In its 13th Annual Construction Disputes North America Report for 2023, Arcadis highlights a wealth of data about construction disputes, including an analysis of their leading causes.

Notably, the report lists the top three causes of construction disputes as:

1. Errors and/or omissions in the contract documents.
2. Owners/contractors/subcontractors failing to understand and/or comply with its contractual obligations.
3. Poorly drafted or incomplete and unsubstantiated claims.

It is not a surprise to see that two of the top three causes of construction disputes involve the various project participants — design professionals, owners, contractors and/or trade contractors. Equally unsurprising is the report highlights 1) risk management and 2) constructability reviews as two of the top three most effective strategies to avoid claims, and it also states an owner and contractor’s willingness to compromise is the number one factor in expediting dispute resolution.

Having a tailored professional liability insurance policy is a necessary risk management tool to help successfully implement IPD projects.
While many conclusions can be drawn from the data in the report, one conclusion is glaringly obvious — the key to managing risk and mitigating and avoiding construction disputes is effective collaboration, coordination, communication, and compromise among and between the various participants working on a construction project. A closing paragraph in the Arcadis report summarizes this best, “To successfully resolve construction disputes moving forward, project participants will need to adapt to new ways of working...all while embracing a spirit of compromise.”

**The Spirit of Compromise – Integrated Project Delivery**

In construction, “new ways of working” can be interpreted as new or alternative project delivery methods, basically any delivery method other than traditional design-bid-build delivery. While there are many alternative delivery methods, one thing is certain — there will be many more in the future.

However, over the past 15 years or so, integrated project delivery (IPD) has been introduced here in the US and successfully implemented on a number of projects. It appears to be the one delivery method that embodies the collaboration, coordination, communication and compromise characteristics needed to effectively avoid construction disputes and minimize their impact when they occur.

A significant amount has been written about IPD, what it is, case studies about projects that have been delivered using IPD, and their success stories. It’s compelling evidence that demonstrates IPD, true IPD, works. Therefore, this article will not focus on those aspects of IPD. Rather, this article will focus on the fundamental pillars required for true IPD to be successfully implemented and how properly structured professional liability insurance for integrated project delivery can facilitate that implementation.

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**TRUE IPD vs. IPD Lite**

Often, we hear about a project that will be delivered using IPD, only to learn that while the intent is for the parties to collaborate more closely, especially during the pre-construction phase, there are critical elements missing from the project structure and agreements that make it true IPD. There are a number of important components that need to be present for IPD to be true IPD.

The components or characteristics of true IPD include a multi-party integrated contract between the owner, design professionals and contractors (general contractor and certain trade) forming the IPD team. Additionally, all of the participants on the IPD team, including signatories to the IPD agreement, must share in the risks and rewards of the project and establish an agreement not to make claims against each other (with limited exceptions and under strict rules for resolution). If these and other key components are not in place, then it’s not true IPD, but rather something called IPD lite.

The goal of true IPD is to promote and facilitate the fundamental pillars of IPD — collaboration, coordination, communication, all the members of the IPD team and compromise and the IPD agreement seeks to accomplish those goals.

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**Structuring an IPD Professional Liability Insurance Policy**

Construction is very much a risk and reward business. As a result, when the principals of a construction project, the owner, general contractor/construction manager, design team and key trade contractors all
agree to share in the rewards of the project. However, with those rewards comes risk, risks that are shared by all the members of the IPD team.

Chief among those risks is professional liability risk resulting from, among others, pre-construction phase services, principally design services. Errors or omissions resulting from the negligent performance of design services can result in a variety of damages, most significantly delays and cost overruns. This is where professional liability insurance comes in and is vital as a risk management tool for any project, in particular, an IPD project.

Similar to the IPD agreement, a well-structured professional liability program for the IPD project will facilitate the IPD goals of collaboration, coordination, communication and cooperation as the professional liability policy allows IPD team members to share in the professional liability risks without fear of a lack of insurance coverage for those damages, including IPD team members that traditionally do not assume or are otherwise not exposed to professional liability risks.

**What Are the Key Components of a Well-Structured IPD Professional Liability Policy?**

- **The Named Insured and Additional Named Insured(s)** – Is the IPD team a sole purpose entity? Will the some purpose entity subcontract services and work to the design and construction members of the IPD team? Are there any joining agreements in addition to the IPD team agreement?

- **Definition of the Covered Project** – Defined with sufficient detail and including reference to the IPD agreement.

- **Professional Liability Coverage** – Must be maintained to protect the IPD team from third-party claims from persons or entities outside of the IPD team.

- **Rectification/Mitigation Coverage** – Due to the IPD structure of risk sharing and no blame/no claims among and against IPD team members, rectification is the most important coverage feature of an IPD policy. The wording for the rectification coverage part must recognize the no blame/no claims approach facilitated by the IPD agreement.

- **Retention Applicable to Rectification/Mitigation Claims** – Structure the retention applicable to rectification losses as a policy aggregate.

- **Protective Indemnity Coverage** – Protective indemnity coverage should be maintained to protect the IPD team from excess damages from the services performed by non-IPD members of the design or construction team.

- **Definition of Design Professional** – Must delineate that a design professional is not a signatory to the IPD agreement or joining agreement to eliminate any conflict with the protective indemnity coverage.

- **Definition of Professional Services** – Broadly worded to contemplate all professional services performed by design and construction members of the IPD team. This definition may likely specify that professional services do not include professional services performed by the project owner.

- **Definition of Rectification Expense/Loss** – Includes expenses to prevent potential damage or loss resulting from an act, error or omission in the services performed by an insured under the IPD agreements, including joining agreements.

- **Insured vs. Insured Exclusion** – Limited to professional liability and protective indemnity claims.

- **Contractual Liability Exclusion** – Because the IPD agreement will likely include contractual liabilities extending beyond those that would attach in the absence of the contract, it is important the contractual liability exclusion be amended to specify that it does not apply to any assumption of liability of an IPD team member in the IPD contracts or joining agreements or to any claims for breach of the IPD contract by an Insured IPD team member.
• **Warranties and Guarantees Exclusion** – Similar to the contractual liability exclusion, the IPD agreement likely imposes obligations upon IPD team members for certain losses or damages without a finding of negligence. These obligations may be deemed an express warranty or guarantee and, therefore, not covered by the traditional professional liability policy. The IPD policy must specify that the warranty and guarantee exclusion does not apply to liability for such resulting from an insured's participation in the IPD agreement/covered project.

• **Faulty Workmanship Exclusion** – Proper carve backs to the faulty workmanship exclusion for professional liability and protective claims resulting from negligent acts, errors or omissions by an insured or by those for whom an insured is legally responsible and for rectification loss resulting from acts, errors or omissions by an insured or by those for whom an insured is legally responsible.

• **Joint Defense** – For third-party professional liability claims made against an insured, it is vital a joint defense approach is written into the policy. The cooperation and collaboration necessary for successful IPD projects by and among IPD team members will be susceptible to failure without a joint defense approach for third-party professional liability claims.

**Final Takeaways**

Professional liability insurance plays a crucial role in any construction project, but its importance is amplified in IPD projects due to increased collaboration and risk sharing among IPD team members. By evaluating project-specific risks and creating a sound professional liability insurance structure protecting all IPD team members from those risks, design and construction professionals can focus on delivering a successful IPD project. As the professional liability marketplace for coverage for IPD projects continues to evolve, we anticipate new approaches and professional liability products to be introduced. Keep a lookout for future updates from us/NFP on any important updates.

**Questions? Contact:**

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