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# Understanding and Reviewing Contracts

PRESENTED BY:

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# What Forms a Contract?

- Three requirements for contract:
  - Offer
  - Acceptance
  - Consideration
- A contract can be verbal: only certain types of contracts have to be in writing

# What Constitutes Acceptance?

- Binding acceptance can take many forms:
  - Express acceptance (verbal or written)
  - Acceptance by conduct (e.g., proceeding with performance following receipt of an offer)
  - Silence or a failure to respond can constitute acceptance (e.g., sale/purchase of material – Commercial Code)

# Counteroffers

- Counteroffers are not acceptance
- Counteroffers constitute a new offer which requires acceptance to form a contract
- As a counteroffer rejects the original offer, the original offer is no longer binding on the original offeror

# What are the Terms?

- Executed written contract: Read it!
- What about a verbal contract?
- When contract terms are proposed, work proceeds, but a full written agreement is not executed?
- In a sales contract, only quantity is required; price need not be specified



# Project Delivery Methods

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# Common Project Delivery Methods

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- **Design-Bid-Build (“Bid-build”)**
  - Design-negotiate-build
  - Design-GMP-build
  - Fast track-multi-prime
- **Design-Build**
- **Engineer-Procure-Construct**
- **PPP (“P3”)**
  - Design, build, finance, deliver
  - Design, build, finance, operate, maintain (i.e., concession contract, toll roads, etc.)
  - Ground lease – Pure private development of public lands

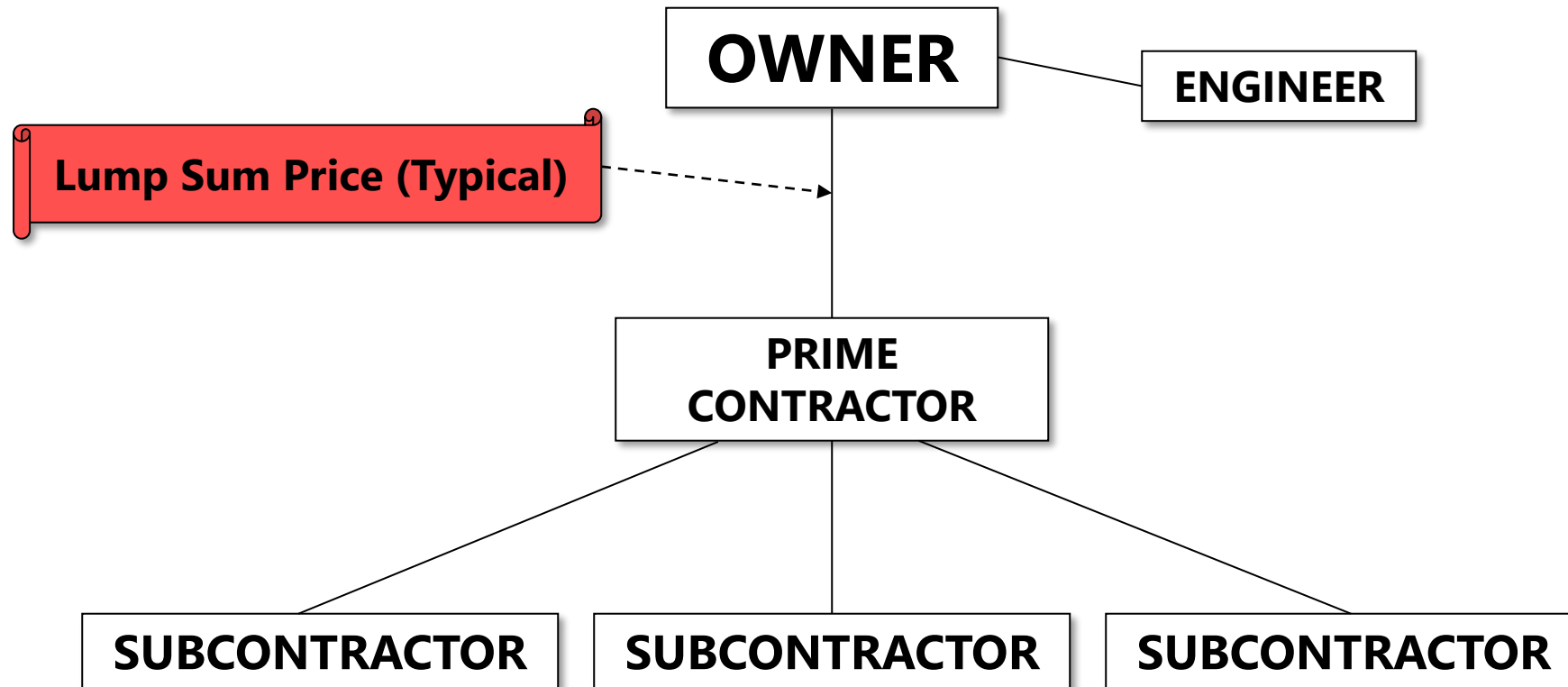
# Design-Bid-Build

- Traditional: Owner/GC/Subcontractors
- CM at Risk
- Agent CM
- Multiple Primes (often used in conjunction with Agent CM)

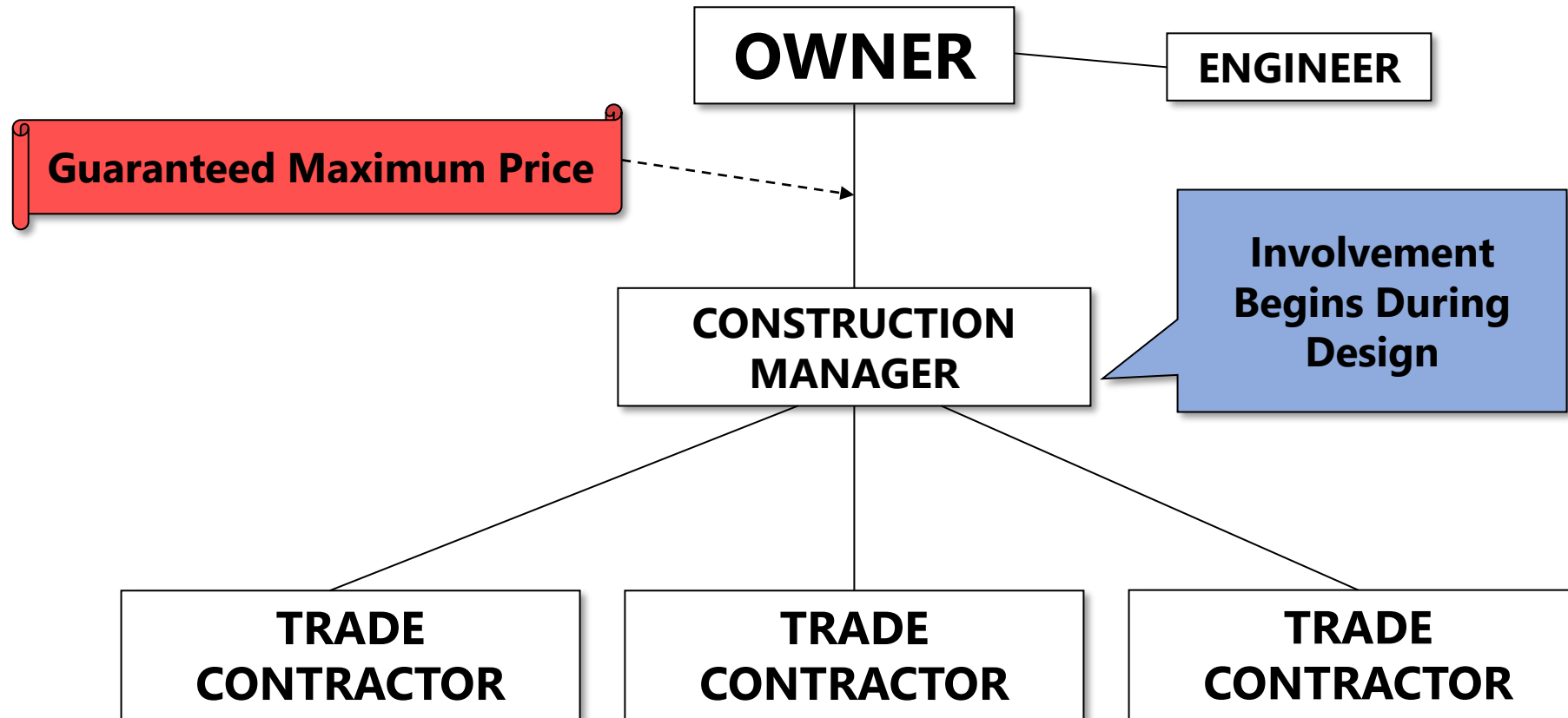


# TRADITIONAL

## *Owner/GC/Subcontractors*

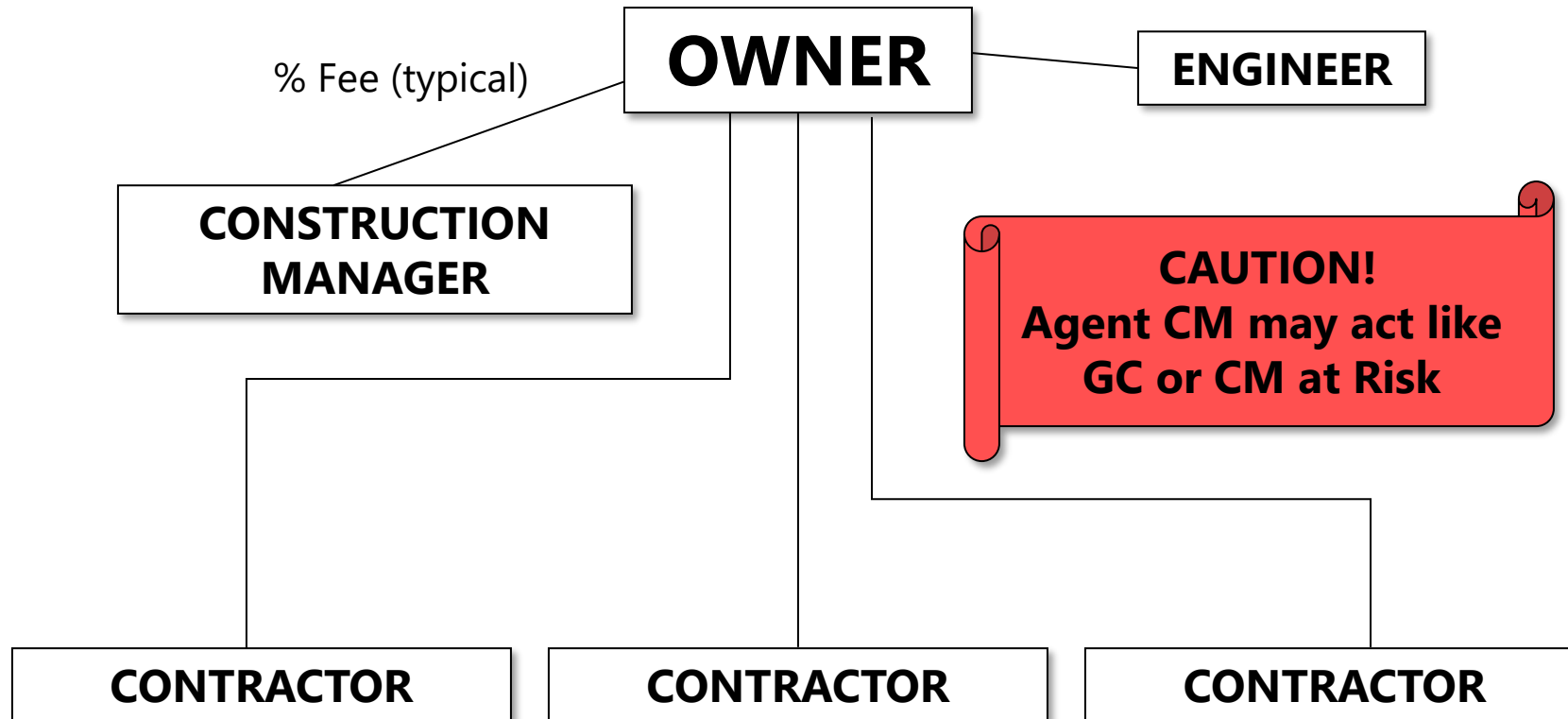


# CM "At Risk"



# Agent CM

*(Shown with Multiple Primes)*



# Understanding the Contract

## CONTRACT

and Contractor agree as follows:

**Agreement.** This Agreement shall be effective as set forth in this Agreement have been satisfactorily performed in full. Contractor shall have a continuing obligation to survive the completion, expiration or termination of this Agreement intended for the Company's protection.

THAT NO WORK SHOULD BEGIN UNDER THIS AGREEMENT UNTIL SUCH TIME AS ALL NECESSARY PERMITS AND AS A PRELIMINARY

# Contract Knowns and Unknowns

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Contracts address:

- **Known Knowns** – Parties know what the original bargain is (service or product to be delivered, base price, original duration, etc.)
- **Known Unknowns** – The parties know that changes can and likely will occur (delays, changes in quantities, design changes, etc.)
- **Unknown Unknowns** – ???

# Contractual Risks

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- Scope of work and obligations
- Differing site conditions
- Other scope changes
- Non-payment by Owner
- Delays, interruptions, suspensions
- Property damage, personal injury
- Termination – Default or convenience
- Quality/warranty
- Hazardous materials
- Design

# Risk-Shifting Clauses

RISK	CLAUSE(S)
Scope of Work	<ul style="list-style-type: none"><li>• Scope of Work</li><li>• List of Documents</li><li>• Mutuality of Obligations (Incorporation of Prime Contract)</li><li>• Conflict of Terms</li></ul>
Changes	<ul style="list-style-type: none"><li>• Changes</li><li>• Claims</li></ul>
Site Conditions	<ul style="list-style-type: none"><li>• Differing Site Conditions</li><li>• Inspection of Site</li></ul>
Non-Payment	<ul style="list-style-type: none"><li>• Pay-If/When-Paid</li><li>• Prompt Payment</li></ul>

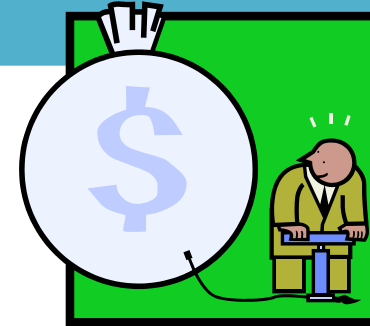
# Risk-Shifting Clauses (continued)

RISK	CLAUSE(S)
Delays, Interruptions, Suspension	<ul style="list-style-type: none"><li>• No-Damage-for-Delay</li><li>• Liquidated Damages</li><li>• Suspension</li></ul>
Property Damage, Personal Injury	<ul style="list-style-type: none"><li>• Indemnification</li><li>• Insurance</li></ul>
Termination	<ul style="list-style-type: none"><li>• Termination for Default/Convenience</li></ul>
Quality of Construction	<ul style="list-style-type: none"><li>• Inspection/Re-Inspection</li><li>• Warranty</li></ul>
Design/Engineering	<ul style="list-style-type: none"><li>• Warranty of Design</li><li>• Shop Drawings</li><li>• Submittals</li></ul>



# Contract Risk Options

1. Increase the price? (Try to cover the risk with money in the bid)
2. Change the contract? (Shift the risk back to Contractor)
3. Accept the risk?
4. Walk away?





# Specific Clauses

# Scope of Work

- Scope of work is commonly detailed in enumerated items of work contained in a subcontract subsection, exhibit, or attachment
- Some contractors incorporate a subcontractor's proposal by attachment or by reference into the subcontract
- Scope inclusions and exclusions should be thorough and clear, avoiding vague terms such as "by others" where possible
- Scope of work can be affected by flow-down clauses

# Flow-Down Clause

- A flow-down clause passes (“flows”) down to the subcontractor obligations (and often rights) the Contractor owes to the Owner
- Typical flow-down clause:

*OBLIGATIONS The Constructor and the Subcontractor are hereby mutually bound by the terms of this Agreement. To the extent the terms of the prime agreement apply to the Subcontract Work, then the Constructor hereby assumes toward the Subcontractor all the obligations, rights, duties, and redress that the Owner under the prime agreement assumes toward the Constructor. In an identical way, the **Subcontractor hereby assumes toward the Constructor all the same obligations, rights, duties, and redress that the Constructor assumes toward the Owner and Design Professional under the prime contract.** In the event of an inconsistency among the documents, the specific terms of this Agreement shall govern.*

# Conflicts Clause

- A conflicts clause establishes the hierarchy, priority, and/or interpretation of subcontract terms in the event of a conflict or ambiguity created between terms and conditions contained in the contract and subcontract documents or in different parts of the subcontract

- Example:

*If there is any conflict, ambiguity or inconsistency within or between the Prime Contract, Subcontract, and/or attachment documents, or a difference in interpretation, the terms and conditions imposing the greatest obligation on the Subcontractor shall take precedence.*

(See sample subcontracts for other versions)

# Understanding the Prime Contract

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- Compare schedule of values in prime contract with schedule of values in subcontract for variations in pricing structure or discrepancies in quantities and other items
- Expressly indicate that your scope of work prevails over scope of work in the prime contract where inconsistent
- Review prime contract to determine prime contractor's rights with respect to key subcontractor items (differing site conditions, assumptions of risk, equitable adjustments for changes and delays, etc.)
- Understanding the scope and assumptions of risk by the prime contractor is especially important if subcontracting with a design-builder

# Contract Documents

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- Make sure the plans and specifications in the contract documents are the same as the plans and specifications used for the bid/proposal (same dates, versions, drawings numbers, etc.)
- Make sure no additional addenda, RFI's, attachments, or other documents are included that were not included previously
- Responsibility for "all of the documents"

# Guaranteed Maximum Price and Design-Build Prime Contracts

- Where the prime contractor is working on a GMP contract, the design may not be fully developed and complete when the work commences
- The subcontract may include language making the subcontractor responsible for scope of work necessary to meet the “intent” of the design concept, with no additional compensation for changes in the design
- The same “intent” language may be present in subcontracts on design-build projects
- Subcontractors may be forced to agree that its price is a GMP





# Pricing and Payment Terms

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## Base Subcontract

- Lump sum
- Unit price
- Shift rate
- Cost-plus

## Pricing of Changes

- Negotiated lump sum
- T&M
- Extension of unit prices

What if the unit prices are not adequate to cover changes in the work?

# Variation in Estimated Quantities (VEQ)

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*If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the Contractor may request, in writing, an extension of time, to be received by the Contracting Officer within 10 days from the beginning of the delay, or within such further period as may be granted by the Contracting Officer before the date of final settlement of the contract.*

(FAR 52.211-18)

## PAY-IF-PAID Clause

Trigger language:

- "Payment by Owner is a **CONDITION PRECEDENT** to Contractor's obligation to pay Subcontractor"
- "Subcontract relies upon the **credit and solvency of the Owner** and not the Contractor"
- "Subcontractor **assumes the risk of non-payment** by Owner."

# Payment Terms

7.3 Notwithstanding anything to the contrary in this Subcontract, in the Prime Contract or in any bond or other document, the Owner's approval of the Subcontract work for which payment is requested and the Contractor's actual receipt of each progress payment, **final payment or any other payment from the Owner shall each be an absolute condition precedent to any obligation of Contractor to make any progress payment**, final payment or any other payment whatsoever to Subcontractor, including but not limited to the obligation to pay for extra or changed work (if any) to the extent allowable pursuant to this Subcontract. Both progress payments and final payment to the Subcontractor shall be made only out of funds actually received by the Contractor from the Owner for progress payments or for final payment of the Prime Contract and only to the extent said progress payments or final payment reflect Subcontract work which has been satisfactorily performed by Subcontractor in strict accordance with this Subcontract and which has been approved and paid by Owner. Subcontractor hereby expressly warrants and agrees that **Subcontractor is relying upon the credit, solvency and financial stability of the Owner and not the Contractor for payments** of work performed under this Subcontract. The Subcontractor expressly **accepts the risk of loss** if the Owner cannot or will not pay the Contractor.

# Payment Terms (cont'd)

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- A clause setting the time payment will be made (after the contractor receives payment) is a **PAY-WHEN-PAID** clause, not a pay-if-paid clause
- Compromise language:

*"If the reason for non-payment by Owner is due to the fault or negligence of Contractor or its other subcontractors, Subcontractor shall be entitled to payment from Contractor upon demand."*

- Tie release of retention to completion of your work, not the end of the entire project
- Right to stop work?

# Payment Terms (cont'd)

- Right to suspend work upon non-payment

*PAYMENT DELAY If the Constructor has received payment from the Owner and if for any reason not the fault of the Subcontractor, the Subcontractor does not receive a progress payment from the Constructor within seven (7) Days after the date such payment is due, as defined in the subsection immediately above, or, if the Constructor has failed to pay the Subcontractor within a reasonable time for the Subcontract Work satisfactorily performed, the Subcontractor, upon giving seven (7) Days' written notice to the Constructor, and without prejudice to and in addition to any other legal remedies, **may stop work until payment of the full amount owing to the Subcontractor has been received.** The Subcontract Amount and Time shall be adjusted by the amount of the Subcontractor's reasonable and verified cost of shutdown, delay, and startup, which shall be effected by an appropriate Subcontractor Change Order.*



# Schedule and Delays



- Is the scheduled duration achievable/reasonable?
- Is the scheduled sequence and phasing of work consistent with your proposed/planned sequence of work?
- What are the subcontractor's schedule deliverables?
  - Are you required to submit a baseline schedule and updates?
  - Is a CPM schedule required?
  - How often are updates required to be submitted?
  - Is a schedule/time impact analysis required for delay requests?

# Schedule – Sequencing of Work

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Can the Contractor re-sequence subcontractor's work unilaterally? If so, what are the subcontractor's rights to additional compensation for such changes?

*"The Contractor has the right to require the Subcontractor, without cost or liability to the Contractor, to schedule work hereunder in such a manner as will minimize interference, delay and expense of work of others or for the best interests of the Project as the Contractor may determine. If so ordered by the Contractor, the **Subcontractor shall prosecute certain portions of the Subcontract work in preference to other portions at no increase in Subcontract price.**"*

# Equitable Adjustment For Delay

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- Does the subcontract allow for additional compensation in the event subcontractor's work is delayed by:
  - Owner?
  - Contractor?
  - Contractor's other subcontractors?

(see Consensus Docs 750 – 5.3)

# “No Damage For Delay” Clause

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- Typical no-damage-for-delay clause:

“Contractor shall have the right at any time to delay or suspend the work or any part thereof without incurring liability therefore. An extension of time shall be the sole and exclusive remedy of Subcontractor for any such delays or suspensions, but only to the extent that a time extension is obtained from the Owner.”

## Actions:

- Strike the clause
- Revise to allow for compensation for Owner-caused delays

# Disruption Of Work

**If the Subcontractor's work is delayed, hindered, suspended, disrupted, interfered with,** rendered less efficient or more costly, or adversely affected in any way by any cause whatsoever whether such delays or hindrances are avoidable or unavoidable, anticipated or unanticipated, reasonable or unreasonable (including, but not limited to, acts or omissions of the Contractor or the Owner, the Architect or other subcontractors, by unusually severe weather, by acts of God, by unavoidable casualties, war, strikes, picketing, boycott, lockouts, or by any other reason beyond the Subcontractor's control and without fault or contribution by the Subcontractor), **the sole and exclusive remedy of the Subcontractor shall be to receive from the Contractor an extension of time** for each day of proven actual, excusable, and non-concurrent delay to the Subcontractor's work which, at the time of such delay, was on the Project's critical path.

(See sample subcontract) – 4.3

# Delays Caused by Other Subcontractors

- Beware of language limiting subcontractor to pursuing delay claims against Contractor's other subcontractors – LACK OF PRIVITY

Example:

*If, through acts, omissions, or neglect on the part of any entity other than Contractor, including, without limitation, any other contractor or subcontractors, Subcontractor shall suffer loss or damage, **Subcontractor agrees to resolve such alleged damages or claims directly with such other entity.** If another entity shall assert any claim against Contractor on account of any loss or damage, Contractor shall notify the Subcontractor, who shall defend, indemnify and save harmless Contractor against any such claim.*

# Liquidated Damages Clause

- Establishes a daily or other unit rate for failing to achieve contractual milestones or specifications (typically scheduled completion dates)

Example:

*If the Subcontractor fails to complete the work within the time specified in the Subcontract, the Subcontractor shall pay liquidated damages to the Contractor in the amount of \$1,500 for each calendar day of delay until the work is completed or accepted.*

*If the Contractor terminates the Subcontractor's right to proceed, liquidated damages will continue to accrue until the work is completed. These liquidated damages are in addition to excess costs incurred by Contractor to substitute Subcontractor's work under the Termination clause.*

# Liquidated Damages Clause

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- Must be reasonable estimation of damages that are not readily calculable at time of bid
- Cannot be punitive in nature
- Often precludes recovery of actual damages

## **Actions:**

- Strike the clause in its entirety
- Reduce the damage amount
- Set a cap on total delay damages
- Explicitly exclude actual damages





# Differing Site Conditions

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# Differing Site Conditions: Type I and II

CONCEALED OR UNKNOWN SITE CONDITIONS If the conditions encountered at the Worksite are (a) **subsurface or other physical conditions materially different from those indicated in the Contract Documents**, or (b) unusual and unknown physical conditions **materially different from conditions ordinarily encountered and generally recognized as inherent in Work** provided for in the Contract Documents, the Subcontractor shall stop affected Work after the condition is first observed and give prompt written notice of the condition to the Constructor. The Subcontractor shall not be required to perform any Work relating to the unknown condition without the written mutual agreement of the Parties. Any change in the Contract Price or the Contract Time as a result of the unknown condition shall be determined as provided in ARTICLE 5.

See Consensus 750 – 7.3

# Assumption Of Risk for Differing Site Conditions

*The Subcontract amount provided herein constitutes full and complete payment to the Subcontractor for all Subcontract work to be performed, **for all loss or damage arising out of the nature of the work, for any unforeseen difficulties or obstructions** which may arise or be encountered during prosecution of the work, **for all risks of every description connected with the work**, for all expenses incurred by or in consequence of suspension, interference, disruption, hindrance, or discontinuation of the work.*

See sample subcontract – 4.3

# Differing Site Conditions

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## Actions to take:

- Add a differing site conditions clause
- Price work for dealing with such conditions (rock excavation/obstruction removal, dewatering, standby time, etc.)
- Expressly exclude common differing site conditions from scope of work

# Differing Site Conditions on a Design-Build Project

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- Shifting of design risk **does not** automatically preclude entitlement to compensation for DSC
- Entitlement is based upon the representations made by Owner (i.e., borings and geotechnical reports)
- Disclaimers of information can have more weight in Design-Build contract, especially if Design-Builder has express geotechnical investigation scope of work



# Indemnification and Insurance

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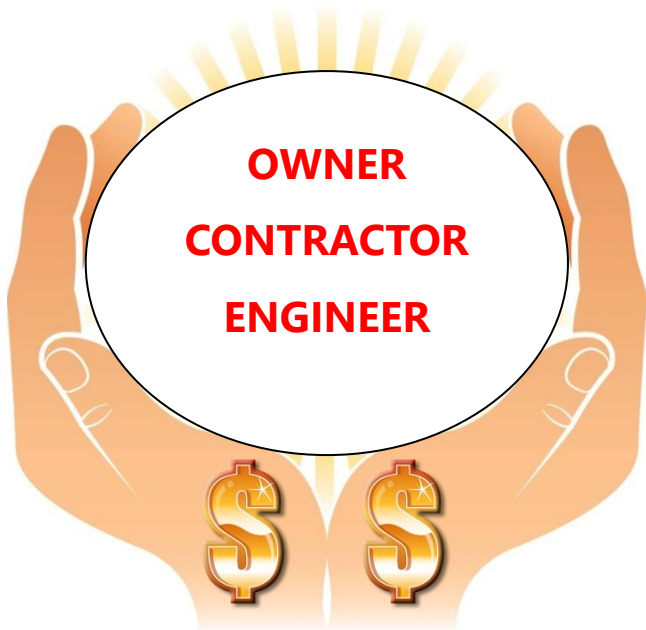
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# Indemnification and Insurance

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- ***Indemnification*** – Agreement to keep another party from financial harm resulting from claims by others
- ***Additional Insured*** Protection – Agreement to add a party to contractor's insurance policy and cover that party as if it was the insured

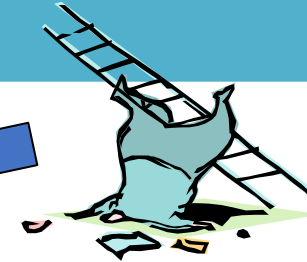
# Indemnification and Insurance



**Additional Insured Protection**



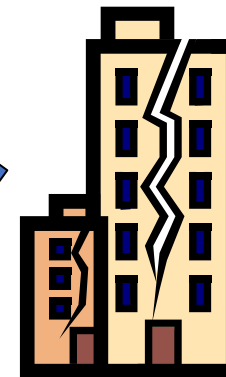
**Indemnification**



**Worker Injuries**



**Bystander/  
Third-Party Injuries**



**Property Damage**



## DON'T LET THE CONTRACTOR MAKE ITS NEGLIGENCE YOUR PROBLEM!

What it looks like:

“Subcontractor shall indemnify, insure, defend, and hold harmless Owner and Contractor for and against all claims, damages, suits and actions related to or arising out of Subcontractor’s work, **even if such claims and damages are caused in whole or in part by the fault or negligence of indemnitees.**”

# Indemnification (cont'd)

## ARTICLE XI: INDEMNIFICATION

11.0 TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR COVENANTS TO DEFEND, INDEMNIFY, HOLD HARMLESS, PROTECT, AND EXONERATE BOTH THE CONTRACTOR AND ITS AFFILIATES, AGENTS, EMPLOYEES, REPRESENTATIVE, AND SURETIES AND THE OWNER, ARCHITECT, AND ENGINEERS, JOINTLY AND SEVERALLY, FROM AND AGAINST ANY AND ALL LIABILITY, CLAIMS, DAMAGES, LOSSES, SUITS, ACTIONS, DEMANDS, LIENS, ARBITRATIONS, ADMINISTRATIVE PROCEEDINGS, AWARDS, JUDGMENTS, EXPENSES, COSTS, AND ATTORNEYS' FEES PERTAINING TO ECONOMIC LOSS OR DAMAGE, LABOR DISPUTES, SAFETY REQUIREMENTS, PERFORMANCE OR NONPERFORMANCE OF OBLIGATIONS, CERTIFICATIONS, PROPERTY RIGHTS OF THIRD PARTIES, PERSONAL INJURY, BODILY INJURY, SICKNESS, DISEASE, DEATH, OR DAMAGE TO OR DESTRUCTION OF PROPERTY (INCLUDING LOSS OF USE THEREOF) WHICH (I) ARE CAUSED IN WHOLE OR IN PART BY THE SUBCONTRACTOR (HEREIN DEFINED TO INCLUDE BUT NOT BE LIMITED TO THE SUBCONTRACTOR'S OWNERS, EMPLOYEES, AGENTS, REPRESENTATIVES, SUBCONTRACTORS, SUPPLIERS, CONTRACTEES, AND INVITEES OR OTHER THIRD PARTIES CONNECTED WITH THE SUBCONTRACT OR THE AGENTS OR EMPLOYEES OF ANY OF THEM). (II) ARISE FROM **OR OCCUR IN CONNECTION WITH WORK** UNDERTAKEN OR TO BE PERFORMED BY THE SUBCONTRACTOR, **REGARDLESS OF WHETHER THE SAME IS WITHIN OR BEYOND THE SCOPE OF WORK.** OR (III) ARISE FROM OR ARE CONNECTED WITH ANY OTHER ACT OR OMISSION RELATING TO THE SUBCONTRACTOR, THIS SUBCONTRACT, OR THE SUBCONTRACT WORK. IT IS THE SPECIFIC AND EXPRESS INTENT OF THIS SUBCONTRACT FOR THE FOREGOING COVENANTS AND INDEMNITY OBLIGATIONS TO APPLY TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, **REGARDLESS OF WHETHER THE LIABILITY IS CAUSED IN PART BY A PARTY INDEMNIFIED HEREUNDER INCLUDING, WITHOUT LIMITATION.** WHETHER OR NOT THE SAME BE CAUSED BY, OR ARISE OUT OF, THE JOINT, CONCURRENT, OR CONTRIBUTORY NEGLIGENCE OF A PARTY INDEMNIFIED HEREUNDER.

# Indemnification (cont'd)

- **Use language to limit your duty to indemnify and insure:**

"Subcontractor shall indemnify, insure, defend, and hold harmless Owner and Contractor ...

... only to the extent of Subcontractor's negligence."

or

... for Subcontractor's proportional share of fault or negligence."

or

... in the event of concurrent negligence by Owner or Contractor, but will do so only to the extent of Subcontractor's negligence."

- **Include similar limitation in insurance section:**

"A party's status as an additional insured is subject to indemnification limitations described above."

A close-up, low-angle shot of the yellow hydraulic bucket teeth of an excavator. The teeth are arranged in a diagonal line from the bottom left towards the top right. The background is a bright blue sky with soft, out-of-focus clouds. The overall composition is clean and professional, suitable for a corporate presentation.

# Termination



# Termination For Default

*NOTICE TO CURE A DEFAULT If the Subcontractor persistently fails to supply enough qualified workers, proper materials, or equipment, to maintain the Progress Schedule, or fails to make prompt payment to its workers, sub-subcontractors, or suppliers, or disregards Laws or orders of any public authority having jurisdiction, or otherwise is guilty of a material breach of a provision of this Agreement, the Subcontractor shall be deemed in default of this Agreement.*

(See remedies for default – Consensus 750, 10.1.1)

- Ensure that Contractor is required to give Subcontractor written notice and an opportunity to cure
- Restrict Contractor's right to take possession of equipment

# Contractor's Use of Subcontractor's Equipment

*USE OF SUBCONTRACTOR'S EQUIPMENT* If the Constructor performs work under this article, either directly or through other subcontractors, the Constructor or other subcontractors shall have the **right to take and use any** materials, implements, **equipment**, appliances, or tools furnished by, or **belonging to the Subcontractor and located at the Worksite for the purpose of completing any remaining Subcontract Work.**

# Termination For Convenience

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- Termination for Convenience of Contractor

*Contractor shall be entitled to terminate the work of the Subcontractor in whole or in part for the convenience of the Contractor. If Contractor terminates the work Subcontractor for Contractor's convenience, the Contractor shall be liable to the Subcontractor solely for the reasonable value of Subcontract Work performed by the Subcontractor prior to the termination, including reasonable overhead and profit on the Subcontract Work performed, less prior payments made, and other reasonable costs incurred by reason of such action. In no event shall Subcontractor be entitled to overhead and profit on the Subcontract Work not executed.*

- Beware of language excessively limiting OH&P on costs of work performed



# Other Important Clauses





- Ladders Last
- Stretch and Flex
- Pre-Task Plans
- AHA's
- Subcontracts will commonly require the subcontractor to acknowledge and abide by the prime contractor's safety policy, which may also be included in the subcontract

# Employment/Hiring Clauses

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- EEOC provisions
- State and local employment development program requirements;
  - Department of Employment Services First Source Employment Program
  - EBDI (Baltimore)
- If Federal Project, Executive Order 11246, Vietnam Era Veterans Readjustment Act of 1974, and Section 503 of the Rehabilitation Act of 1973

# Small/Minority Business Participation

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- MBE/WBE subcontracting requirements
- If federal, small business subcontracting plan (FAR 52.219-9)

# Prevailing Wages

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- State prevailing wage requirements
- Davis-Bacon Act – federal prevailing wage requirements
- Subcontract will reference and include (for federal projects) a wage determination



# Design Liability Concerns

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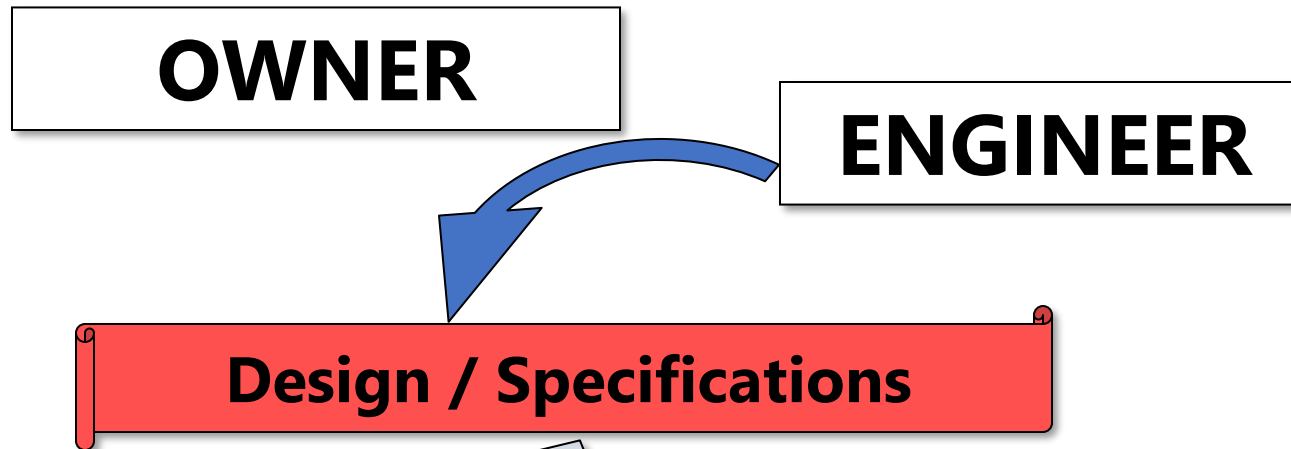
# Design Liability Under Various Project Delivery Methods

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	Contractor/Subcontractor Design Responsibilities?
Design-Bid-Build	✓
Fast-Track: Multi-Prime	✓
Design-Build	✓
Engineer-Procure-Construct	✓
Concession Contract	✓

# Warranty of Design/Specifications

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Owner, as preparer or provider of plans and specifications, implicitly warrants the accuracy and adequacy of the design and specifications for their intended uses.

***"Spearin Doctrine"***

*U.S. v. Spearin, 248 U.S. 132 (1918).*

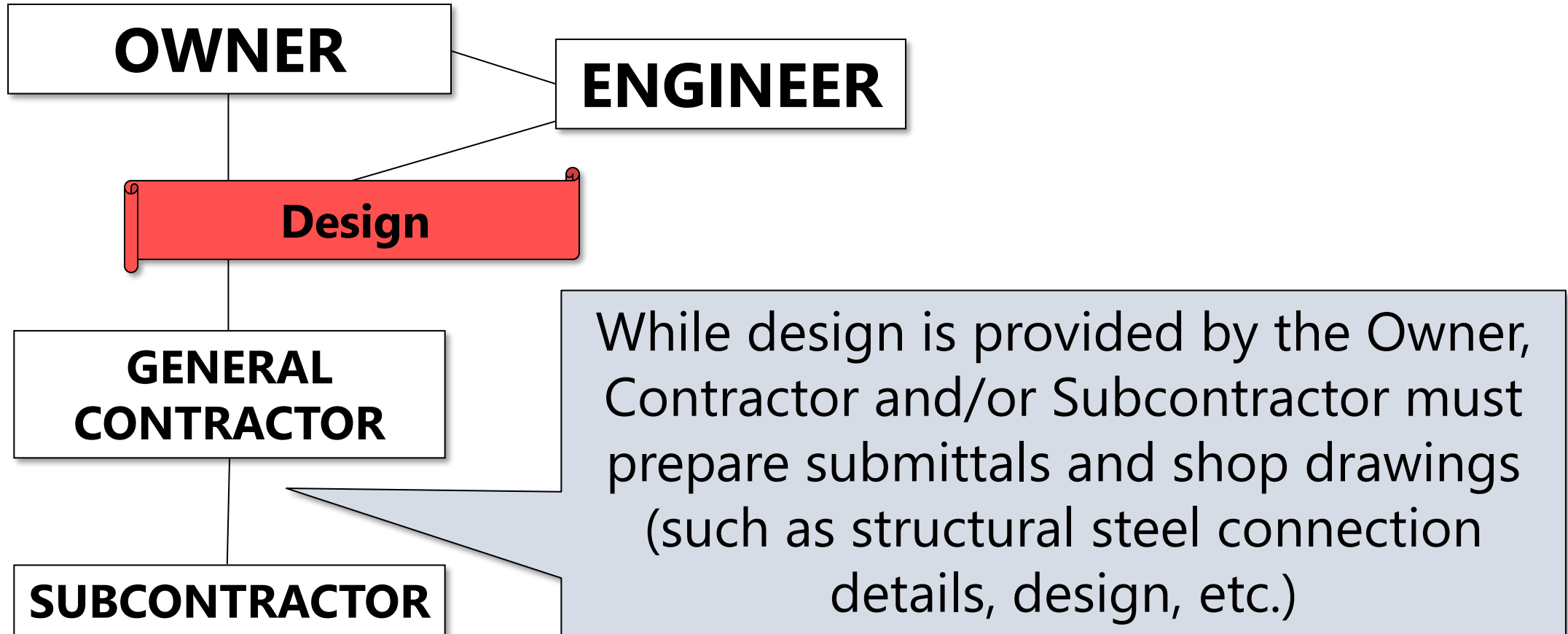
# Delegation of Design Responsibilities

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- Shop drawings and submittals
- Performance specifications
- Requirement for coordination drawings
- Disclaimers and verification requirements



# Shop Drawings and Submittals



# Performance Specifications

- Require a contractor to produce a specific result without specifying the particular method or means of achieving that result
- Only an objective or criterion of performance is provided, and the contractor is free to choose the materials, methods and design necessary to meet the objective or criterion

## Performance Spec $\neq$ Design-Build

- Examples:
  - **Performance Specification**: **Construct** a cutoff wall with specified dimensions to achieve a specified minimum permeability
  - **Design-Build**: **Design and construct** an earth retention system

# Performance Specifications v. Design Specifications: How to Distinguish

- Look to language of the contract as a whole
- What is the degree of Contractor's involvement in developing specifications?
- Does Contractor have discretion in carrying out performance (i.e., is Contractor free to work at its peril)?

# Performance Specifications

- Does providing a technical proposal to meet a performance spec shift the risk of design?

*The "mere fact that a Contractor submits a technical proposal does not shift the risk of defective drawings and specifications from the Government to the Contractor."*

*Owens-Corning Fiberglass Corp. v. U.S., 419 F.2d 439 (Ct.Cl. 1969).*

# Disclaimers and Verification Requirements

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- Owner will often attempt to shift the risk of design by disclaiming any Owner representations and requiring the Contractor to “verify” the Owner’s design

Example: Owner requires Contractor to verify dimensions

- Such provisions are generally **not sufficient** to shift the risk/warranty of design (exception: “patent” ambiguities and obvious errors)

# Design-Build Contracting: Risk of Design

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- Design risk is shifted to Design-Builder

**BUT, RISK SHIFTING IS NOT ABSOLUTE!!!**

- Owner retains liability for inaccurate preliminary design information and other representations – even if Design-Builder is required to verify the information provided by Owner

# Ownership and Use of Designs

## Concerns:

1. Owner's use of your design for construction by another contractor
2. Owner or GC's use of your design on another project
3. Disclosure of confidential information and infringement of intellectual property – protection of trade secrets, copyrights, patents, and trademarks



# Design-Build – Use of Designs

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Subcontract should include language addressing:

- Possession and control of design documents
- Ownership and use of design documents
- Limitations of representations and warranties
- Copyright, trade secret, and intellectual property protection

# Use of Designs – Contract Language

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## Use of Proposals and Designs

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# Lien and Bond Claims

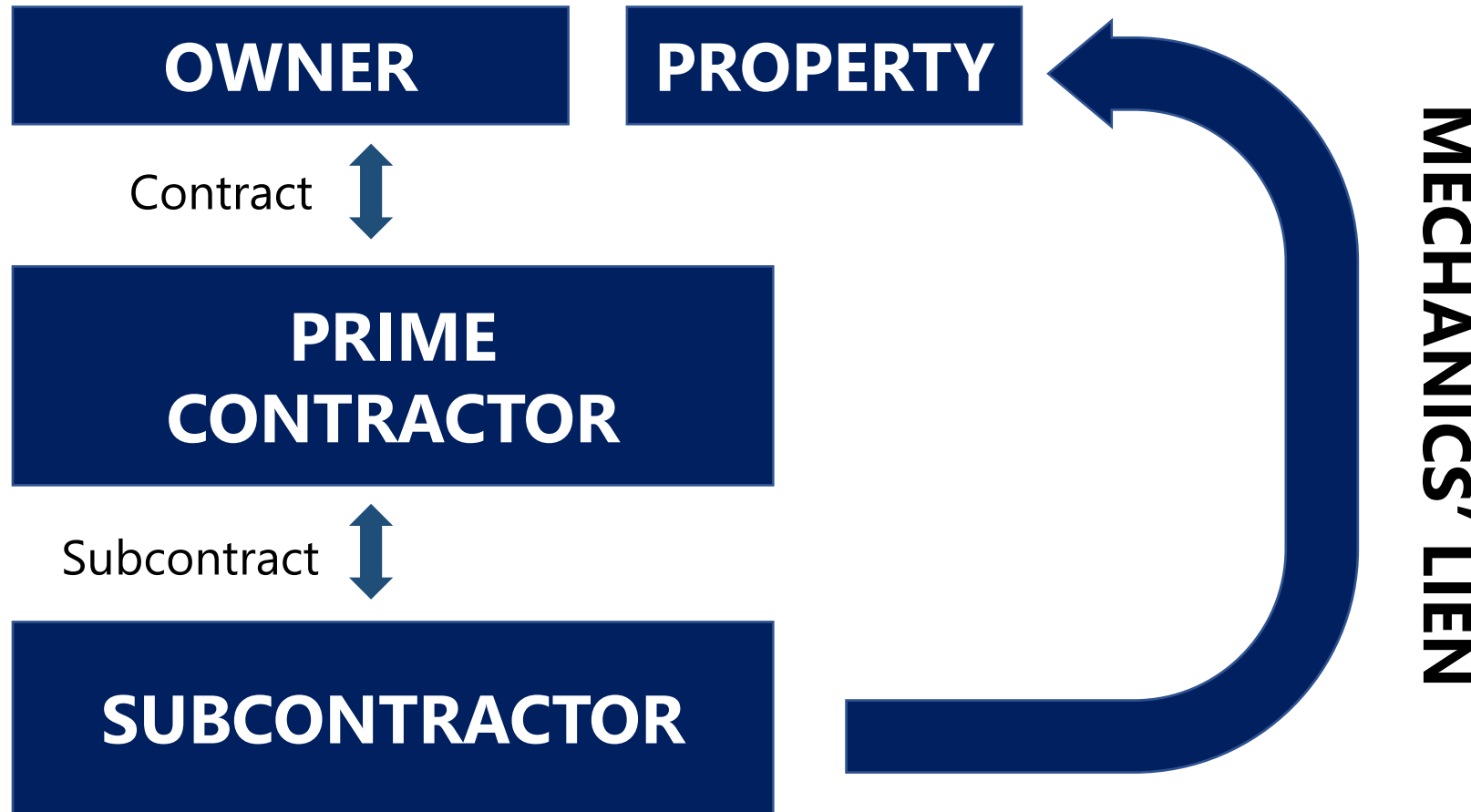
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# Mechanics' Lien

- A claim against real property to secure a debt incurred for improvement of the property
- Must be based on an agreement (can be express or implied, written or oral)

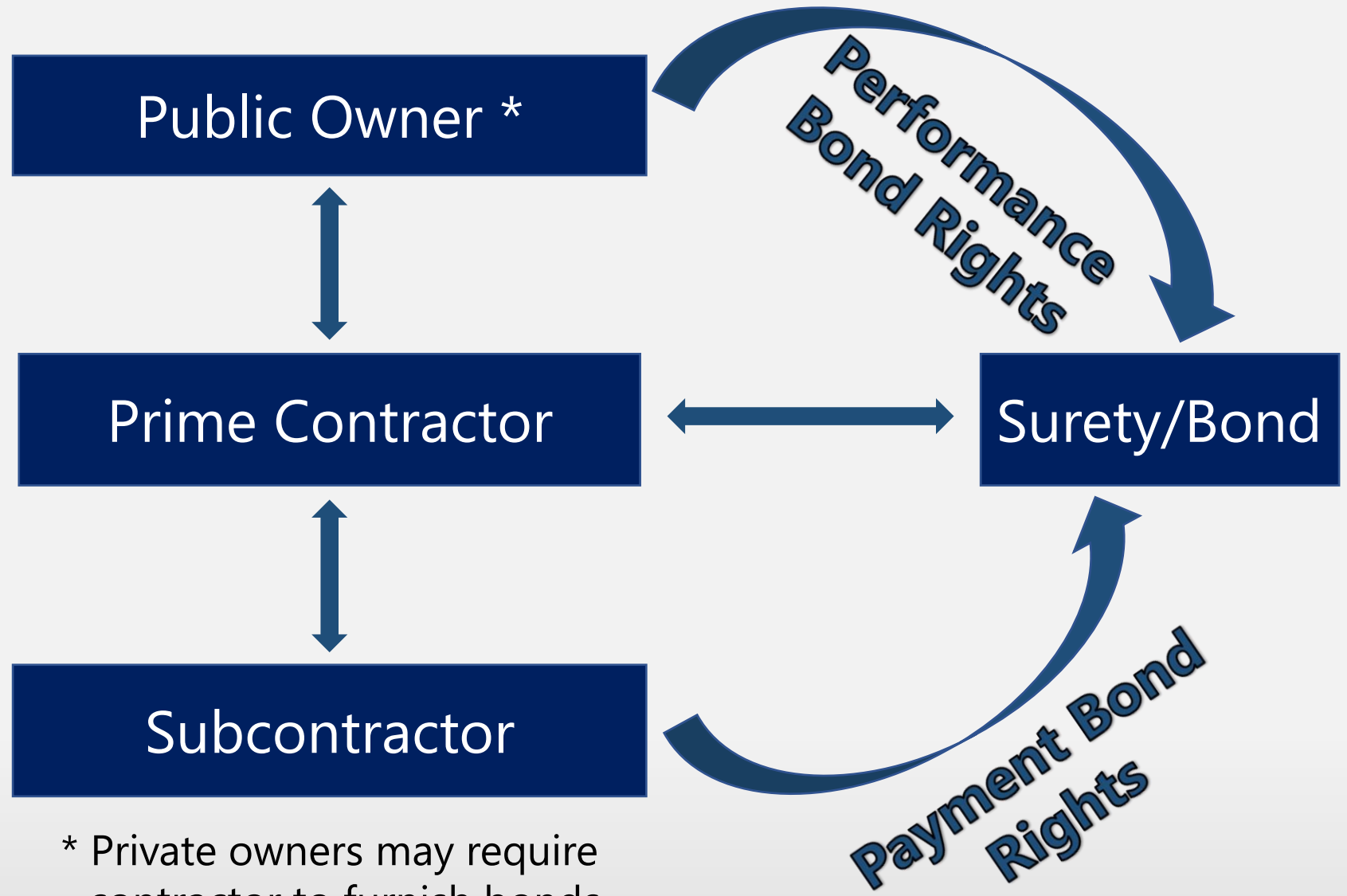
# Mechanics' Lien



# “Perfecting” a Mechanics’ Lien – Common Procedures

- Preliminary Notice (in some states) – Serve within X days of first work
- Record the claim of lien – Within Y days/months of last work (typically 90 to 120 days) and serve parties with copy of claim of lien
- File foreclosure action (lawsuit) within Z days/months/years of recording lien
- Win the foreclosure action
- Foreclose
- Sheriff seizes property and sells it at auction

# Payment Bonds



\* Private owners may require contractor to furnish bonds

- **Surety** – Bonding company
- **Principal** – Party furnishing bond to secure its performance obligation (i.e., Contractor)
- **Obligee** – Party protected by bond and to whom the performance obligation is owed (typically, the Owner)
- **Claimant/Beneficiary** – Party with right to make claims against the bond (i.e., Subcontractors, material suppliers, etc.)





# Liens and Claim Releases

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# The Payment and Release Stand-Off

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- Typical Situation: Contractor requires you to sign unconditional or final release before payment is made
- The Risk: **Payment is not made after release is provided!!!**
- Release is enforceable for third parties unaware that payment has not been made, including the Owner
- Owner may enforce release if it makes payment to Contractor for which release was contemplated

# Exchanging Payments and Releases: Alternatives

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- Give release in exchange for or after payment (actual check)
- Issue conditional release
- Give release to an escrow agent with instructions to forward upon receipt of payment

# Release Scenario

- **Owner:** In Business For Now Development Company (“IBFN”)
- **GC:** Bigtime Construction, Inc.
- **Subcontractor:** XYZ Drywall, Inc.
- **Project:** Hot Sun Towers, Atlantic City, NJ

## Chronology:

- November 1, 2020 – XYZ Drywall begins work
- Work continues through March 10, 2021
- First Invoice: December 1, 2020 – \$100,000
- Second Invoice: January 1, 2021 – \$150,000
- Third Invoice: February 1, 2021 – \$100,000
- Final invoice has not been submitted

- On March 10, XYZ demands payment. Bigtime says it will pay invoice 1 & 2 now and third invoice in 30 days.
- On March 15, 2021, Bigtime sends the following:

# Release Scenario: Typical Release Form

## WAIVER AND RELEASE OF LIENS

Upon receipt by the undersigned of a check from Bigtime Construction, Inc. in the sum of \$250,000 payable to XYZ Drywall, Inc. ("XYZ"), and when the check has been properly endorsed and has been paid by the bank upon which it is drawn, this document shall become effective to release any mechanic's lien, stop notice or bond right the undersigned has on the job of Hot Sun Towers located at 1234 Water Road, Atlantic City, NJ. This release covers payment for labor, services, equipment or material furnished by XYZ to Bigtime Construction, Inc. through March 1, 2021 only and does not cover any retention or items furnished after said date. Before any recipient of this document relies on it, said party should verify evidence of payment to the undersigned.

Signed this \_\_\_\_ day of March, 2021

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XYZ Drywall, Inc.

# Release Scenario (cont'd)

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- Bigtime pays XYZ \$250,000 in exchange for the lien release
- XYZ files a lien for third invoice and final invoice
- Bigtime files for bankruptcy protection
- Owner informs you it has paid Bigtime in full
- Owner presents the lien release signed by XYZ

## WHAT RESULT?

# Releases: Through Dates

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**Release is valid and enforceable through the date indicated, **irrespective of amount of payment indicated****

# Reviewing Lien Releases: What to Look For

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- Make sure the “**through date**” on the release covers only the period for which we are being offered payment
- If payment is out of sequence, **specify the specific invoices** that the release covers or **specify a window of time** (i.e., January 15 – February 15)
- Make sure the stated payment amount is current
- Add an exclusion or other limiting language





# Questions?

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