

WILL COLLABORATION BE ACHIEVED

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UNDER THE CCDC 30 INTEGRATED PROJECT DELIVERY CONTRACT?

The Integrated Project Delivery (IPD) has been used successfully in the U.S., the U.K. and Australia for approximately 20 years, but is a new development in construction in Canada.

Unlike the traditional approach involving separate contracts between the principal construction parties, the basic principles underlying IPD are the sharing of risk and reward, early involvement and equality of stakeholders, project-first thinking, limitation of liability, and transparency. Ideally, the IPD contract is to be used to incent team members to collaborate, rather than to provide limitations or penalties. In an IPD project, collaboration of all parties from the outset and throughout the project is essential to reduce inefficiency, costs and disputes.

In Canada, CCDC recently issued the CCDC 30 IPD contract, which is a single collaborative contract between the principal parties in the construction team (owners, design professionals and contractors). It is stated that the CCDC 30 is designed to address scope allocation, payments, changes, conflict management, termination, insurance, contract security and liability allocation.

There are many facets to the CCDC 30 model to discuss. The purpose of this article, though, is to consider the impact of the waiver of liability clause and its exceptions.

Waiver of liability in IPD is considered to be key to provide the parties with confidence that they can collaborate, share information freely and work cooperatively toward the mutual goals of meeting the agreed upon schedule, costs and the owner's goals. In its purest form, there would be few exceptions to the waiver of liability in an IPD contract.

exceptions to the waiver of liability that could result in future litigation that seeks to apportion fault, including claims brought by third parties (this may include a future purchaser of the property), claims covered by insurance specified in the contract, and defects or deficiencies not discoverable during the term of the contract and warranty periods that are "substantial" (meaning that the work is "unfit for the purpose intended" by the contract). Should such claims be pursued, there is a likelihood that the parties, their insurers, and courts or tribunals may approach the dispute and allocation of liability in the

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The CCDC 30 includes a waiver of liability clause (GC 11.1), but it is noteworthy that this provision includes a number of exceptions. Many of these exceptions simply allow the parties to enforce the contractual obligations, such as claims related to a party's wilful default, and express warranty, payment or insurance obligations under the contract. But there are additional

traditional way. This raises the question as to whether allowing such exceptions to the waiver of liability actually undermine the overall objectives of the IPD approach.

Claims under these exceptions to the waiver of liability are likely to be presented after the construction has been completed. Thus, on its face, it



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appears that the exceptions should not impede the parties' willingness during construction to work cooperatively toward the mutual goals of meeting the agreed upon schedule, costs and the owner's goals. However, the parties' behaviour could potentially be influenced by their insurers' and lawyers' risk management advice, and a concern about possible future increases in insurance premiums or loss of insurability based on their claims history. Since, under the CCDC 30 regime, post-construction claims may be brought by the parties' insurers and other third parties, there is a risk that those claimants could rely on communications during the construction in a future lawsuit. This risk could cause the parties to be reluctant to engage in the full transparency during construction that is necessary for proper collaboration.

There are, no doubt, many ways to address this concern. Options include:

1. During construction, where there is any concern about potential future liability, rather than

withdrawing from full disclosure and collaboration, parties could communicate that the disclosure or communication is made on a "without prejudice" basis. Language should be included in the supplemental conditions to ensure that parties are free to take this step under the terms of the contract¹.

2. Consider broadening the waiver of liability through revisions to the waiver provision, or to the insurance required under the contract (under Part 10 of the CCDC 30) to limit the scope of the insurance exception (it is recommended that advice be sought from an insurance broker before reducing insurance coverage).

There are many reports from other jurisdictions of the success of the IPD approach in construction. Therefore, the Canadian construction industry should feel confident that this approach is viable. But it is important to understand the implications of standard form contracts, such as the CCDC 30, to ensure that the IPD contract is structured in a way to achieve the

objectives sought, with full knowledge of the risks that are assumed by each party. Standard form contracts are extremely useful tools to use as a starting point. However, one must be careful to choose the correct one, and to use supplemental conditions to customize the contract to suit the particular project and to ensure the proper allocation of risk. ■

Written by Adrienne Atherton, with gratitude to articling students Nicholas Krishan and Eugenia Adamovitch for their cross-jurisdictional research.

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¹ In the U.K. court case, *Willmott Dixon Housing Ltd v Newlon Housing Trust* [2013] EWHC 798 (TCC), the Court commented that the parties' obligation under the IPD contract to engage in a "transparent and cooperative exchange of information in all matters relating to the project" extended to the adjudication procedure.



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