

# CONSTRUCTION TODAY

BY MICHAEL K. DE CHIARA

MARCH / APRIL 2016

## SERIOUS ISSUES

### *A Close Analysis Reveals the Fallacy of Integrated Project Delivery.*



Michael K. De Chiara  
Co-Founding Partner  
Zetlin & De Chiara LLP

#### Best Practices

Integrated project delivery (IPD) is a concept that, in practice, can't work in accordance with the initial expectations of the parties. And if you don't believe me, you either are naïve or have not been involved in an IPD, or are an owner who has used an IPD to take advantage of contractors and design professionals.

As discussed in this article, IPD means a three-party agreement among the owner, the design team and the construction team. In this construct, the owner agrees that the total cumulative liability for damages in connection with the design and construction of the project of the design team and the construction team will be limited to the collective profits of the design team and the construction team (the "project team"). In return, the owner is supposed to have a project team that is totally in sync, working cooperatively and collectively to lower costs and speed up the project schedule – and thereby deliver a superior product at a lower cost to the owner. The IPD construct includes a pool of shared savings, which could increase if the project comes in under budget and ahead of schedule.

Presumably, these shared savings will be offered in some manner with the project team and increase the profits that they would otherwise realize.

On paper, this IPD construct begins as a utopian ideal, which has the propensity to quickly turn dystopian. Why, you ask, should this happen when it appears that this new construct maximizes everyone's profits, while at the same time limiting the financial risk for the project team? A closer analysis reveals serious structural issues with IPD.

The first issue becomes defining basic costs excluding profits for the project team. They are significantly different. What home office charges are properly included in basic costs? And appropriate categories of employees to include in basic costs are not so easily determined. But this is the easy part of the financial mosaic.

The next issue is what is the definition of the project, that is, what is the owner expecting as the baseline deliverable at the outset from the project team? That is harder to define and, like any other project, it will likely change from the inception of the project to its conclusion. As this changes, how does this affect costs, costs, schedule, and budget? Who pays, and are the payees being charged appropriately? How do changes impact the profit pool? Is the system really well thought out? Who knows?



The IPD construct begins as a utopian ideal, but can quickly turn dystopian.

The owner will not typically limit the liability of the project team to its profits on a project. While conceptually the owner may indicate willingness to do so, when the actual terms of an IPD are being negotiated, the owner will finally decide to what extent it will agree to a limitation on liability for the project team. For instance, to what extent will the owner forego consequential damages if they exceed the profit pool designated as the source of remuneration for damages? If the owner requires the design team to maintain errors and omissions insurance, who pays for those premiums, since, in theory, there was to be no litigation related to the project? Similarly, if the owner wants bonds from the contractors, who pays for those? The question quickly becomes, who is responsible for those costs? Are certain costs to be: (1) Project costs, which are paid for by the owner and have no impact on the potential profit pool for the project team; (2) are they to be costs to be paid for out of the potential project profit pool; or (3) are they costs to be paid independently by the project



IPD will only work if an owner fully understands the potential risks and embraces them.

team, or individually by the design team or the construction team? It's not until the IPD agreement is actually drafted, when the claims the owner is agreeing to forego are specified, that the project team will know what level of IPD it is embarking on. By then, it may be too late to back out.

One of the biggest issues in an IPD project is also related to liability: determining the standards that will apply to the professional services of the design team and the construction work of the contractors. These standards can have a very real impact on the insurability of the services being performed by the design team and the expectations of the owner with respect to the quality of the contractors' work. Similarly, what happens with third-party claims and how are they covered in an IPD scenario? What statements are being demanded of the project team regarding quality, innovation, and maximization of any number of things from price to budget?

A related topic is the type of insurance that will apply to the project. What will the coverage be, and who will pay the premiums? Who will pay the deductibles? In grappling with these questions, the unified nature of the IPD team is likely to be significantly tested.

Finally, an underlying question must be considered: What is motivating an owner to proceed with an IPD system? The owner cannot be risk-adverse because, should there be a serious or catastrophic issue costing millions of dollars on the project, the owner will be over-exposed and the project team will be well protected. If the owner is looking to save significant dollars, is the project underfunded from the inception? Similarly, if the owner is looking to save significant time on its schedule, are its expectations for the project realistic?

If the answer to any of these questions is the wrong answer, then the IPD construct is likely doomed from the beginning. Then, what happens with this construct and its unusual contract and provisions? A holiday for lawyers and a nightmare for clients.

While the concept of IPD is appealing, it will only work if an owner fully understands the full potential of risks and embraces them. Otherwise, there will be compromises in the IPD agreement itself, which will shift significant risks to either the design team or the project team, or both, and will result in significant losses for both of them and probably for the owner as well.

If something appears to be a panacea, especially in the world of construction, it likely is not a panacea, but a plague. When it comes to IPD, something which is conceptually simple but practically very complex to apply, the risks are indeed in the details and the details are, in this writer's opinion, too little understood.

