

## ***ALTERNATIVE PROJECT DELIVERY METHODS: Principles and Contractual Arrangements of Integrated Project Delivery***

### **I. Background and Overview**

Alternative project delivery methods are varied project delivery methods developed by the construction industry to address problems viewed as inherent in traditional project delivery methods. Alternative project delivery methods were developed in large part out of a need in the construction industry to address waste. While some, such as ConsensusDOCS 300 and AIA's C195 approaches are recent, others such as Project Alliancing are not. Studies have shown productivity lagging in the construction industry, in large part due to inefficiencies, mistakes, and delays on construction projects. These wastes decrease productivity, some studies say by as much as 30%, and drive up costs. The separate shouldering of responsibilities and risks by the main players – Owner, Contractor, and Architect – has led to adversarial postures and cross purposes. Also, traditional project delivery methods are viewed as prone to claim activity and adversarial postures. To address these issues, and with the advent of new, advanced technology, alternative project delivery methods are being developed and utilized.

The goal is to integrate technological advances, in particular Building Information Modeling (“BIM”), as well as Electronic Communication Protocols, into an effective and economical delivery method of design and construction services. There have been differing approaches to attain this goal. It is fair to say that in spite of the variety of alternative project delivery methods, all integrate some elements of collaboration, with varying degrees of new technology, to create differing contractual arrangements. There has been modification of existing methods, resurgence of a seldom-used model, as well as development of new models by industry leaders to reach this goal.

- Traditional project delivery methods, especially design-build, have been “tweaked” by some owners and contractors to add further elements of collaboration.
- Seldom-used methods of project delivery, such as project alliancing, have gained sudden, newfound attention. Project alliancing was initially created by British Petroleum in the 1990s to counter the deteriorating business environment (i.e., uneconomical projects) for oil extraction in the North Sea oil and gas fields.<sup>1</sup> British Petroleum developed a new contracting method – project alliancing – whereby the project team would win or lose *as a whole* depending on overall project performance. As it turned out, British Petroleum’s project completed 6 months early and approximately 22% under target price.<sup>2</sup>
- In the early 2000s the Construction Users Round Table (CURT) implemented a “3XPT” initiative whereby the three primary parties – Owner, Architect and Contractor – lead Process Transformation. Included in that transformation is the way the parties inter-relate and deliver project assets.

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<sup>1</sup> Matthew Sakal, *Project Alliancing: A Relational Contracting Mechanism for Dynamic Projects* (2005).

<sup>2</sup> Joseph Grynbaum, P.E., *Alliance Contracting Eliminates the Risks of EPC Contracts* (Power Engineering, July 2004).

- With the leadership of CURT, additional industry organizations comprised of Owners, designers, contractors, subcontractors, sureties and surety bond producers (22 organizations in total currently) formed ConsensusDOCS to, among other things, “break the mold” of traditional project delivery systems. Out of that mindset the ConsensusDOCS 300 series, the BIM Addendum for “Collaborative Project Delivery” and the Electronic Communications Protocol Addendum were born.
- AIA soon followed with a family of “Integrated Project Delivery” Contract Documents.

Alternative project delivery methods can be generally characterized as having “a more concentrated and concerted”<sup>3</sup> design phase with a number of disciplines involved. In most cases, the design phase(s) will be longer than in traditional delivery methods since the design will be more fully developed. Also, BIM will be used more often than not in conjunction with alternative project delivery methods. Among other benefits, BIM helps the integrated team visualize the design, provide a free flow of information, allow for “virtual” testing, and provide a shared starting point for the various team members. Project performance goals will be established, defined, and shared in alternative project delivery methods, with the expectation that there will be higher degrees of commitment and buy-in by the team. Contractual agreements will be reflective of the evolution in approach by incorporating collaboration and value-based compensation, as well as some measure of allocation of risks and incentives.

## II. Terms

- Building Information Modeling (“BIM”)** – a digital, three-dimensional information resource linked to a project information database. BIM is a tool to make design information explicit and support the IPD process, allowing design and construction professionals to work collaboratively throughout the project deliver process. BIM is defined by the National Institute of Building Sciences as utilizing “cutting edge technology to establish a computable representation of all the physical and functional characteristics of a facility and its related project/life-cycle information, and is intended to be a repository of information for the facility owner/operator to use and maintain throughout the life-cycle of a facility.”<sup>4</sup> BIM can also be a 4D model, that incorporates time, or a 5D model, that incorporates cost data.
- Collaboration** – Principles based on mutual trust, confidence, good faith and fair dealing. The process by which project participants willingly work together in concert to design, construct and make decisions for the good of the project. In a non-threatening environment envisioned by collaboration, the parties would openly share ideas in order to optimize the construction process.
- Integrated Project Delivery** – “...a project delivery approach that integrates people, systems, business structures and practices into a process that collaboratively harnesses the talents and insights of all participants to optimize project results, increase value to the owner, reduce waste and maximize efficiency through all phases of design, fabrication and construction.”<sup>5</sup>
- Integration** – in the construction setting, there can be integration of teams or of design. Either concept involves the coming together in the beginning of the project in order to have a free flow of information to work together toward the best project as a whole.
- Lean Construction** - Lean Construction is a production management-based approach to project delivery. Applied to construction, Lean changes the way work is done throughout the delivery process. Lean Construction extends from the objectives of a lean production system - maximize value and minimize waste - to specific techniques and applies them in a new project delivery process.<sup>6</sup>
- Painshare-Gainshare compensation** –compensation method used in Project Alliancing. If the actual cost of the project comes in under the target cost, then the team “wins” and splits the savings; if the actual cost of the project ends up greater than the target cost, then the team “loses” and shares in the losses.

<sup>3</sup> 3xPT Strategy Group, *Integrated Project Delivery: First Principles for Owners and Teams* (July 2008).

<sup>4</sup> [www.nibs.org/newsstory1.html](http://www.nibs.org/newsstory1.html)

<sup>5</sup> AIA, *Integrated Project Delivery: A Guide* (2007); *see also* AIA A295 at ¶1.3.13 (2008).

<sup>6</sup> While this paper briefly references Lean Construction principles, as those principles are incorporated into the ConsensusDOCS 300 approach, those principles are not fully examined in the present paper.

- g. **Project Alliancing** – a relational contract method whereby participants work as an integrated team by tying commercial objectives to the actual outcome of the project. The profit or loss then is not tied to individual performance, but rather to attainment of project goals.
- h. **Pull Scheduling** – Scheduling approach, inspired by Lean Construction principles and incorporated into ConsensusDOCS 300, whereby the release of work is based on readiness downstream to receive the work, so that preceding activities are not begun sooner than needed. In other words, the team works from a target completion date backwards to develop the activities needed to complete that phase, thereby assuring continuous and timely performance of subsequent activities.
- i. **Relational Contracting** – construction contracts which concentrate on communications and relationships between parties, as well as their rights, obligations and deliverables.
- j. **Target Cost** – the Owner's, Designer's, and Contractor's target of total costs for design and construction costs, which will serve as the benchmark metric for the project's success.

### III. Types of Alternative Delivery Methods

#### a. **Project Alliancing**

In the 1990s, when British Petroleum, sought to *profitably* tap into North Sea oil reserves, it developed a new contractual method that would lend itself to teamwork commitment, relationship development, and trust.<sup>7</sup> The methodology British Petroleum developed was a type of relational contracting to reduce the high project development costs it faced, and was ultimately termed "Project Alliancing."<sup>8</sup> Project Alliancing has since been used to deliver infrastructure projects in Australia and New Zealand. As of September 2008 it was estimated there have been over 50 alliance projects worldwide.

#### 1. Principles of Project Alliancing

There are several fundamental principles of Project Alliancing:

- Projects are insured. All uninsurable risk is shared between project participants. Using the assumption that collective responsibility will improve the outcome of the project, the result of the risk sharing is that teamwork and collaboration will drive better project outcome.
- Project participants are paid using a "3 limb" approach, known as the "painshare/gainshare" model. Limb 1 is direct project costs and overhead; these Limb 1 costs are guaranteed. Limb 2 represents corporate overhead and profit; these are the maximum amount a participant can lose for target cost overruns. Limb 3 is the painshare/gainshare arrangement, which will depend on how the final cost compares to the target cost. The development of the "target cost" by the participants is critical as the target cost will be the benchmark with which to compare the actual costs of the project.
- A "Project Leadership Team" or "Project Alliance Board," comprised of senior management from each participant, governs and makes decisions, which must be unanimous.
- The project team makes decisions based on what is "best for the project," not for the best interest of individuals or their employers. The project team is "co-located" or, in other words, located under one roof.
- Disputes and conflicts are handled internally and quickly, through the project leadership team and/or third party neutral. Litigation or arbitration is not permitted among the project participants (except in the rare circumstance of willful default).

<sup>7</sup> See Matthew Sakal, *Project Alliancing: A Relational Contracting Mechanism for Dynamic Projects* (April 2005).

<sup>8</sup> See Michael Wilke, *Project Alliancing - Sharing Risks and Rewards Through a Collaborative Agreement* (ABA Sept.2008).

- “Alliance coaches” are used to increase the leadership skills of key players and to assist the spirit of cooperation and collaboration necessary on an alliance project.

## 2. Processes of Project Alliancing

There are no hard and fast “phases” for Project Alliancing. However, there are several critical *processes* that lead up to design and construction:

- **Development of the alliance** - Development of the alliance involves the selection of alliance team members. Project participants must be willing to accept the “no blame” philosophy, as well as the sharing of risks and open communication of alliancing.
- **Commercial discussions** - Commercial discussions are those that take place between the owner and the selected project participants regarding the Limb 2 fees (i.e., corporate overhead and profit). An independent alliance auditor assists in this process.
- **Interim Project Alliance Agreement (“iPAA”)**- At the end of all commercial discussions with each participant, an interim Project Alliance Agreement is entered into. The target cost is developed at this time. Until the iPAA is finalized, participants can walk away from the project. Participants, other than the owner, are paid for their actual costs (i.e., Limb 1) to date.
- **final Project Alliance Agreement (“PAA”)** – Once the participants finalize the target cost, the PAA is entered into. At this point, profit and overhead (i.e., Limb 2) will be paid to participants. Only the owner has the right to terminate the PAA beyond this point.

While not all of these processes may be utilized in a particular Project Alliance project, it is more than likely they will be. Further elements may be present too, such as an advance release by each participant, agreeing to release each other from all liability arising out of the project except for “willful default.” It would not be unusual either in a Project Alliance to require the leadership team, or Project Alliance Board, to have 100% attendance to achieve a quorum and that all decisions must be unanimous.

### b. Consensus DOCS Collaborative Project Delivery (“CPD”)

#### 1. Principles of CPD

Consensus DOCS Collaborative Project Delivery is designed to address what it views as fragmentation of the separate disciplines in construction contracting. Collaborative Project Delivery is set forth in ConsensusDOCS 300 series. CPD promotes collaboration and Lean construction principles.

The Parties agree that the Project objectives can be best achieved through a relational contract that promotes and facilitates strategic planning, design, construction and commissioning of the project, through principles of collaboration and lean project delivery...<sup>9</sup>

CPD values early team assembly so that the key players can collaborate from the start on design and construction. CPD principles of collaboration and lean construction include that the project participants will make commitments to work and schedule that can be relied upon by others and that drive out waste, will focus on what is best for the project as a whole, and will seek constant improvement through continuous assessment and implementation of ‘lessons learned.’<sup>10</sup>

In contrast with the AIA IPD approach, CPD is a completely integrated tri-party approach between the Owner, Designer, and Constructor. CPD also has developed a BIM Addendum for use with ConsensusDOCS 300 as well as an electronic communications protocol addendum to deal with the transmission of project documents electronically. As stated previously too, CPD incorporates lean construction concepts, principles, and processes, which AIA IPD does not.

<sup>9</sup> See ConsensusDOCS 300 at para.3.2, *Collaborative Project Delivery*.

<sup>10</sup> See AGC, *ConsensusDOCS Guidebook* (April 2008) at p.21.

## **2. Phases of CPD**

The phasing of CPD emphasizes early involvement and a collaborative approach. The Pre-Construction and Design Services anticipated by CPD are not as detailed as those in the IPD documents, in fact the CPD process is much more integrated than the new project phases that are set forth in the AIA IPD documents. As a result, there is significant collaboration and shared control/decision making going on within the course of the project. So, while the phasing of the project does not appear greatly changed from traditional project delivery approaches, the shared lean construction principles and collaboration are what differentiate CPD from traditional project delivery methods.

### **c. AIA's Integrated Project Delivery Method**

#### **1. Principles of AIA's Integrated Method**

The AIA's solution to providing better projects through a new project delivery method is using integrated project delivery ("IPD"). The foundation of IPD is collaboration between the parties. The theory is that collaboration is built on trust and, when the parties can trust each other and thus collaborate, they can then focus on project outcome rather than individual goals. In IPD, a project team is assembled as early as possible in order to collaborate on the project. To maximize the use of IPD as an effective process, the AIA developed the following "Principles" of IPD<sup>11</sup>:

1. Mutual Respect and Trust
2. Mutual Benefit and Reward
3. Collaborative Innovation and Decision Making
4. Early Involvement of Key Participants
5. Early Goal Definition
6. Intensified Planning
7. Open Communication
8. Appropriate Technology
9. Organization and Leadership

The AIA believes that early involvement by more parties, (i.e., "key participants" as the AIA terms them), particularly in the project design, will lead to working together as a team toward defined project goals. IPD anticipates team decision making, use of BIM, open communications (which includes sharing of proprietary or confidential information), compensation tied to overall project success, and a project/team decision-making body to resolve disputes.

#### **2. Phases of AIA's Integrated Method**

AIA's method with respect to IPD differs from traditional delivery methods in two areas: team assembly and project phases. As explained above, assembly of key participants at project inception is critical. Key participants would include owner, contractor, and architect, and could also include major or critical subcontractor(s) or fabricators, depending on the project. The phasing of an IPD project focuses on this early team assembly and the moving of design decisions up front to make such decisions more effective and less costly. Combined with the use of BIM, the design is brought to a higher level of completion earlier in the process and before documentation begins. In traditional delivery methods in AIA contract documents, the project phases are Pre-Design, Schematic Design, Design Development, Construction Documents, Agency Permit/Bidding, and Construction; in IPD, the phases become instead Conceptualization, Criteria Design, Detailed Design, Implementation Documents, Construction, and Closeout.

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<sup>11</sup> AIA, *Integrated Project Delivery: A Guide*, at p.5 (2007).

- **Conceptualization** – “Conceptualization begins to determine WHAT is to be built, WHO will build it, and HOW it will be built.”<sup>12</sup> This is the initial phase where performance goals, cost structure, and preliminary schedule are developed, and where communication and technologies are agreed upon, by the team.
- **Criteria Design** – Many aspects of the project are tested, selected, and then finalized in this phase, such as the scope, selection and design of major building systems, cost estimate, and schedule.
- **Detailed Design** - All key design decisions are finalized during this phase. All major building systems, including fixtures, furnishings, and equipment, are defined and all building elements are fully engineered. Collaboration among the team during this phase eliminates inconsistencies, conflicts or constructability issues.
- **Implementation Documents** – The documents to be used by 3rd parties for permitting, financing, and regulatory purposes are created. The goal of this phase is to implement the design intent through documentation, not to change or further develop the design intent.
- **Construction** – The Construction phase is more efficient since greater effort is put in the design phases of IPD. In particular, Substantial Completion is reached with few if any RFIs, less construction administration, a schedule tied to the model to allow visualization, better understanding of design intent because of BIM, and more prefabrication.
- **Closeout** – In this final phase the complete BIM 3D model can be delivered to the Owner for long term use such as building management, maintenance and operation.

#### IV. Contractual Arrangements for Alternative Delivery Methods

As mentioned previously, both the AIA and the Consensus DOCS have created contract documents for Alternative Delivery Methods. Consensus DOCS has created the ConsensusDOCS 300 series, as well as a BIM Addendum. The AIA developed its new contract documents for IPD. Other individual owners or attorneys have come up with new contract forms incorporating elements of lean construction, collaboration, and/or project alliancing.

##### a. ConsensusDOCS 300

ConsensusDOCS 300 is a tri-party agreement for the Owner, Designer and Constructor which fully incorporates collaborative and lean construction principles. ConsensusDOCS 300 states its objectives succinctly, as follows:

*3.1...The Project objectives are to design and construct the facilities called for in the Owner's Program, within the Project Target Cost Estimate and the Schedule developed under the Agreement.*

*3.2 ...The Parties agree that the Project objectives can be best achieved through a relational contract that promotes and facilitates strategic planning, design, construction and commissioning of the project, through the principles of collaboration and lean project delivery.<sup>13</sup>*

These objectives are instituted by assembling as early as possible the project management team of the Owner, Designer, and Constructor, who then pull in critical trade subcontractors and suppliers. Each of the trades invited then becomes part of what is termed the Collaborative Project Delivery Team (“CPD Team”) by executing a Joining Agreement, thereby accepting the principles of collaboration.

The agreement provides for two types of risk allocation – to be selected at the option of the parties thereto. First, there is a “Safe Harbor Decisions” risk selection, whereby the parties agree to release each other from any liability arising out of collaboratively reached and mutually agreed upon project decisions for any actions but “willful default.” Second, the parties can choose instead “Traditional Risk Allocation,” whereby each party is liable for its own negligence, and breaches of contract and warranty. This Traditional Risk Allocation does however allow the parties to enter a limitation of liability figure for the Designer and Constructor. Additionally, a mutual waiver of consequential damages is included in ConsensusDOCS 300 regardless of which risk allocation approach is selected.

<sup>12</sup> AIA, *Integrated Project Delivery: A Guide* (2007) at p.24.

<sup>13</sup> ConsensusDOCS 300, ¶3.1, ¶3.2.



The CPD Team is required to come up with a Project Target Cost Estimate (“PTCE”) when the project design is sufficiently complete. This figure then is incorporated into an amendment to the agreement to lock in the PTCE. Compensation to the Constructor is based on the PTCE, as well as incentive and risk sharing provisions. The PCTE will be the sum of the Owner’s design and construction-related costs, Designer’s total costs for design and design implementation, and the Constructor’s construction costs, which include design, construction, and permitting contingencies, estimated Cost of the Work, the Constructor’s fee, allowances, and general conditions.<sup>14</sup> With respect to financial incentives, ConsensusDOCS 300 provides for a program which considers performance - in safety, quality, cost, schedule, planning system reliability, innovative design, construction processes and teamwork - and is funded through savings in contingencies and reduction in costs of the work.<sup>15</sup> Should the actual cost of the Project come in either above or below the PTCE, then Article 11 provides for insertion of percentages as to the sharing of the savings or loss, as well as the loss limit for each party.

Bonding is optional under ConsensusDOCS 300 as the parties can select whether to have bonds required of the Constructor.<sup>16</sup> Similarly, the choice of mitigation procedures for disputes and dispute resolution is selected by the parties as well.<sup>17</sup> The parties can choose either a Project Neutral or a Dispute Review Board if internal discussions between the parties do not result in a resolution of a dispute. If that’s unsuccessful (or if the parties do not choose the mitigation procedures of 23.3), then the parties will use mediation to try to resolve the dispute. If the dispute is still unresolved after submission to mediation or the mitigation procedure, then the parties can choose in ConsensusDOCS 300 ¶23.5 to proceed via litigation or binding arbitration.

Unlike the AIA IPD family of documents, there is no separate set of general conditions for ConsensusDOCS 300. Instead, general conditions-like provisions are provided throughout the base agreement. ConsensusDOCS 300 anticipates the likely use of BIM, but still leaves it to the option of ConsensusDOCS 300 users, and provides for the attachment of a BIM Addendum.

In contrast to a traditional project delivery approach, the Constructor’s responsibilities under ConsensusDOCS 300 include considerable collaboration. Article 3 provides that the Constructor “shall furnish preconstruction and construction administration and management services, collaborate with the Designer in the Designer’s development of the Project Plan and Project design and use the Constructor’s diligent efforts to promote the delivery of the Project in an expeditious manner.” However, as in a traditional project delivery method, the Constructor has responsibility for the construction means, methods, techniques, sequences, and procedures, as well as all labor, materials, equipment, and services necessary to complete the project.

#### **b. AIA’s “Transitional” and “Special Purpose Entity” Contract Documents**

AIA’s approach to integrated project delivery methods has been to create a new “family” of documents. In so doing, AIA has given *two options* to users of its contract documents: a “transitional” set of documents or a set of Single Purpose Entity (“SPE”) documents. The first three of the following contract documents are for use with a transitional approach, while the last three contract documents utilize a SPE approach:

1. A195 – 2008 Standard Form of Agreement Between Owner and Contractor for Integrated Project Delivery
2. A295 – 2008 General Conditions of the Contract for Integrated Project Delivery
3. B195 – 2008 Standard Form of Agreement Between Owner and Architect for Integrated Project Delivery
4. C195 – 2008 Standard Form of Agreement of SPE for Integrated Project Delivery
5. C196 – 2008 Standard Form of Agreement Between SPE and Owner for Integrated Project Delivery

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<sup>14</sup> ConsensusDOCS 300 ¶8.3.1

<sup>15</sup> Id. at ¶¶11.2, 11.3

<sup>16</sup> Id. at ¶21.8

<sup>17</sup> Id. at ¶¶23.3 and 23.5

6. C197 – 2008 Standard Form of Agreement Between SPE and Non-Owner Member for Integrated Project Delivery

**1. Transitional Approach (A195, A295)**

The transitional approach is not truly integrated delivery since the approach continues the old contractual arrangement of a contract between the Owner and Contractor (A195) and a separate contract between the Owner and Architect (B195). This approach is predicated on the AIA's Construction Management at Risk platform. These separate agreements that the Owner enters into with the Contractor and Architect set forth only the business terms and conditions, such as compensation and licensing details. The General Conditions (A295), however, is the "cornerstone" and serves as the source of the terms and conditions for *both* the A195 and the B195. The General Conditions establish the duties of each party and how they will collaborate to complete the work together. There are no separate "silos" of responsibilities - the duties of the three parties are integrated into each phase of the project. So, rather than setting forth the duties in separate articles for each party, the General Conditions are arranged by phases – Conceptualization, Criteria Design, Detailed Design, Implementation Documents, Construction, and Closeout – with the Owner's, Contractor's, and Architect's respective duties particular to each phase contained therein. In comparison to traditional methods of project delivery, the Contractor provides significant pre-construction and design services (in addition to the normal construction and closeout services) in this "transitional approach" set forth by the AIA.

Broken down into the six new phases that the AIA's IPD contract documents use, the responsibilities of each party in the A295 General Conditions are as follows:

<b>Phase</b>	<b>Owner's Duties</b>	<b>Contractor's Duties</b>	<b>Architect's Duties</b>
<b>Conceptualization (Art.5 of A295)</b>	Owner shall furnish a program to the Contractor and Architect for their review and mutual understanding of Owner's requirements for the project	Contractor to work with Architect to prepare and update periodically a Project schedule; to provide to Architect the cost and constructability information and the initial procurement and construction schedule information for integration thereof into the Model (i.e., the Building Information Model)	Architect to submit a schedule of its services for inclusion in Project schedule; collaborate with Contractor to preliminarily evaluate Owner's program and budget for the Work and to suggest possible alternatives to the design and construction.
<b>Criteria Design (Art. 6 of A295)</b>	Review and approval of preliminary design; review and approve Criteria Design documents prepared by Architect and Contractor; meet with Architect and Contractor	Contractor to obtain information regarding cost feedback, systems and products from subcontractors to validate their estimates; refinement of construction schedule and Contractor's estimate; preparation of procurement schedule for long lead items. Contractor to work with Architect to prepare the Criteria Design Documents.	Architect, in consultation with Contractor, to prepare and present to Owner a preliminary design; preparation of Criteria Design Documents
<b>Detailed Design (Art.7 of A295)</b>	Review and approve Detailed Design Documents; meet with Contractor and Architect as needed to progress Detailed Design Documents and to review and approve the GMP Proposal;	To provide list to Architect and Owner of possible subcontractors and material suppliers; verification of cost accuracy, prefabrication decisions, tolerances, and construction schedule; finalize coordination of building systems; upon Owner's acceptance of Detailed Design Documents, Contractor to prepare and submit GMP Proposal; Contractor to meet with Owner and	Architect, in consultation with Owner and Contractor, to prepare the Detailed Design Documents, which are to describe the development of the approved Criteria Design Documents and consist of drawings, other documents, and the Model; meet with Owner and Contractor to review the Detailed Design



Phase	Owner's Duties	Contractor's Duties	Architect's Duties
		Architect regarding GMP Proposal as needed.	Documents at end of the phase.
<b>Implementation Documents (Art.8 of A295)</b>	Owner to agree in writing with Contractor on commencement date for construction; meet with Architect and Contractor as necessary; review and approval of Implementation Documents	Prepare Implementation Documents together with Architect; coordinate with subcontractors and suppliers for final pricing and schedules of their work packages; provide shop drawings and other submittals for approval and inclusion into Implementation Documents; overall coordination and management of the buyout process	In conjunction with Contractor, prepare Implementation Documents which shall show the further development of the approved GMP documents and set forth requirements for construction of Work; working with Contractor, include the design requirements of governmental authorities involved in Project.
<b>Construction (Art.9 of A295)</b>	Make payments to Contractor pursuant to Certificate of Payment; right to stop work or carry out work; consultation with Architect over progress of work	Perform work in accordance with GMP documents; cooperate with Architect; perform work in expeditious and economic manner consistent with Owner's interests. Article 9 contains many provisions related to Contractor's construction duties and responsibilities which are similar to standard A201 general conditions and the Contractor still has sole control over the means and methods of construction.	Certify Applications for Payment and submit to Owner for payment; administration of contract; evaluate progress of work
<b>Closeout (Art.10 of A295)</b>	To participate in final inspections with Architect to confirm work in accordance with GMP documents; make final payment.	Prepare list of items to be completed or corrected before final payment; submit final documentation to Architect; complete and correct work	Conduct inspections to determine date(s) of Subst. Completion and Final Completion and issue certificates relating thereto; forward to Owner information and documentation received from Contractor, such as warranties, consents of sureties, lien waivers and other documents required by GMP; issue final Certificate of Payment

## 2. Single Purpose Entity Approach (C195, 196, 197)

In this fully integrated and highly collaborative approach, a limited liability company is created by the Owner, Architect, and Construction Manager,<sup>18</sup> as well as other key participants they might invite to join. Each becomes a member of the Single Purpose Entity/LLC, the sole purpose of which is to design and construct a project utilizing the principles set forth in *Integrated Project Delivery: A Guide*.<sup>19</sup> The C195 is the contract entered into by the Owner, the Construction Manager, and the Architect to form the SPE. Under the C195, the Members agree to jointly prepare a

<sup>18</sup> Importantly, it is a Construction Manager in this approach as opposed to a Contractor. As will be explained further on, any contractor or supplier enters into a separate agreement with the SPE, not the Construction Manager, under this approach.

<sup>19</sup> As one legal commentator has opined, "The forming of a company, while a bit more involved than simply writing up a contract, furthers the parties' collaborative undertaking as it requires them to carefully consider governance and financial incentive questions critical to Project success." See Patrick J. O'Connor, Jr., *Integrated Project Delivery: Collaboration Through New Contract Forms (2009)*.

Target Cost, a Risk Matrix, Project Goals, an Integrated Scope of Services matrix, a Project Schedule, and a Funding Schedule. The Members agree the SPE will be managed by the Members and that the management and business affairs will be handled by a Governance Board. The Governance Board is to consist of five (or other odd number to avoid a deadlock on those matters able to be decided by majority vote) representatives, one each from the Construction Manager and the Architect (and any other Non-Owner Member), with the remainder from the Owner. Unless specifically set forth in Article 8.2.4 as capable of being accomplished through a majority vote, all actions by the Governance Board require a *unanimous* vote. The C195 also lists seventeen minimum conditions that must be contained in the Member agreements that the SPE enters into (i.e., the C197) subsequently with the Architect and Construction Manager.

As to liability and dispute resolution under the SPE approach, the Members agree in the C195 that there shall be no liability to the SPE or each other for loss, damage, or claim (except for willful misconduct) arising out of their good faith performance of their duties on behalf of the SPE. The Members do agree, however, that any disputes between themselves, or with the Company, and whether arising out of the C195, 196, or 197, shall be resolved by mutual consensus. Any dispute which fails to be resolved through mutual consensus, as described in Art.18 of the C195, will then be referred to arbitration through a Dispute Resolution Committee for full and final resolution. The Dispute Resolution Committee is to consist of the chief executive of each Member and the "Neutral"<sup>20</sup> described in Art.2. If a mutual resolution is not achieved within 60 days of the dispute being referred to the Dispute Resolution Committee, the Neutral shall decide the matter.

After the SPE has been set up via the C195, the SPE then enters into a separate agreement, the C196, with the project owner, who is thereafter referred to as the "Owner Member." The C196 provides the terms whereby the Owner Member will fund the SPE in exchange for design and construction of the project by the SPE. Important to understanding this fully integrated approach, is the fact that the SPE is not expected to earn any income or incur any loss. The C196 draws a distinction between capital contributions or advances that may be required of the Owner Member under the C195, and the funding agreed to by the Owner Member under the C196. Under the C196, the Owner Member's funding obligations are amounts paid for the services provided by the SPE in designing and constructing the project. The Owner Member also agrees in the C196 to furnish tests, inspections, and reports required by law, to give the SPE access to the project site, to furnish surveys and a written legal description of the project site, and to secure and pay for all necessary approvals, easements, assessments and charges required for the project site.

Once the SPE has entered into the C196 with the Owner Member, the SPE then enters into separate agreements with the other members of the SPE, who are now termed "Non-Owner Members," via the C197.<sup>21</sup> The C197 contains the terms by which the Non-Owner Members provide services to the SPE to design and construct the project in exchange for payment of the Non-Owner Member's incurred direct and indirect costs. In this way, material suppliers, vendors, design consultants, and trade contractors all have direct agreements with the SPE rather than with the Construction Manager or Architect. In fact, the C197 specifically states that it is *not* a contract for construction.<sup>22</sup> The six phases of IPD (Conceptualization, Criteria Design, Detailed Design, Implementation Documents, Construction, and Closeout) are contained in the SPE approach and the Members of the SPE each agree to deliver their services in accordance with these six phases. The C197 incorporates an Integrated Scope of Services Matrix, which sets forth the specific services the Non-Owner Members are to perform. The work of the Owner, Architect, and Construction Manager follow the same pattern and responsibilities as were described in the table above for the transitional approach (i.e., A295). The Members waive all claims against the SPE and other Members, except for those claims arising from willful misconduct.

Article 6 of the C197 describes the compensation element for the SPE approach. A Target Cost is arrived at in the C197, as well as the opportunity for Non-Owner Members to receive profit through the Incentive Compensation and Goal Achievement Compensation. This is different from both a traditional project delivery method approach as well as

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<sup>20</sup> The "Neutral" is defined in Art.2.19 as "a third party whom the Members have identified below."

<sup>21</sup> Separate agreements are used due to what the AIA viewed as the best way to comply with licensing issues, since the SPE could not engage in the practice of architecture or construction management.

<sup>22</sup> Art.2.5.2 of the C197 anticipates that a separate construction agreement would be entered into between SPE and a Member that is to perform construction work. However, none of the AIA documents appear to address how a trade contractor, that is not a Member of the SPE, contracts for work on a project nor what form of contract it would execute.

from the transitional approach described above. Instead, this compensation approach is somewhat similar to Project Alliancing compensation. While Project Alliancing uses the “painshare/gainshare” method of compensation, the C197 has the Architect or Construction Manager paid for its actual costs by the SPE. However, the “profit” comes in two ways. First, if the Non-Owner Member achieves the pre-determined goal(s), then the Owner-Member makes payment of profit, which is termed “Goal Achievement Compensation.” Second, with the establishment of Target Cost, the Non-Owner Members can earn profit if the actual cost of the work is less than the Target Cost (i.e., the three participants divide the difference) or earn no profit if the actual costs either meet or exceed the Target Cost. That second element is similar to the “painshare/gainshare” principle used in Project Alliancing and is referred to as “Incentive Compensation” in Article 6 of the C197. That is, if the actual cost exceeds the Target Cost, the Owner-Member only must pay costs incurred up to the Target Cost amount. The costs incurred in excess of the Target Costs are borne by the Non-Owner Members, as provided in Art.6.1.2 of the C197. Finally, dispute resolution follows the procedures set forth in Art.18 of the C195, which is mutual consensus with arbitration through a Dispute Resolution Committee if mutual consensus fails.

