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Musical Chairs: Managing & Mastering Multiple Models of Project Delivery

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Even a brief review of the contracts provided by the AIA, AGC and others, as well as the related construction industry literature, reveals a crowded field of terms describing the “competing” concepts for project delivery such as: Design-Bid-Build; Design-Build; Integrated Project Delivery; Multiple Prime; Fast Track; Construction Manager at Risk; Guaranteed Maximum Price; Cost Plus Fee; and more. With all of the variations and permutations, there are literally dozens of possible project delivery models. Each acts essentially as a separate language with a unique set of priorities, risks, and processes. By contrast, the historical pattern for many in the design community has been a single, dominant project delivery model. For many years, design-bid-build has dominated as the primary (or even sole) project delivery model for many firms. It has been comfortable and reasonably placed, and has created a “preferred” priority on the design and client relationship. It avoids stress, as the easiest and quickest path to “success” for any construction party would be to focus on a single project delivery model, to know it well, and to master its nuances. However, just as inadequate linguistic skills limit participation in the global conversation, isolation to a single project delivery model limits economic participation and success in the broader construction marketplace. Those who cannot adapt will inevitably be limited, fall behind, and may even fail.

In addition to the availability of contract options, raw economic and industry data also demonstrates that traditional “minority” or “evolving” project models are successfully competing for ever-larger shares of the design and construction marketplace. A 2010 survey by the Design Build Institute of America reveals that design-build now exceeds 40% of the total dollars spent on construction in the United States, and that many of these projects are the preferred projects with construction budgets exceeding \$10 million. Similarly, an April 2012 survey from the American Institute of Architects reveals a significant increase in the consideration and use of Integrated Project Delivery, such that architects indicate that this model is being used on 14% of their projects and growing.

While each variation is an opportunity, it is also a challenge for adaptation and flexibility as well as a risk for failure. Those who succeed will not treat each project delivery model as a completely separate creation, but will develop a systematic and common process for evaluation, planning, and execution. The more common elements or considerations can be identified,

established, and implemented, the more likely it will be that a participant in the process can successfully navigate the variations without mishap or embarrassment. That is precisely the point of this paper. It seeks to provide a common structure for the evaluation and planning of each varied project model, with the goal of a tailored solution for success in response to the variations. As a means of doing so, this paper proposes a three-phase evaluation and strategy for project planning and execution:

1. Project Drivers: Expectations, Procedures, & Exposures.
2. Contracted Parties: Rights & Responsibilities.
3. Non-Contracted Parties: Obligations & Expectations:
 - * Project Participants.
 - * End Users/Third Parties.

An Introduction Based On Legal Obligations & Liabilities

Ultimately, much of this discussion focuses on achieving professional and economic success in multiple project delivery models. Success can be defined and lost in many ways, but the ultimate “failure” is often most clearly defined by those projects which become subject to claims, allegations of professional negligence, expensive insured and uninsured financial losses, and adverse publicity and disclosure requirements. As a result, it is very important to understand the bases for such claims.

As a simple division, most claims on construction projects fall into one of two categories:

- * Tort
- * Contract

Contract claims are relatively easy to understand. They involve the alleged breach of some express or implied contract provision. Accordingly, they are most often brought only by the parties to the contract, and less often by a party claiming to be a third-party beneficiary under the terms of the agreement. Tort claims are less clearly defined and depend much more heavily on the facts of the project and claim circumstances with a particular focus on the closeness of relationship between the parties and the reasonable foreseeability of the harm.. For the most part, construction tort claims tend to fall into one of three categories. In descending order of frequency, they are:

- * Negligence. Generally requires the showing of (1) duty; (2) breach of duty; (3) causation; and (4) damages.
- * Strict liability. Most often based on Code violations, Statutes, or products liability principles. Requires no finding of fault or wrongdoing.
- * Intentional Acts.

In the design professional and professional liability community, most claims focus on principles of negligence and, particularly, on the professional standard of care which is to be the basis of such claims. Suggestions for defining the standard of care are discussed in more detail below. What gets far less attention and effort is the concept of duty. Specifically, who is owed that duty and what is the extent? The question of “duty” is particularly relevant in the context of varied project delivery models. For example, in the context of a design-build project, is the duty owed to the design-builder different than that which would typically be owed to an owner/developer? Alternatively, does the presence of a construction manager modify a design professional’s “duties” for the project, and is there any corresponding duty between the construction manager and design professional? Finally, in the context of an Integrated Project Delivery model using either the AGC’s tri-party agreementⁱⁱⁱ, the AIA’s single-purpose entity model^{iv}, or something else, where and to who are the duties owed? Are they all the same or differentiated as primary and secondary?

The obvious answer seems that duty does vary from project to project and model to model. However, experience and reality have repeatedly demonstrated that it is too seldom considered, documented, and agreed to in advance. In the resulting vacuum, the duties are often what an aggrieved party (and its lawyers) wishes to make them in asserting a claim. Much of the focus of an integrated project strategy is to better strategically define and document those duties. This has the dual benefits of better containing and clarifying both the party expectations and the corresponding claims for both the parties to the agreement and third parties.

The secondary issue associated with the contract/tort distinction and the varied relationships of differing project models is the availability of financial resources to respond to and resolve any claims. Most often, that resource for design professionals has been and remains professional liability insurance. However, that insurance generally applies only to traditional negligence claims involving a violation of the common law standard of care for professionals. Most importantly, professional liability does not necessarily apply to or cover the “non-traditional” duties that may be undertaken by design professionals under an alternative delivery model. Most design professional insurance policies will have an exclusion for contractually-assumed liabilities which will provide something like:

This policy does not apply to any Claim based upon or arising out of liability assumed by an Insured under any contract or agreement, whether oral or written, except to the extent that the Insured would have been liable in the absence of such contract or agreement.

As a result, it becomes very important for design professionals to carefully examine any extended contract obligations or roles, and to provide for them through either insurance of their own or others or waivers, releases, and indemnities from others.

The Project & Model: Relationships, Responsibilities, Rewards, & Risks

The starting point of any project consideration should be to look at the project and evaluate the key components which will necessarily drive the project delivery and outcomes. Broken into their sequential components, those are as follows:

1. **Relationship.** Each construction project will have multiple participants. Many design professionals seek to make the project the focal point of their relationship. The danger in doing so is that the project itself cannot communicate or take any adverse action. The real focal point should be on the multiple participants in the project and, specifically, on the design professional's relationship to them in a particular project. It can and will vary radically between project models, and these variables must be accounted for. For example, the relationship with an owner is dramatically different on a design-build project than it is on traditional design-bid-build project.

It is useful to look at these relationships in two ways. The first is on a "teaming" basis. That is, who is a part of the "design" effort, how are they organized together, and what is the expected process and communication? Again, just the variation between a project with all designers retained as subconsultants to a single prime and a different project with all designers retained as separate consultants directly by the owner is significant. Overall these may be characterized as the "collaborative" relationships. The second category of relationships is based on "commitments". That is, those relationships whereby there is either a primary commitment of a deliverable or obligation, most often based on contract, or a secondary commitment or duty implied in or derivative of either the contractual obligations or the mere delivery of the instruments of services. In general, the secondary relationships should be as limited and as discrete as possible.

2. **Responsibility.** The second consideration is the responsibility for the project and its outcomes. The first component is the *scope of responsibility* of the design professional, and it must be examined in two ways. As a starting point, it is obviously what role the design

professional expects and is prepared to undertake for the project. The second, and more frequently overlooked or ignored component, is what others might be expecting from the design professional, and how that expectation corresponds or diverges from what the design professional can and should provide. These issues are best addressed through the contract by following the suggestions in the discussion below. It can and should also be continually observed and reinforced through project documentation.

The second component of responsibility is those areas where the design professional is dependent on information, data, or direction from others. It may be clients, owners, building officials, other consultants, design-builders, manufacturers, or more. Those areas of reliance should be identified with the contractual caveats that the design professional is entitled to rely on them and is not responsible for failures in that regard.

3. Rewards. The reference to rewards is first a reminder that design professionals seldom share the incentives associated with “alternate” project delivery models and, therefore, should not take on more risk for those desired results than is commensurate with their fee and control. The second is that the real “reward” in any project is achievement of the owner’s project objectives, and failure to attain those objectives most often defines project failure and claims. Accordingly, the project objectives should be identified and then evaluated as being realistic and the extent of the design professional’s impact and influence over those outcomes.

4. Risks. Finally, the project risks should be fairly allocated consistent with opportunities of control. As with any project and agreement, only the party with the ability to control a risk should bear that risk. Absent such control, the risk should pass to the person in a position to best receive the rewards of the success. For design professionals involved in varying models of project delivery, this means very clearly defining and limiting the scope of work and assigning responsibility for other responsibilities to others with the defining words of exclusivity such as “only” and “sole”. Those categories of responsibility and risk most often at issue and warranting attention are:

- * Program
- * Cost
- * Schedule
- * Products
- * Performance

Contracting Structures: Primary, Participants, and Others

On a macro level, the competing project delivery models are most often and best characterized based on the applicable contract structure or title. As a result, appropriate agreements are not just a matter of good practice and even statutory compliance, but also as the best vehicle to identify and confirm common project expectations, planning, and commitments. A legally valid contract or contract clause is to represent a “meeting of the minds”. In a construction context, it is often the first, last, and only time this really happens, and even more often the only time it is documented. It is also the best time for a design professional to clearly establish its duties to clients and others. Accordingly, it is not an opportunity to be overlooked, taken lightly, or squandered.

To play in the multiple arenas of project delivery, design professionals should be conversant with and prepared for the variables in at least six potential project delivery models:

- * Design Bid Build
- * Multiple Prime
- * CM at Risk
- * CM as Agent
- * Design Build
- * Integrated Project Delivery (or LEAN)

In terms of standard form agreements, participants in each of these project delivery models will have a wealth of options, including those from AIA, EJCDC, FIDIC, AGC, DBIA, and more. Many of these forms vary widely, and sometimes the variations may even surprise as they run against traditional stereotypes. For example, some provisions in the AGC documents are more favorable to design professionals than the corresponding provisions from the AIA or EJCDC.

Even so, the standard forms and all of the non-standard client-specific variations are so plentiful that they cannot all be continually mastered. The variations may be best handled with a common approach and set of priorities. As a starting point, it is best to recognize and group contract provisions by their function to create a common model and avoid inconsistencies. For most purposes, the key contract clauses will perform one or more of the following functions:

- * Relationships
- * Scope of Responsibility
- * Performance Standards
- * Procedures
- * Financial Rights & Responsibilities
- * Liability & Resolution
- * Exit Routes

In this context, not every clause or provision requires or warrants intensive negotiation. In fact, there are approximately sixteen clauses which matter most for project success and risk management.^v

For purposes of any project model, design professionals have three circles of widening relationship. The “inner” circle, and the circle most warranting attention and focus, is the client relationship. Ironically, in the context of varying project delivery models, this is the relationship most misplayed by many design professionals. Design-build projects present the prime example in this regard. Perhaps due the traditional dominance of the design-bid-build model, many design professionals cannot and do not move beyond the instinctive primary commitment to the owner and the project “design”. However, if retained by a contractor acting as a design-builder, the design professional’s first and foremost obligations need to be to the design-builder’s priorities of schedule, cost, and baseline program compliance. The second circle is those persons or entities who fall under the category of project participants and, therefore, part of the “team” involved in creating the project and “working with” the design professional. However, each will also have its own set of priorities and obligations. The design professional should be careful not to blur those lines or, by a “collaborative” spirit, take on the responsibilities of others. The third circle are those “third parties” who are not part of the project, but may become impacted by the project or the services. Obligations there may be disclaimed by contract, but that along may not foreclose the risk.

While there are countless contractual and performance opportunities to either plan for and adhere to a reasonable strategy or to create untenable obligations, there are four key steps which can and should control the concerns, regardless of the project model. They are:

1. Contained Scope of Work/Responsibility. A detailed scope of work is key to any project success. Ideally, it should be unambiguous and closed-ended. To make certain of this, the scope of work and related statements should provide:

Consultant's services shall be limited to those expressly set forth above, and Consultant shall have no other obligations or responsibilities for the Project except as agreed to in writing or as provided in this Agreement. Nevertheless, all of Consultant's actions and communications relative to the Project shall be subject to this Agreement.

By this clause, the design professional both limits implied terms and makes certain that any and all services are covered by the agreement.

2. Project Assumptions, Reliance, and Unexpected Events. Any scope of work is also premised upon a set of assumptions and reliance on others. To the extent possible, those should be expressly stated in a non-exclusive list as a part of the scope of work, with the provision that the design professional shall not be responsible for variations in those assumptions and that it may be the basis for a change in compensation or schedule.

3. Standard of Care. Every design professional agreement should include a standard of care provision. In alternate project delivery models, it is particularly important to avoid any claimed or implied claim of an elevated standard of care or contract obligations for warranty, safety, cost, schedule or perfection. Such a clause might read:

Consultant's services shall be provided consistent with and limited to the standard of care applicable to such services, which is that Consultant shall provide its services consistent with the professional skill and care ordinarily provided by consultants practicing in the same or similar locality under the same or similar circumstances. Such standard of care is not a warranty or guarantee and Consultant shall have no such obligation.. Accordingly, Client should prepare and plan for clarifications and modifications which may impact both the cost and schedule of the Project.

4. Intended Uses & Beneficiaries. Finally, the intended beneficiaries (e.g., primary contract relationships) and uses of the work product are also critically important. Accordingly, unintended uses or users of the design professional's services should be expressly excluded. Such a provision might provide:

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Consultant's services are intended for the Client's sole use and benefit and solely for the Client's use on the Project. Except as agreed to in writing, Consultant's services and work product shall not be used or relied on by any other person or entity, or for any purpose following substantial completion of the Project.

This provision in particular has a dual use, and should be included in both the agreement for services and the actual instruments of service as a notice and disclaimer to third parties who might otherwise claim unintended right or uses.

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ⁱⁱ *Severson & Werson has provided legal services throughout California and the country for more than fifty years. The firm provides counseling and litigation support to all members of the construction process, including design professionals, construction managers, environmental professionals, owners, contractors, and insurance carriers.*

ⁱⁱⁱ AGC ConsensusDocs 300

^{iv} AIA C195-2008

^v For a sample list and summary of those clauses, see *Sixteen Clauses You Need to Know* by David Ericksen published in PE Magazine, March 2011.