a schedule of design services once a common understanding of the project is reached by all three parties. The contractor then prepares an overall project schedule in collaboration with the architect.

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. For instance, the Spearin Doctrine, a legal precedent that establishes an implied warranty of fitness of the design adequacy of the project, may no longer exist. In the design-bid-build project delivery system, once the owner provides a contractor with the construction documents, the contractor has the

right to rely on those documents. With integrated project delivery, that concept is no longer applicable. Because the contractor is involved throughout the design of the project and has a duty to determine the project's constructability, the contractor can no longer claim reliance on the construction documentation.

While the architect retains ultimate design responsibility in accordance with state licensing laws, the contractor and specialty subcontractors participate extensively in the development of the design. This makes the unlicensed parties subject to design liability claims. Although the contractor is not licensed to provide design services, it is collaborating in making design decisions ranging from spatial requirements to the selection of systems and equipment, and therefore could be held liable.

Forming a New Legal Entity

The AIA also published a form for integrated project delivery that challenges accepted business procedures, legal precedents, and insurance products. The AIA created an innovative concept of a 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. C195-2008, the *Standard Form Single Purpose Entity Agreement for Integrated Project Delivery*, establishes a separate project-specific entity comprising the owner, architect, and construction manager in a relationship that allows a complete sharing of risk and reward. Under

this contractual arrangement, the limited liability company, governed by the three parties, carries out a project while meeting mutually agreed-upon goals and target costs.

Under the contract, 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. The construction manager only provides services; it is not envisioned as constructing the project. The parties that may own the limited liability company are not limited to the three above. Others, such as design consultants and specialty contractors, could be members. The single purpose entity subcontracts for services and construction to comply with licensing laws.

The most radical feature of this 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.

Although the single project entity approach only is 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, the construction manager, and other parties. Visit www.AIAContractDocuments.org/ipd for complete details on these new documents.◆

New Landscape Architecture Contract Forms Released

The American Society of Landscape Architects (ASLA) has published contracts developed expressly for professional services between landscape architects and their clients. The two new forms are the first official contract forms distributed by ASLA. They include a “standard” form with contractual terms and conditions and a detailed scope of services, and a “short form” contract with only basic terms and conditions.

The impetus for the new contracts was ASLA's desire to respond to member concerns that contract forms created by clients or adapted from standard forms for allied professions were inappropriate for the professional services provided by ASLA members in private practice. Landscape architects are often asked to sign professional services agreements that confuse their scope of services with that of the prime professional or construction subcontracts with design-build entities that did not recognize normal legal liability based on a professional standard of care. The contracts were published following a two-year development effort.

The *Standard Form Contract for Professional Services Between Landscape Architect and Client* includes as an exhibit a detailed list of services frequently included as the basic scope of services provided by landscape architects. The list also features services frequently considered supplemental or beyond anticipated services and requiring additional compensation. While the form contains standard terms and conditions that are well-balanced and reasonable, the risk

management value of the form is that the more specifically the anticipated scope of services can be described when contracting the less chance of misunderstanding at a later point.

The *Standard Short Form Contract for Professional Services Between Landscape Architect and Client* is available for use on relatively simple and usually smaller projects for which the risks of possible claims are deemed remote. While both contracts can be used for either direct client services or in interprofessional relationships, the *Standard Short Form Contract* is focused on small residential projects with an established or known client. It is also suitable for a project that, in addition to being small in size, will be brief in duration. The document does not contain the detailed provisions of the full-length

Standard Form with regard to scope of services or issues such as construction safety, dispute resolution, ownership of documents, insurance, consequential damages, and termination and suspension. In the *Standard Short Form Contract* these issues are handled more briefly or not at all given the assumption that the project for which the document is used is anticipated to have little risk. The payment provisions are also simplified.

Schinnerer will provide more information for landscape architects on their contractual risks and the value of these standard contract forms at the ASLA national convention in Philadelphia in October. More information on the contracts can be obtained through the professional practice page at www.asla.org. ♦

New ADA Design Standards Available for Review

The Department of Justice has released the “Advanced Text” of its Notice of Proposed Rulemaking (NPRM) to revise the ADA Standards and Regulations for Titles II & III. Currently the documents are available in PDF and HTML versions at <http://www.ADA.gov/NPRM2008/ADAnprm08.htm>.

Although comments on the department's proposals cannot be accepted until they are published in the *Federal Register*, once they are officially published, interested parties will have 60 days to provide comments. The text published in the Federal Register may have slight variances from the advance text, but

there should be no substantive changes.

Firms that would like to comment officially on the proposed modifications should monitor the Department of Justice website.

Through the ADA website (www.ada.gov) the Department of Justice will provide notice of the publication date in the Federal Register. At that time, the department will remove the advance text from its website and replace it with the published version of the department's proposals. The regulations will also then be available at www.regulations.gov. ♦

Overseas Insurance Coverage Now Available

In response to firms providing design and construction-related services internationally, Schinnerer has packaged a program of emergency medical attention, personal assistance, travel emergency response, and security support. The program, International Advantage®, is written with a leading A-rated insurer. It ties together the resources of an international assistance coordinator and the security information and event remediation of a firm experienced in kidnap and extortion situations.

The insurance package is specifically designed for firms with employees who work overseas or travel internationally. The coverage extends to employees temporarily or

permanently residing in foreign countries. The program can include commercial general liability insurance, auto insurance, commercial property and business income coverage, international medical and accident coverage, and kidnap and extortion assistance.

Medical assistance needs, such as emergency evacuation, hospital admissions deposits, medical monitoring, and employee repatriation can be financially challenging to firms without adequate coverage. Even the need for emergency cash, access to local legal assistance, or translation assistance can create immediate demands on a firm where an immediate response is difficult without expert intervention.

Firms that have either foreign installations or send employees on travel to high-risk areas face a growing kidnapping risk. Few businesses have the specialized expertise needed to effectively assess and quickly respond to threats. Extortion and ransom costs and accompanying legal expenses can be significant. Insurance, along with a team of crisis-response experts, provides two benefits. Employees remain confident in receiving appropriate support and firms know that they can mitigate potential losses.

For more information on International Advantage®, firms can contact their insurance advisor or April Young at 301/961-9805 or April.S.Young@Schinnerer.com.

For additional information on design firm practice management, please visit our website at www.Schinnerer.com or www.PlanetContractor.com. You can reach our Risk Management Department at 301/951-9753, fax at 301/951-5496 or email at vos.RMeducation@Schinnerer.com. Victor O. Schinnerer & Company, Inc. Two Wisconsin Circle Chevy Chase, Maryland 20815

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