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Building Knowledge in Design and Construction

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Driving Business Advantage



A Better Way? Negotiating Integrated Project Delivery Contracts

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September 16, 2011

IPD: The Concept

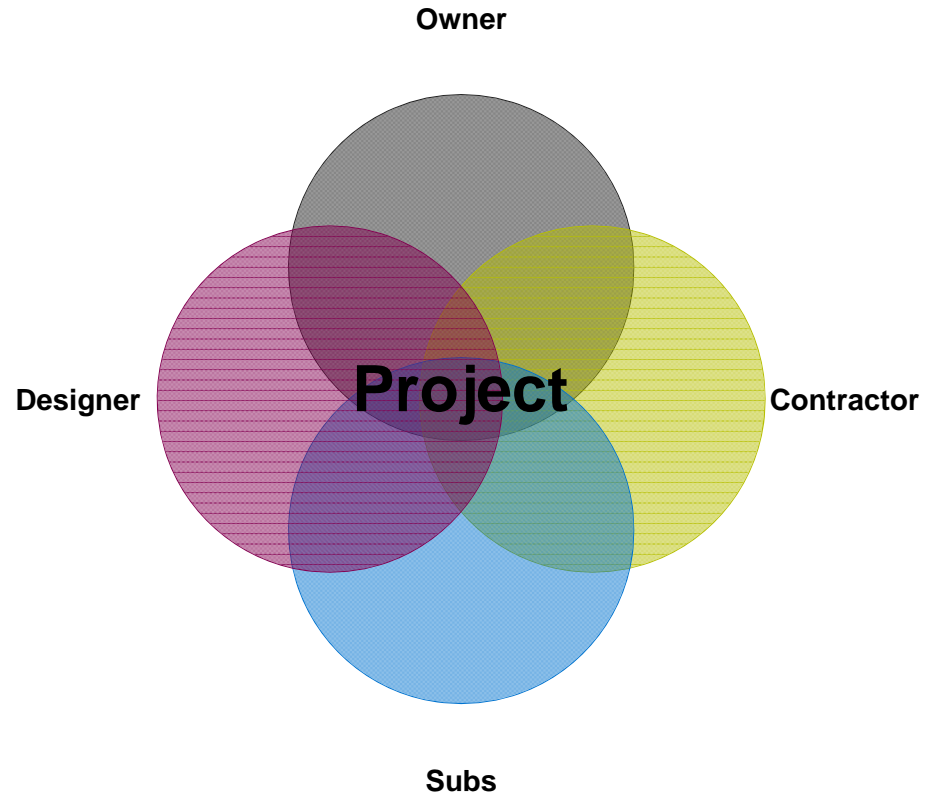
- What is it?
 - Contract or Project Delivery Approach?
 - “IPD is a project delivery approach that integrates people, systems, business structures and practices into a process that collaboratively harnesses the talents and insights of all participants to optimize project results, increase value to the owner, reduce waste, and maximize efficiency through all phases of design, fabrication, and construction.”

A Working Definition: Integrated Project Delivery
AIA Integrated Project Delivery Task Force (2007)

IPD: The Concept

■ What is it?

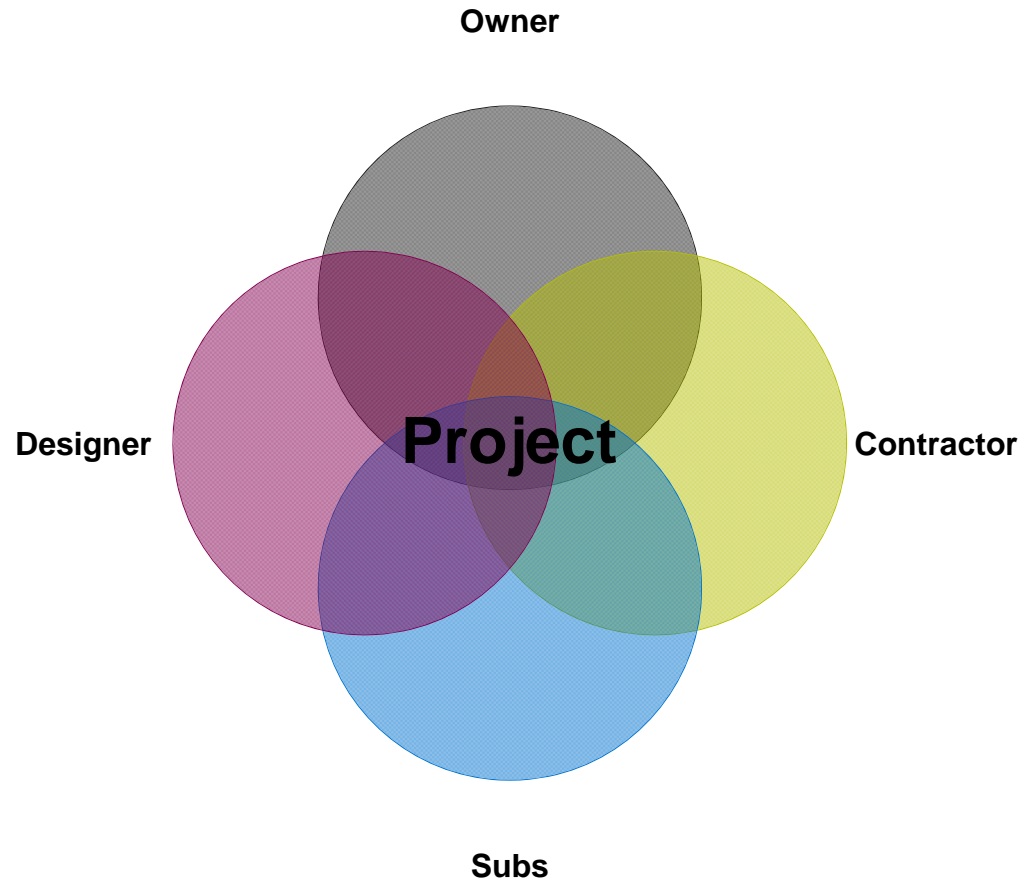
- Multi-party or Collaborative Overlay
- Risk *Avoidance*
- Shared Pain and Gain to Promote Shared Information and Resources
- Project First: all members of the Project Team share in decision-making and execution



IPD: The Concept

■ Why Do It?

- Increased certainty in project outcomes (cost and schedule)
- Increased efficiency with Lean Construction Tools
- Reduced transaction costs (contingencies and claims)



IPD: The Concept

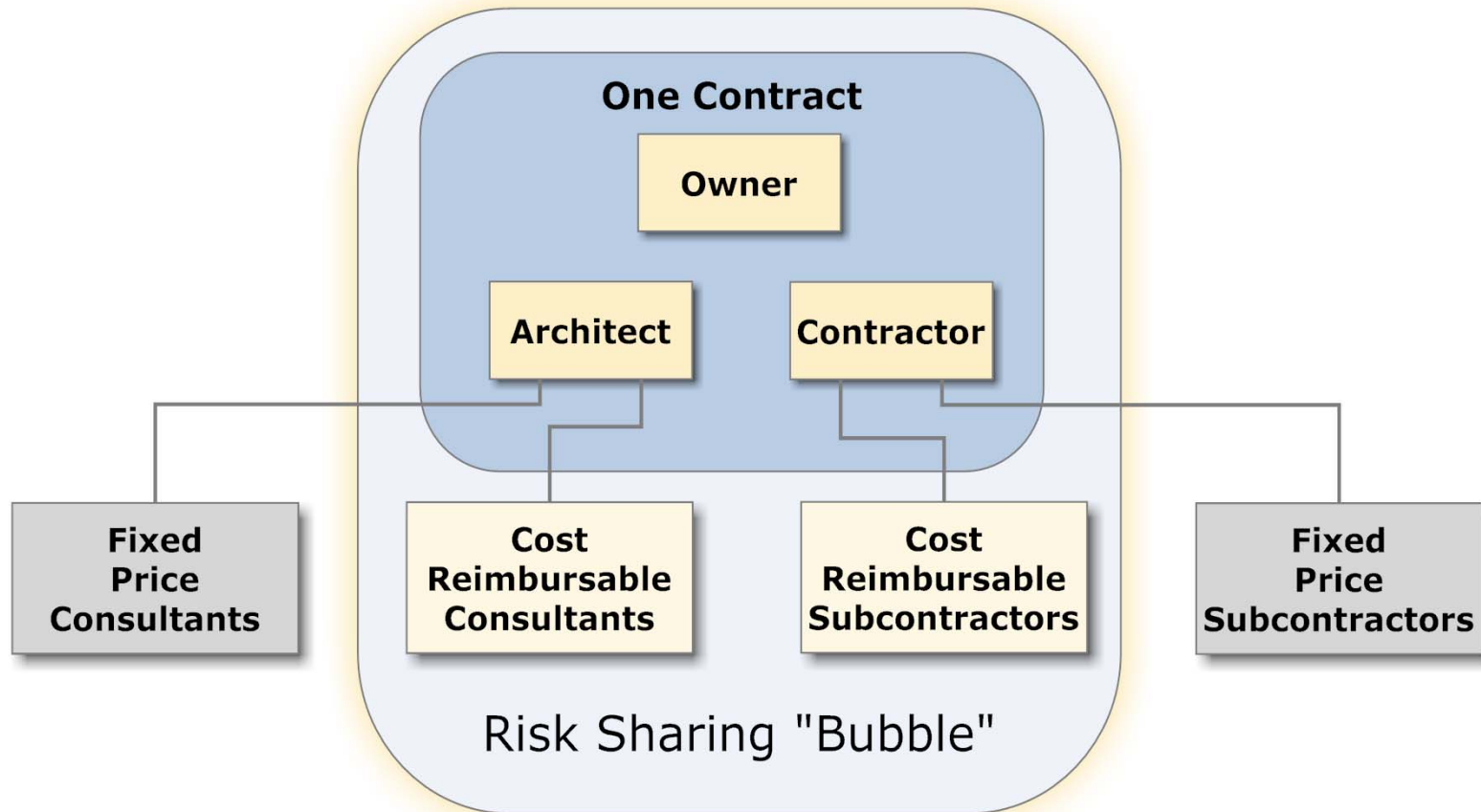


Diagram from: H. Ashcraft, K. Delorey, D. Green, *Integrated Project Delivery*, ABA Forum on Construction Industry Annual Meeting (2011)

IPD: The Concept

Negotiation Process Overview

- The Business Case
- Project Delivery Evaluation
- Project Team Selection
- Negotiating the Deal
- Contract

The Business Case

- Identify Owner's Key Project Goals
 - Maximizing facility value?
 - Return on investment?
 - Schedule?
- Development of Owner Estimate
 - Preliminary definition of project scope
 - Preliminary cost estimate based on available market data
 - Preliminary project schedule based on owner's needs
- Financing
- Capacity
 - Staffing
 - Technology



Project Delivery Evaluation

Is IPD Right for the Project and the Owner?

- **Have to Unlearn What You Know**
 - Project Team Silos / Individual Contracts / Black Box Estimating
 - Complete design before procurement and financing
 - Guaranteed Maximum Price (“GMP”)
 - Owner as end user
- **Learning What You Need to Know**
 - IPD Project Delivery Workshop (What is it? Why do it?)
 - IPD Process Workshop (How will project work day-to-day?)
- **People are Paramount**
 - Comfort with collaboration
 - Mutual ownership / mutual responsibility / mutual investment in success
 - Owner must play a more robust role
 - Creativity and innovation encouraged
- **Institutional Obstacles to Consider**
 - Statutory
 - Corporate
 - Finance
 - Capacity

Selecting the Project Team

- IPD assumes early involvement of owner, designer, contractor and key subs
- Owner brings project to market when development of business case is complete
- Market competition in IPD context
- Private Owner Team Selection:
 - Existing relationships / Experience-based
 - Request for Interest / Qualifications
 - Bid Based on Fees and Overhead
- Public Owner Team Selection:
 - Statutory procurement requirements
 - Options
 - Special legislation
 - Best value selection
 - Selection based on fees, overhead, profit share



Negotiating the Deal

■ Business Terms First!

- Project Scope
- Management & Decision-making
- Compensation
- Project Targets
- Allowable Costs
- Contingencies
- Risk Allocation
- BIM and Document Ownership
- Dispute Resolution



■ Collaboratively Develop Plain Language Term Sheet

■ Contract Language Last!

Negotiating the Deal

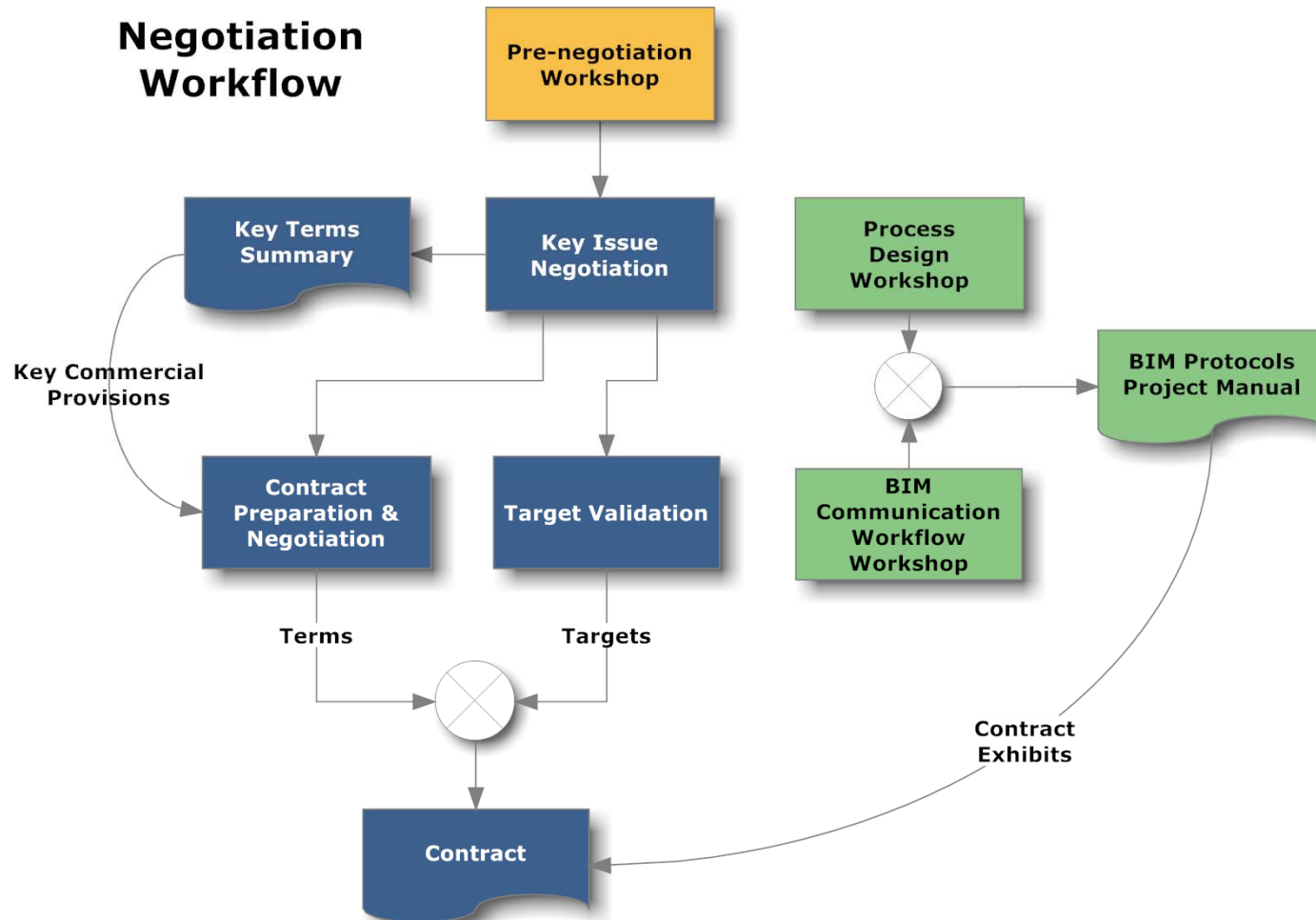


Diagram from: H. Ashcraft, K. Delorey, D. Green, *Integrated Project Delivery*, ABA Forum on Construction Industry Annual Meeting (2011)

Negotiating the Deal

■ Target Validation

- Project Team assessment of feasibility of owner’s scope, estimate and schedule
- Prepares parties for contract price negotiation
- If feasibility not confirmed, termination for convenience

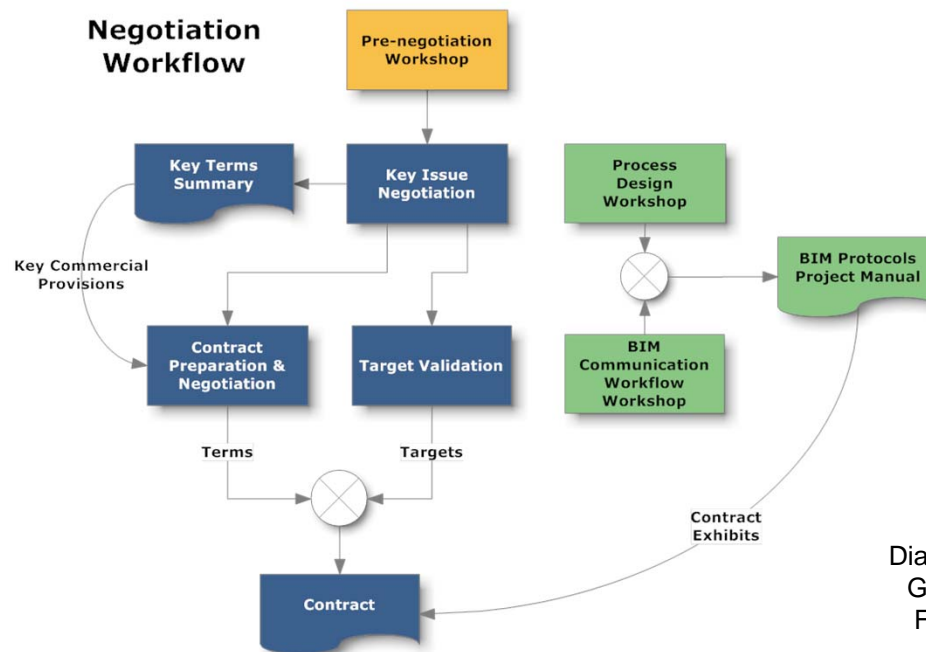


Diagram from: H. Ashcraft, K. Delorey, D. Green, *Integrated Project Delivery*, ABA Forum on Construction Industry Annual Meeting (2011)

Key Terms -- Scope

- **Project Scope**
 - Identify the Owner's project goals
 - Micro-definition of scope not recommended; need flexibility as project moves through design phase
 - Focus on identifying all work that needs to be completed to achieve project goals



Key Terms – Management & Decision-Making

■ Project Management

- Project Management Team manages project day-to-day
- Senior Representatives of all Team members engaged and available for dispute resolution

■ Decision-Making

- Consensus
- Owner with final decision-making authority
- Majority vote of senior representatives (with owner directive option)



Key Terms – Management & Decision-Making

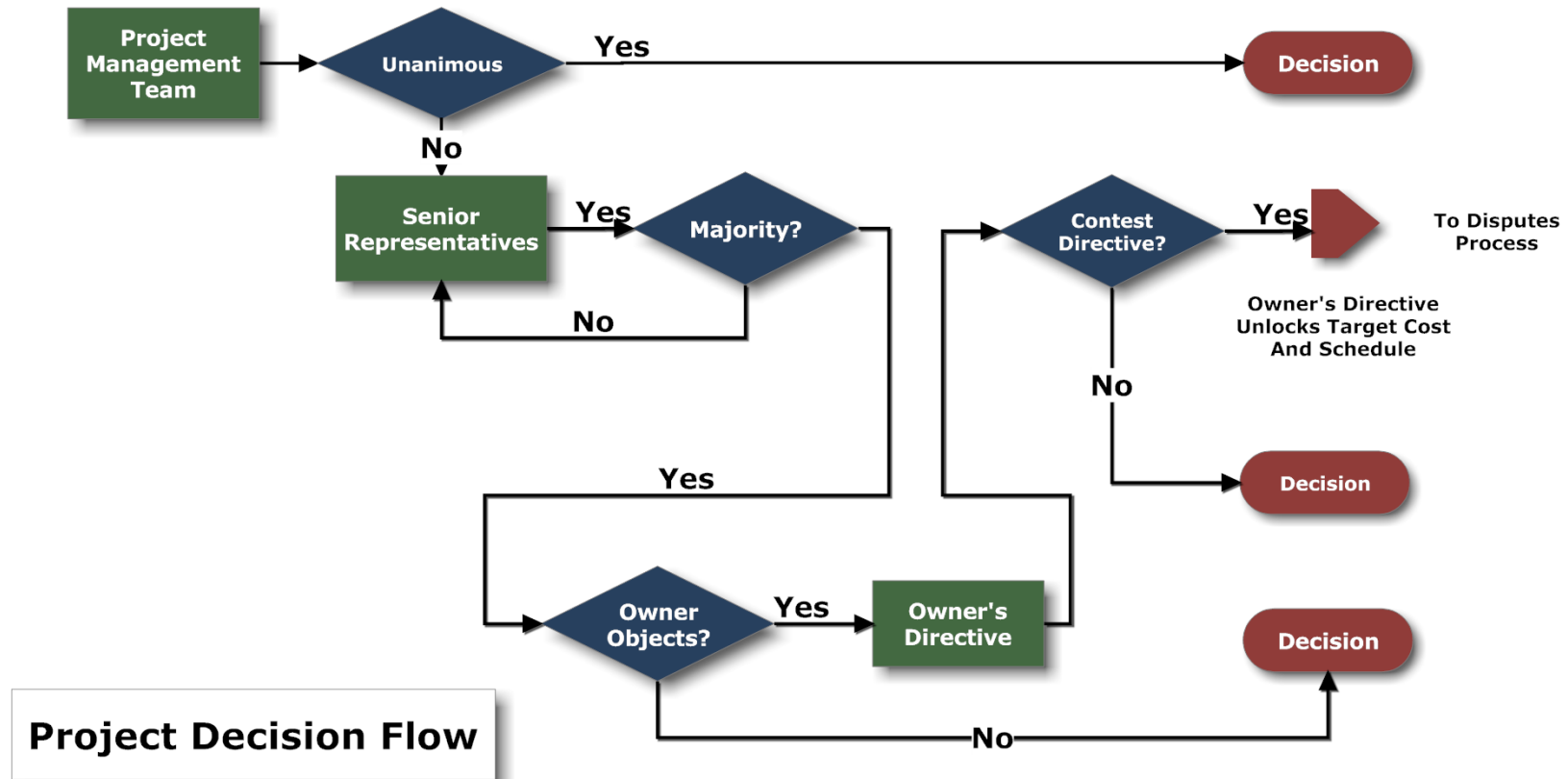


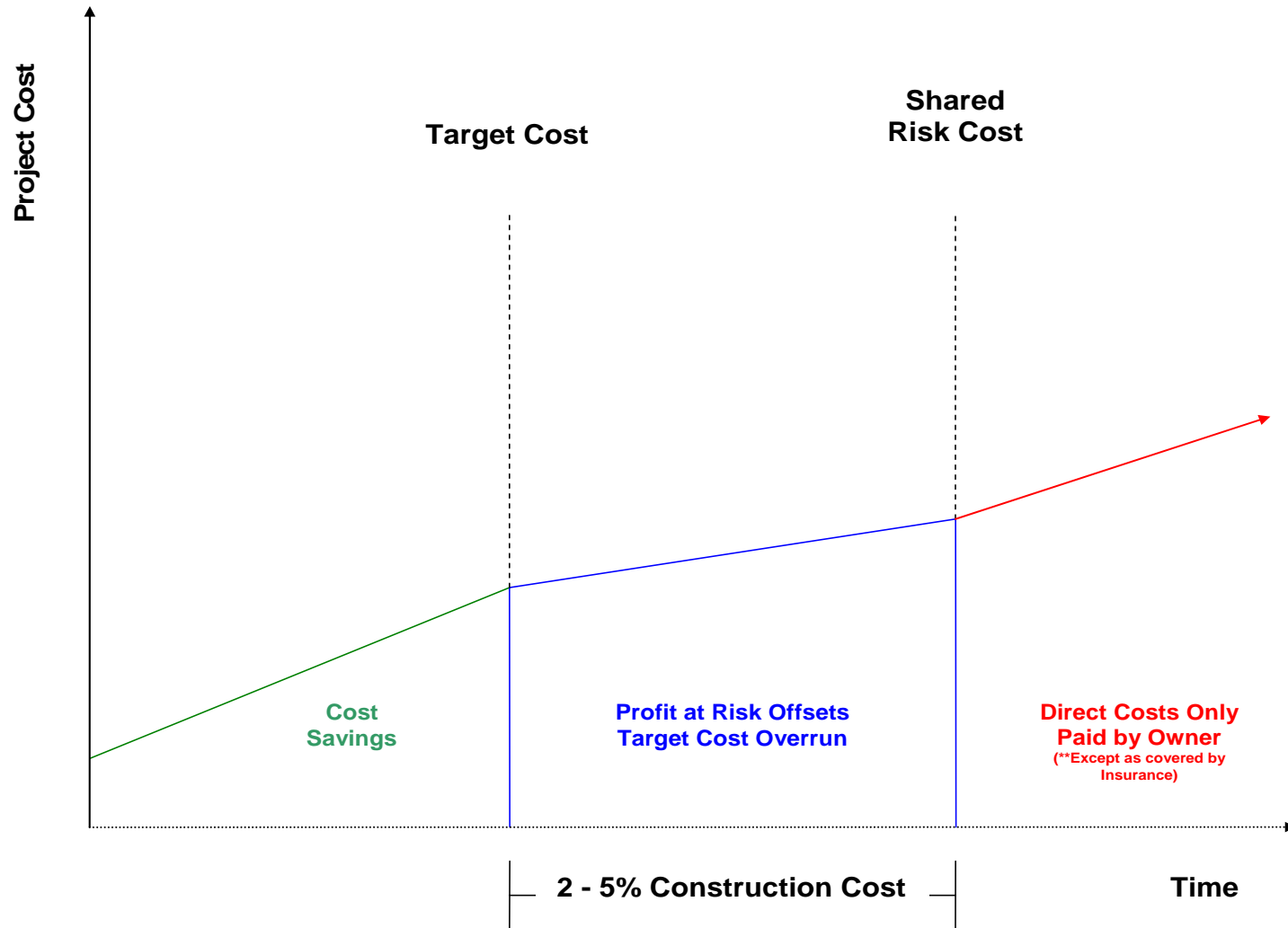
Diagram from: H. Ashcraft, K. Delorey, D. Green, *Integrated Project Delivery*, ABA Forum on Construction Industry Annual Meeting (2011)

Key Terms -- Compensation

■ Compensation

- Goal is to align financial interests with project
- No one size fits all compensation structure
- Key Concepts
 - Target Cost – collaboratively-developed, aggressively-priced project cost estimate that all Project Team members are incentivized to meet or beat
 - Profit at Risk – total sum of profit from designer, contractor, and key subs that can be lost in the event the Target Cost is exceeded
 - Shared Risk Cost – Target Cost + Profit at Risk = Shared Risk Cost

Key Terms -- Compensation



Key Terms -- Compensation

- What Aspects of IPD Compensation are Negotiable?
 - Target Cost
 - Normal Profit
 - Total Amount of Profit at Risk
 - Team Member Shares of Profit at Risk
 - Team Member Shares of Cost Savings



Key Terms – Allowable Direct Costs

Designer

- Traditional Direct Costs = employee salary + subconsultants
 - Multiplier for overhead and profit
- IPD Direct Costs = employee salary + subconsultants
 - Multiplier reduced by designers share of profit at risk

Contractor

- Traditional Direct Costs = cost of work (including subs)
 - Fee for overhead and profit
- IPD Direct Costs = cost of work (including subs)
 - Fee reduced by contractors share of profit at risk
- Parties need to negotiate exactly what are and are not costs of work attributable to project

Subcontractors

- Subs can distort contractors allowable direct costs
- Key subs should be included in Project Team to make costs transparent and tied to the Target Cost and Shared Risk Cost

Key Terms – Project Targets

- Target Types
 - Target Cost
 - Schedule / Milestones
 - Sustainability
- Timing
 - Set at the end of validation / target value design process
 - Project Team can then set aggressive, but feasible targets
 - Late targeting impedes collaboration



Key Terms – Risk Allocation

■ Broad Categories of Project Risk:

- Project Outcomes (e.g. cost, schedule)
- Project Performance (e.g. cracked slab or leaking roof)
- Builder's Risk (e.g. fire during construction)
- Third Party Claims (e.g. worker injury)



Key Terms – Risk Allocation

■ IPD Allocation of Risk

- Project Outcomes Risk: WAIVED
- Project Performance Risk
 - Warranty and professional liability claims preserved
 - Safe harbor for joint decisions
 - Retention of liability for own negligence and breaches of contract
- Builder's Risk: WAIVED to limits of insurance
- Third Party Claims: contractor indemnity or owner controlled insurance plan



Key Terms – BIM Ownership

■ Building Information Modeling

– The Benefits

- Supports collaborative design and construction
- Identifies design/construction clashes
- Efficient facility maintenance

– The Risks

- Capacity
- Control
- Blurred responsibility

– Need to Define

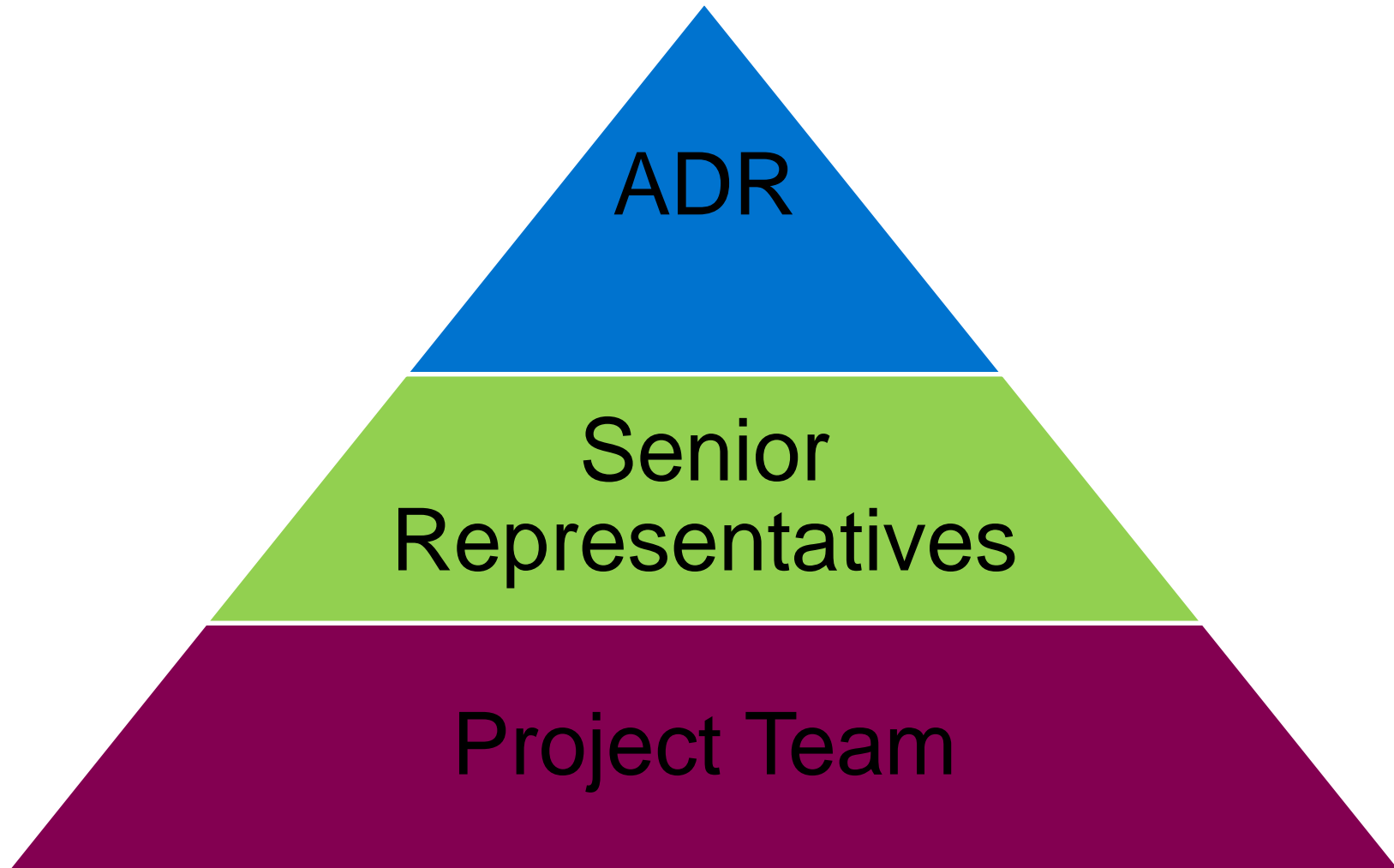
- Who contributes to BIM?
- Who manages BIM during project?
- Who provides IT support for BIM?
- Who owns BIM upon project completion?
- Who owns BIM liability?

– Form Documents

- ConsensusDOCS 301 BIM Addendum
- AIA E-202-2008 BIM Addendum



Key Terms – Dispute Resolution



Key Terms – Term Sheet

- Key terms to be memorialized in plain language term sheet
- Term Sheet drives form, drafting and negotiation of contract
- Time to pick a contract form!

Available Contract Forms

SUMMARY COMPARISON OF INTEGRATED PROJECT DELIVERY AGREEMENTS

IPD CONCEPT ¹	AIA C191 FAMILY (3 Party Agreement)	AIA C195 FAMILY ² (LLC formation + agreement governing LLC +3 separate agreements) (C195, C196, C197)	CONSENSUS DOCS 300 (3-Party Agreement)	Sutter Health's Integrated Agreement for Lean Project Delivery (IFOA rev. 2009) ³ (3-Party Agreement)	HANSON BRIDGETT LLP Standard Multi-party Agreement, V2 ⁴ (3-Party Agreement)
Decision Making	<p>The Project Executive Team ("PET") is responsible for the overall planning and management of the project. The PET consists of a representative from the Owner, Architect, Contractor, and any additional Parties to the Agreement. The PET may delegate responsibilities to others, including the Project Management Team ("PMT"). Decisions by the PET must be unanimous. (§2.1.1, §2.1.2, §2.1.3)</p> <p>If the PET is unable to reach consensus, there is an option for an "Owner's Directive," which is similar to the Hanson Bridgett model, and subject to further dispute resolution. (§2.1.2, §2.1.2.1)</p> <p>The PMT includes one representative from each Party to the Agreement. The PMT is responsible for the day to day management of the project and for executing the decisions of the PET. PMT decisions must be unanimous, and are binding, subject to subsequent review and decision by the PET. The PMT does not have authority to make decisions that impact Target Cost or Contract Time. (§2.2.1, §2.2.2, §2.2.3)</p> <p>If the PMT is unable to reach consensus, any member may refer the matter to the PET for resolution. The PET has the sole authority to approve issues that result in a change to the Target Cost or the Contract Time. (2.2.3, 2.3.2)</p> <p>Note: There is some tension and confusion between the roles and authority of the PMT and PET. The document says that PMT decisions are binding, unless the PET acts, which can create some uncertainty concerning PMT decisions.</p>	<p>Decisions for the LLC are made by a "Governance Board" ("Board") consisting of an odd number of Members (5 or more). Owner has majority with 1 more representative than non-Owner Members. Chair person is one of the Owner's representatives. (§8.2.1)</p> <p>Each Member has sole discretion to replace its representative at anytime and without approval of the Governance Board. (§8.2.2)</p> <p>Authorizations, approvals, or other actions require the unanimous vote of the Board unless specifically designated in the Agreement to be decided by majority vote. (§8.2.3)</p> <p>LLC Members also establish a Project Management Team ("PMT"), consisting of one representative from each Member. The PMT may choose to include non-Member Project participants, as well. (§D.1.1, §D.1.2, §D.1.3)</p> <p>Project decisions require unanimous affirmative vote of the Member representatives of the PMT. If PMT Member reps are unable to reach consensus, the matter is referred to the Governance Board and established dispute resolution procedures. (§D.1.4, §18.2)</p> <p>Note: Presumably, the Members chosen as part of the PMT would not be the same as those chosen to serve on the Board. However, this is not explicitly required under the Agreement.</p>	<p>The Project Management Group ("PMG") has ultimate decision making authority. The PMG includes a representative from the Owner, the Designer, and the Constructor. It can also include other critical project participants by invitation, but with limited voting rights (e.g., items that directly concern that participant's work) and they are subject to removal. The PMG meets regularly regarding Project status and issues. (§3.3, §4.1, §4.7.2)</p> <p>The decision making process encourages consensus among PMG members, but if a consensus is not reached, the Owner decides, unless the decision implicates life, health, property and public welfare and is required to be made by a licensed design professional, in which case the Designer decides. (§4.6)</p> <p>The PMG receives input from the Collaborative Project Delivery Team ("CPD Team"), which includes the Owner, Designer, and Constructor, plus other design consultants and Trade Contractors involved in the preconstruction phase that sign Joining Agreements. The PMG establishes a matrix for regular meetings of the CPD Team regarding overall Project planning, scheduling and coordination, and variances. (§3.3, §4.8)</p> <p>Note: The Agreement does not specify clearly whether the PMG takes part in the regular CPD Team meetings. The matrix may be a means of establishing which Team members should attend.</p>	<p>The overall management of the Project is by a "Core Group" of Owner, Architect, Construction Manager/General Contractor ("CM/GC") and others whom the O/A/C invite to join. The Core Group endeavors to make decisions based on unanimity, but if there is impasse, the Owner may issue directions it believes are in best interest of Project, subject to further dispute resolution. (§4)</p> <p>The Core Group receives senior management support through designated "Senior Management Representatives" who also have responsibility to assist in resolving disputes, as described below. (§4.3, §39.2, §41.8)</p> <p>The Core Group is responsible for assuring that the team prepares a number of required deliverables relating to the management and execution of the Project, including a pull planning system, streamlined communication protocols, project evaluation criteria, Target Value Design plan, built-in quality plan, and similar deliverables meant to implement Lean Construction on the Project and realize Owner value. (§4.7, §8.10, §9.6, §25.2)</p> <p>The Core Group approves Change Orders. Construction Change Directives may be issued by Owner in the absence of agreement by Core Group. (§24)</p>	<p>Project decisions are made by the Project Management Team ("PMT"), which includes a representative for the Owner, Architect and Contractor. Decisions by the PMT must be unanimous. PMT decisions affecting design, cost, schedule or reallocation of the Work are confirmed through a PMT Directive. (§4.1, §4.3)</p> <p>If the PMT is unable to reach consensus, the issue is referred to the "Senior Management Representative" level, which will first attempt to reach consensus but, if a consensus is not reached, will decide the issue by majority vote. (§4.1.6, §4.2)</p> <p>The Owner can make unilateral decisions by issuing a written "Owner's Directive," but if the decision impacts cost of the project or Contract Time, the Target Cost, Target Schedule, and/or Incentive Compensation Layer will be adjusted. (§4.1.6)</p> <p>There is also a Project Implementation Team ("PIT"), which includes the PMT and consultants, subcontractors and others who may significantly impact the project outcome. The PMT actively seeks and considers input from the PIT. (§5.4)</p>

¹ This Summary focuses on how the different contract treat key IPD elements, but does not attempt to detail each difference between the contracts. The user should review each contract approach closely to determine which is the most appropriate, for a specific project and team, and as a first step in determining what modifications may be required. It is intended to assist counsel with a good understanding of IPD concepts and is not a substitute for legal advice from counsel with actual IPD experience.

² Except as otherwise noted, all section (§) references are to AIA Document C195[®] and its Exhibits.

³ The IFOA is a proprietary and copyrighted document. It is included in this list because of it has been used as the basis for many custom IPD documents and influenced the development of the ConsensusDOCS 300. In use, it is adapted to specific project requirements and many key business terms are resolved in Amendment 1, not in the body of the core document.

⁴ The Hanson Bridgett IPD Agreement is a proprietary and copyrighted document. Like the IFOA, it has been for many IPD projects and it influenced the AIA C191 Multi-party Agreement, which shares many concepts. It is also adapted to specific project requirements. If you are reviewing an agreement that is executed on a specific project, its terms may, therefore, vary from the base form.

Consensus Docs 300

- 3 Party Agreement
- Decision-Making
 - Project Management Group (Owner Designer Contractor)
 - Consensus encouraged
 - Owner decides if dispute
- Target Cost
 - Based on 100% design documents
 - Jointly developed by Project Management Group and set forth as amendment
 - If Target Cost exceeds budget: (a) value-engineering, (b) re-bid, (c) termination



Consensus Docs 300

- Compensation
 - Traditional compensation
 - Encourages financial incentives (e.g. Profit at Risk) to meet Target Cost
- Change Orders & Contingencies
 - Traditional process, but for limited conditions (e.g. material changes in scope; agency changes; differing site conditions; owner changes)
- Risk Allocation
 - Builder's Risk, E&O, CGL, Workers Comp. and Auto
 - Owner and Contractor waive all rights against each other for damages covered by insurance
 - Waive consequential damages
 - Safe Harbor for joint decisions OR traditional risk allocation



Consensus Docs 300

- **BIM Management**
 - Amendment negotiated by parties assigning contributions, project control and technology maintenance
- **Dispute Resolution**
 - Discussions between involved parties only
 - If unresolved, elevates to Project Management Group
 - If unresolved, non-binding mitigation with Project Neutral or Dispute Resolution Board
 - If unresolved, binding arbitration or litigation



IPD Resources

- www.ipd-ca.net
- www.aia.org/ipd
- www.consensusdocs.org
- www.leanconstruction.org
- www.autodesk.com/ipd