

BAKER LAW

design and construction counsel



CONSTRUCTION CONTRACTS PRIMER: WHAT REAL ESTATE ATTORNEYS SHOULD KNOW

Chicago Bar Association – Real Property Law Committee
December 10, 2020

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Real Estate Law and Construction Law are Different...

Project Delivery Methods

- Overlooked But Important

Design and Construction Contracts

- Not Just “Fill-In-the-Blank”
- Inter-Contract Coordination

Issue Spotting and Asking the “Right Questions”

- Design-Build MEP/FP Example

Standard Form Contracts

- Pick the Right Form (over 200 AIA Contract Documents)
- Just a Starting Point for Customization

Custom Contracts

- What’s Missing?

Who Is This Guy Anyway?

Design and Construction Attorney

NOT a Real Estate Lawyer – But Serve the Same Clients

- Property Owners, Real Estate Developers, Architects, Engineers, Contractors, Design-Builders, Lenders, etc.

Liaison to AIA Contract Documents Committee

Former JMLS Adjunct Professor, Construction Law

18 Years Big Law Experience

- Schiff Hardin LLP, Construction Law Group (2006-19)
- Cozen O'Connor PC, Subrogation Litigation (2002-06)

Solo Attorney Since October 2019



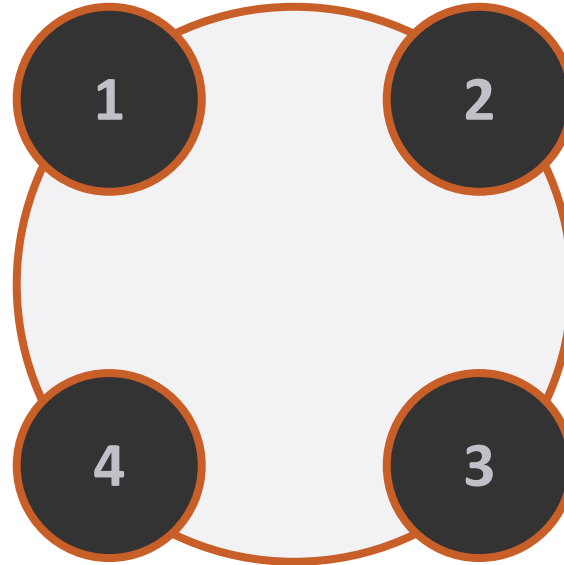
Today's Agenda

Project Delivery
Methods

Insurance
Ramifications

Design and
Construction
Contracts

Pricing
Construction
Services



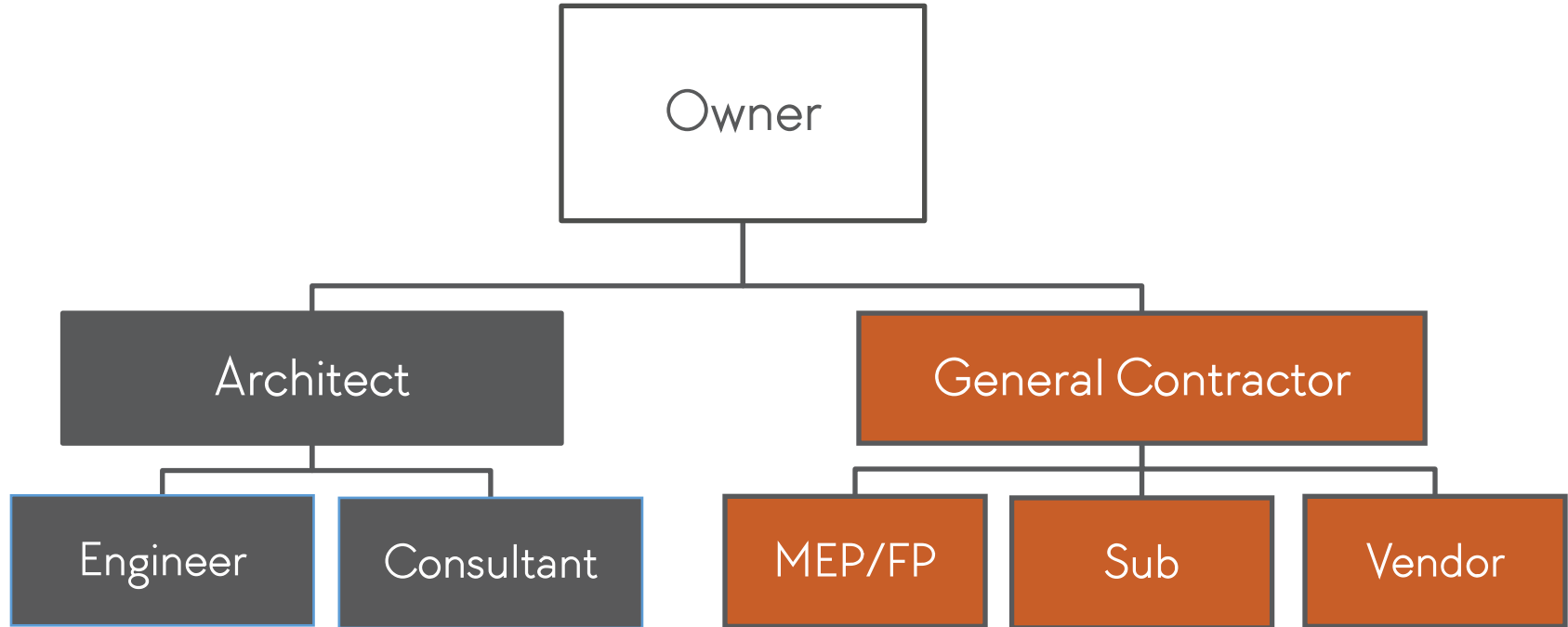


PROJECT DELIVERY METHODS

Common Project Delivery Method Variations

- Design-Bid-Build
- Fast Tracking
- Design-Build
- Multiple Prime Contracts
- Construction Management
- Integrated Project Delivery (IPD)
- Other Options

Project Delivery Methods: Traditional Structure



Project Delivery Methods: Traditional Structure

Advantages

- So Common the Marketplace is Comfortable
- Plans Usually Complete Before Contractor Hired
- Pricing Is Typically More Accurate
- Well-Detailed Design Drawings
- Architect “Polices” Contractor for Owner

Disadvantages

- Often Little Contractor Input During Design
- Slower Delivery Time: Back-to-Back Phasing
- Adversarial Relationship: Contractor and Architect
- Price and Schedule Information Obtained Late



Traditional v. Fast Track

Traditional

Design



Pricing



Construction



Fast-Track

Design



Pricing

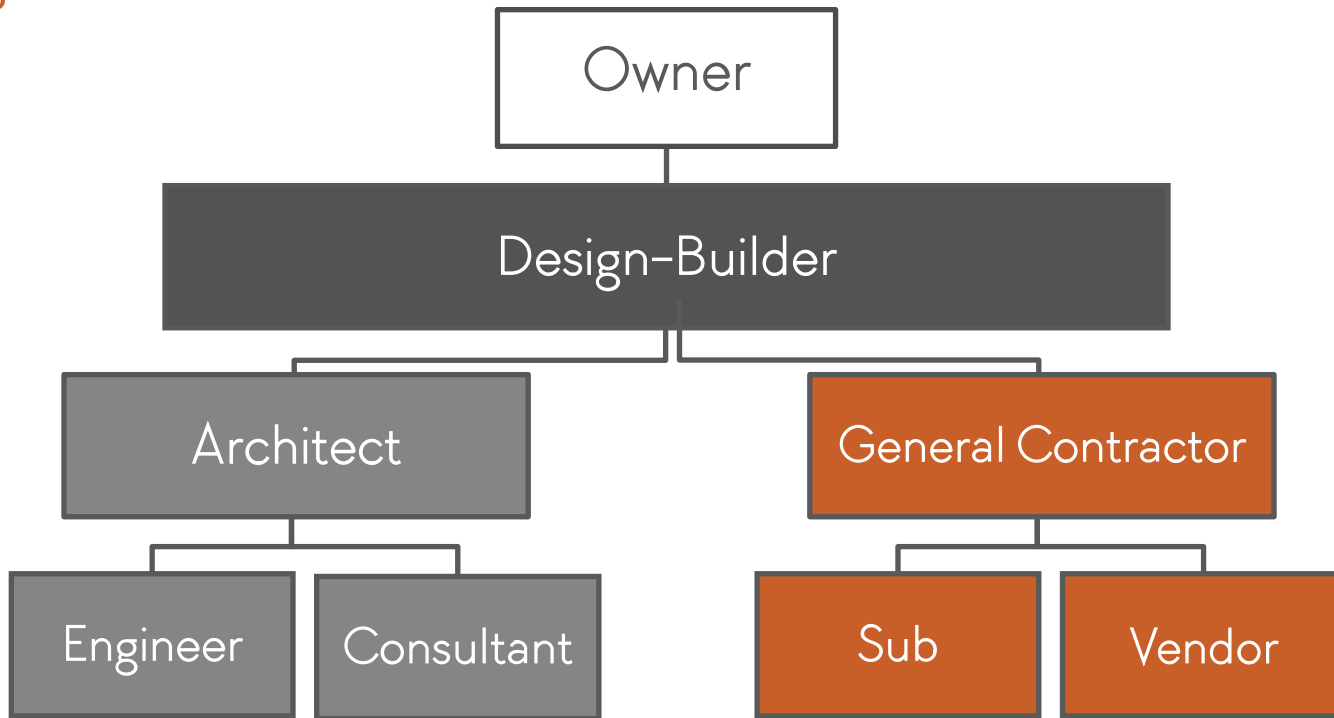


Construction

Advantage: Delivery Speed

Disadvantage: Loss of Cost Control

Project Delivery Methods: Design-Build

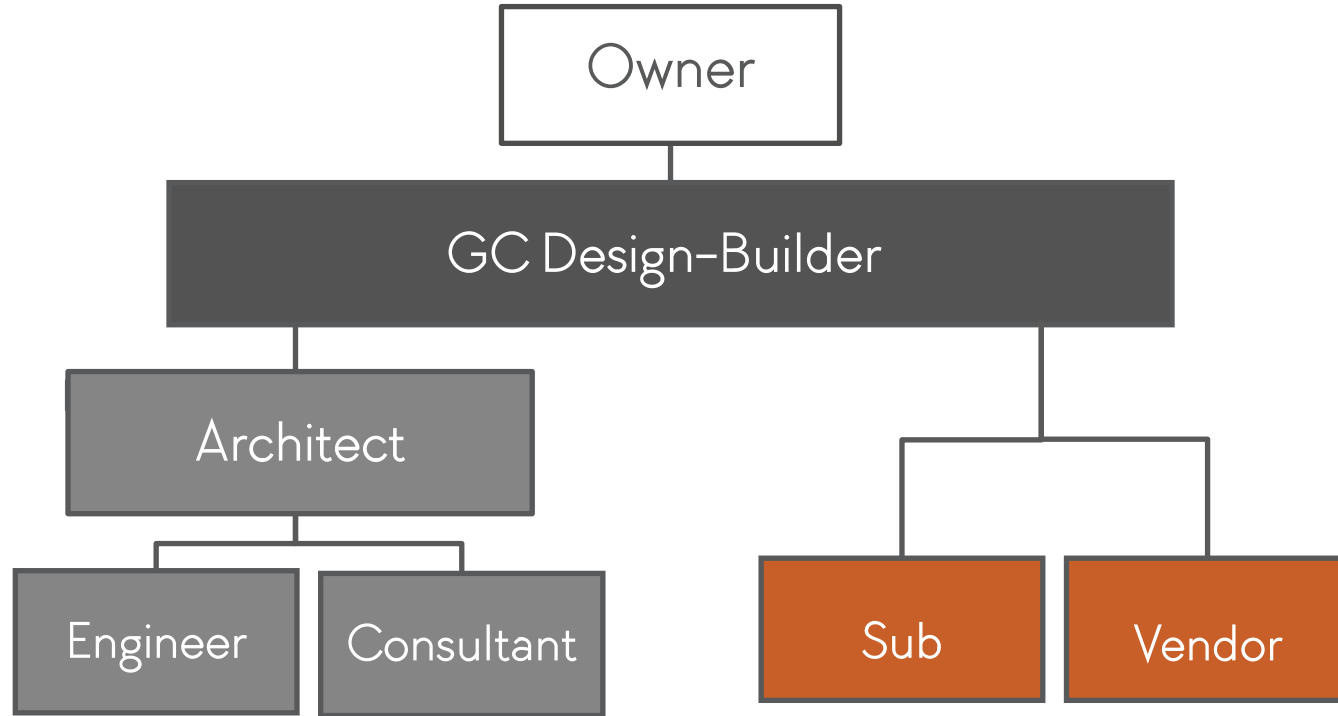


Unique Aspects of Design Build

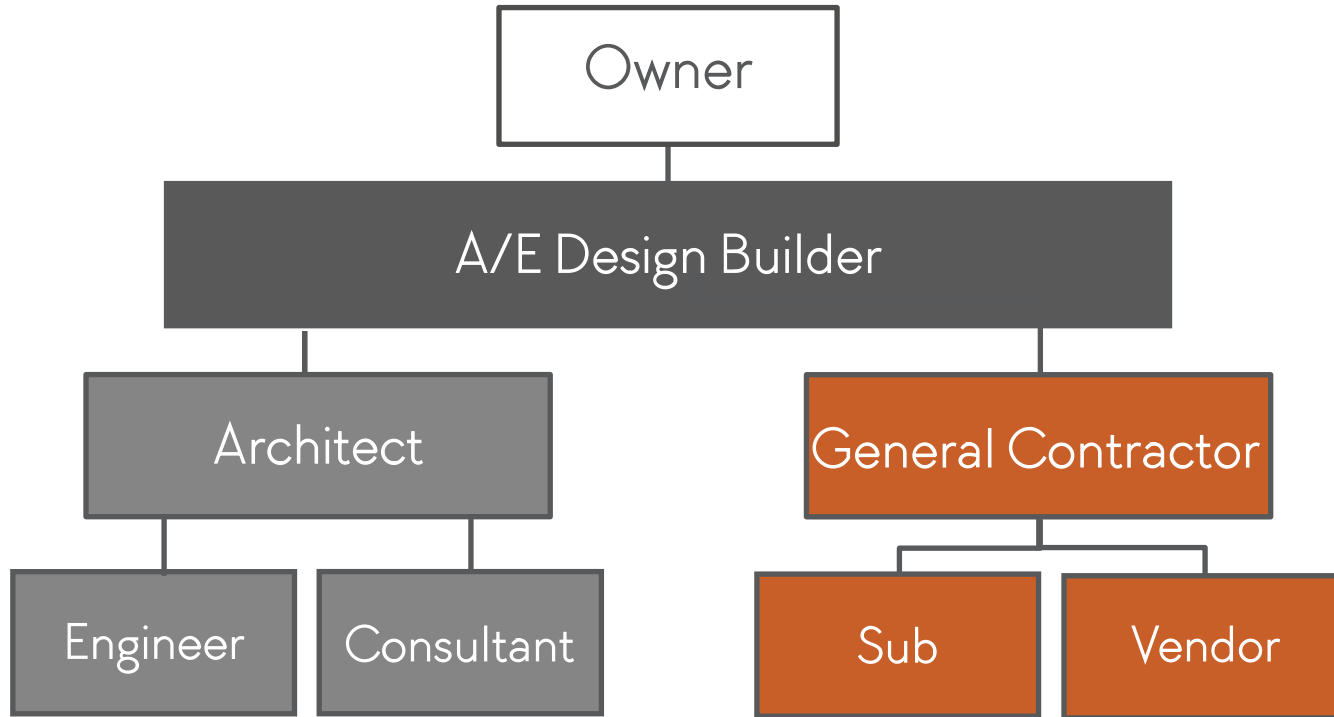
- Faster of Project Delivery
- Fast-Tracking w/o Loss of Cost Control
- Single Point Responsibility (for Owner)
- Greater and Earlier Cost Certainty
- Better Communication of Design Intent
- No Change Orders for Design Problems
- Facilitates Use of 3D Design (BIM)
- Negotiated Pricing
- Need To Learn New Relationships
- Contractor and Architect Not Adversarial
- Architect Does Not “Police” Contractor



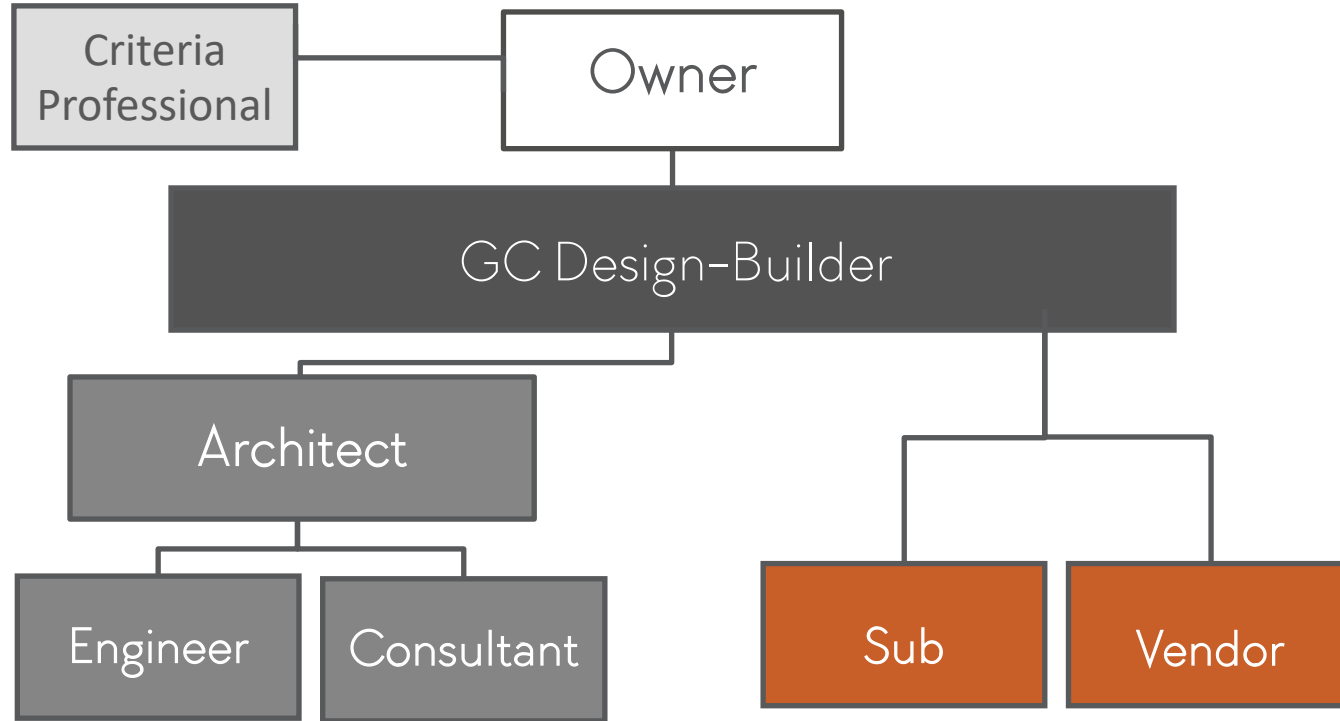
Project Delivery Methods: Contractor-Led Design Build



Project Delivery Methods: Designer-Led Design Build



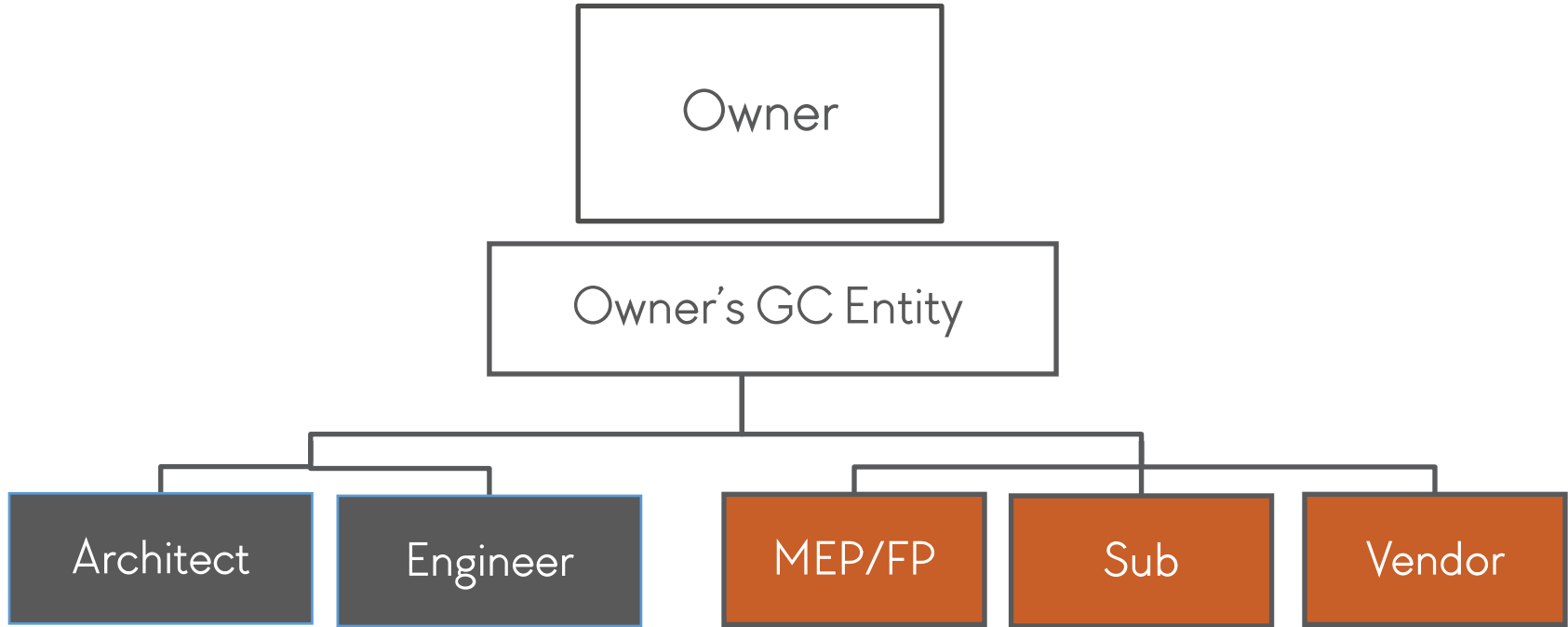
Project Delivery Methods: Contractor-Led Design Build



The Criteria Professional

- Direct Contract With Owner
- Typically An Architect or Engineer
- Strong Understanding of Building Performance and Construction
- Works With Owner To Establish Exhaustive List of Criteria for Finished Project
- Developed Criteria Are Often Stated As “Performance Specifications” Which Define a Successful Project Outcome and Guide the Design Builder
- Criteria Are Incorporated Into Design-Build Contracts
- Criteria Professional Observes Construction and Ultimately Conducts or Witnesses the Performance Tests

Project Delivery Methods: Multiple Prime Contractors

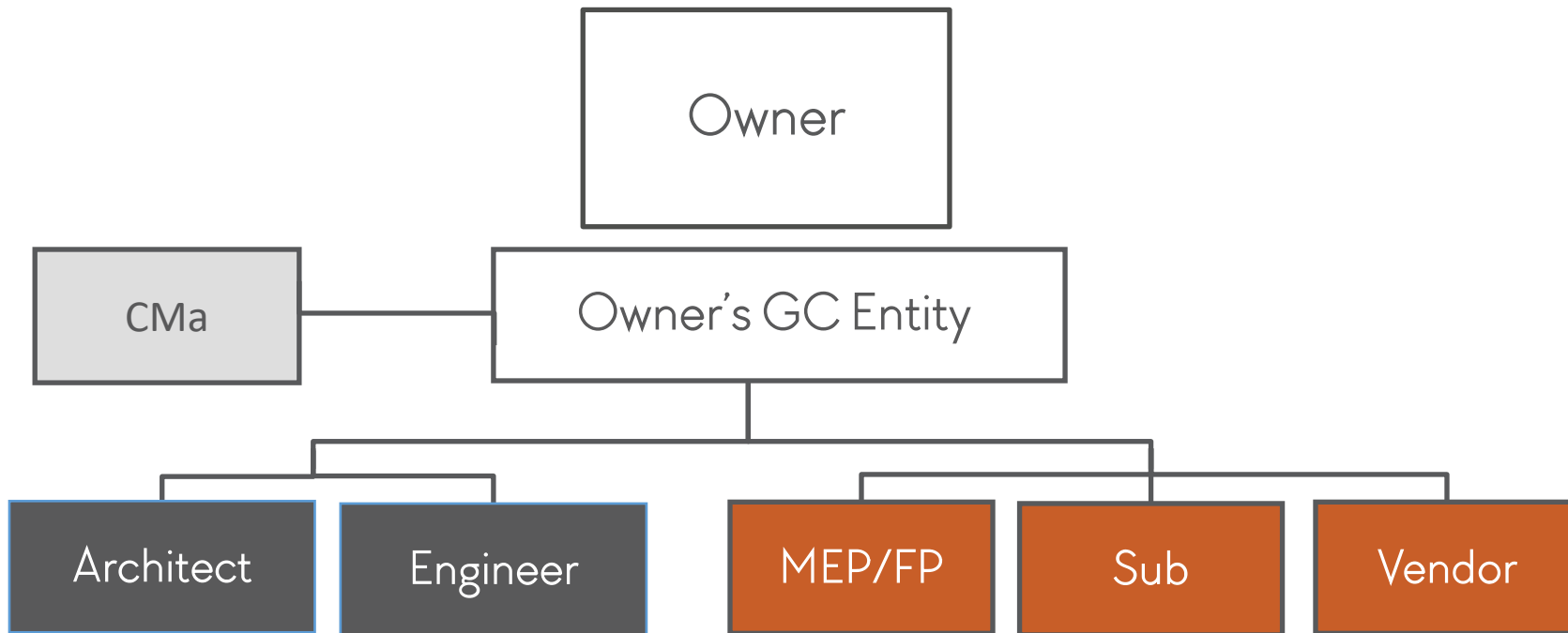


Project Delivery Methods: Multiple Prime Contractors

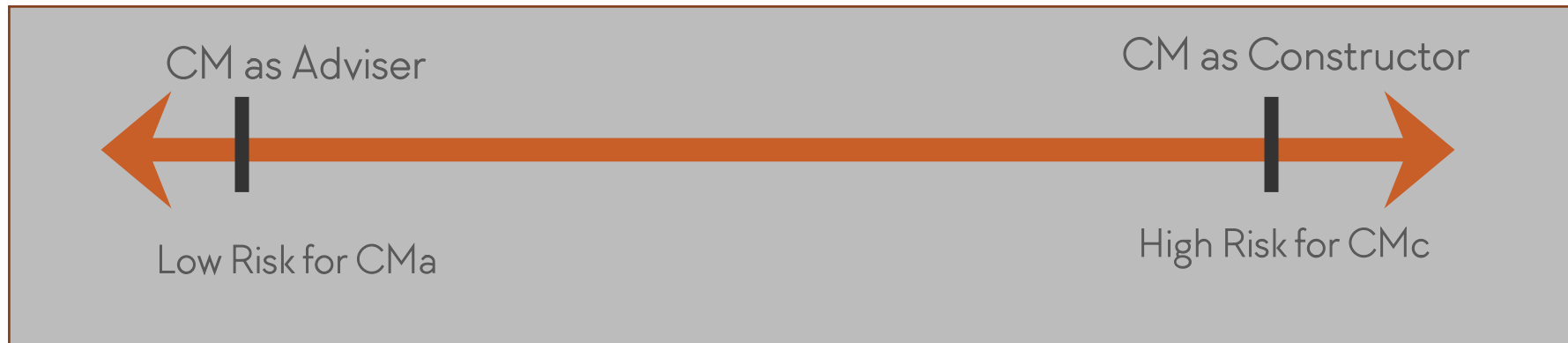
- Owner Acts As General Contractor
- No Role For Traditional General Contractor
- Owner Saves the General Contractor's Fee
- Sometimes Required on Public Projects
- Owner is Ultimately Liable for Management and Coordination Problems
- Owners May Wish To Hire Construction Manager as Adviser (CMA)
 - Creative Options Possible
 - JV of Construction Company and Engineering Company?



Multiple Prime Contractors is Compatible with Construction Manager as Adviser (CMa)

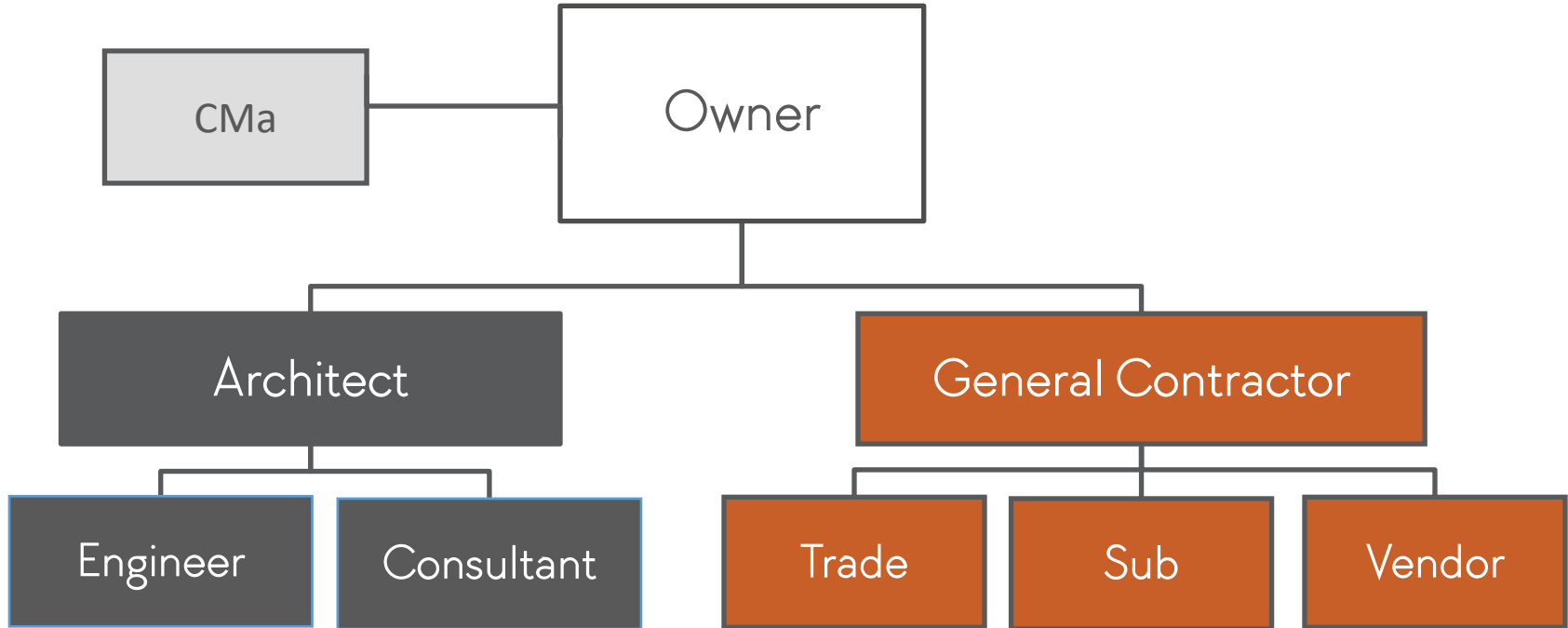


Project Delivery Methods: Construction Management

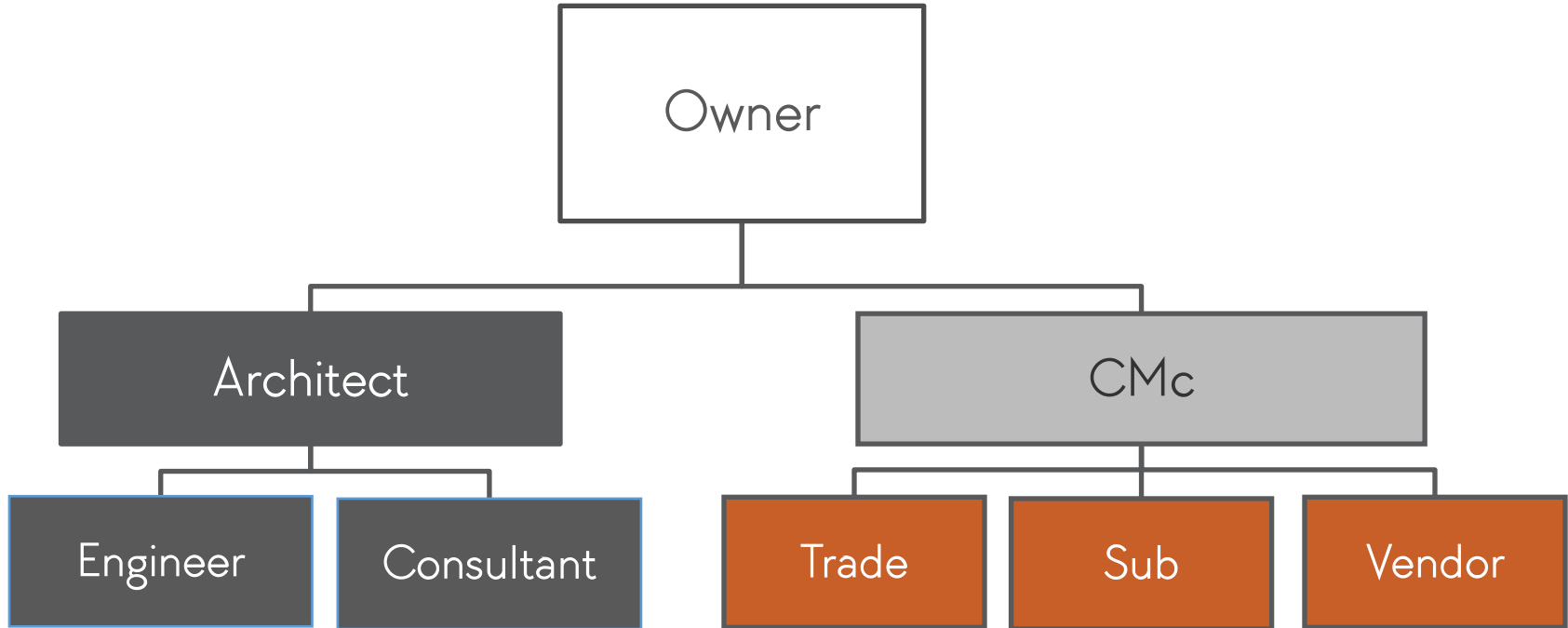


- Construction Management = Wide Spectrum of Possible Options
 - CMa: Layer of Consulting, Coordination, and Management For a Fee
 - CMc: Like General Contracting (CM Holds Trade Contracts) w/ Preconstruction Services
 - Hybrid: Agency CM Where the CM Signs Trade Contracts As the Owner's Agent
- All Provide CM Involvement During Design and Expertise During Construction
- Key Question: Who Will Hold Contracts With the Various Trades?

Project Delivery Methods: CMa



Project Delivery Methods: CMc



Project Delivery Methods: Integrated Project Delivery (IPD)



- IPD Can Encompass a Wide Spectrum of Possible Options
- IPD With Little Owner Risk Can Be Similar To Design-Build
- Full Integration IPD Can Include Contracts With More Than 2 Contracting Parties
 - Very Complex – Legally and Contractually
 - Not A Great Option For Most Projects

Project Delivery Method Conclusions

Consider the Delivery Method Before You Select Contract Type and Form

Which Delivery Method is Best?

- No One-Size Fits All
- No Single Best Option

What Is Owner's Top Priority?

- Speed of Project Completion
- Sticking to Strict Budget
- Quality of Finished Project
- Single Point Responsibility
- Other Goals



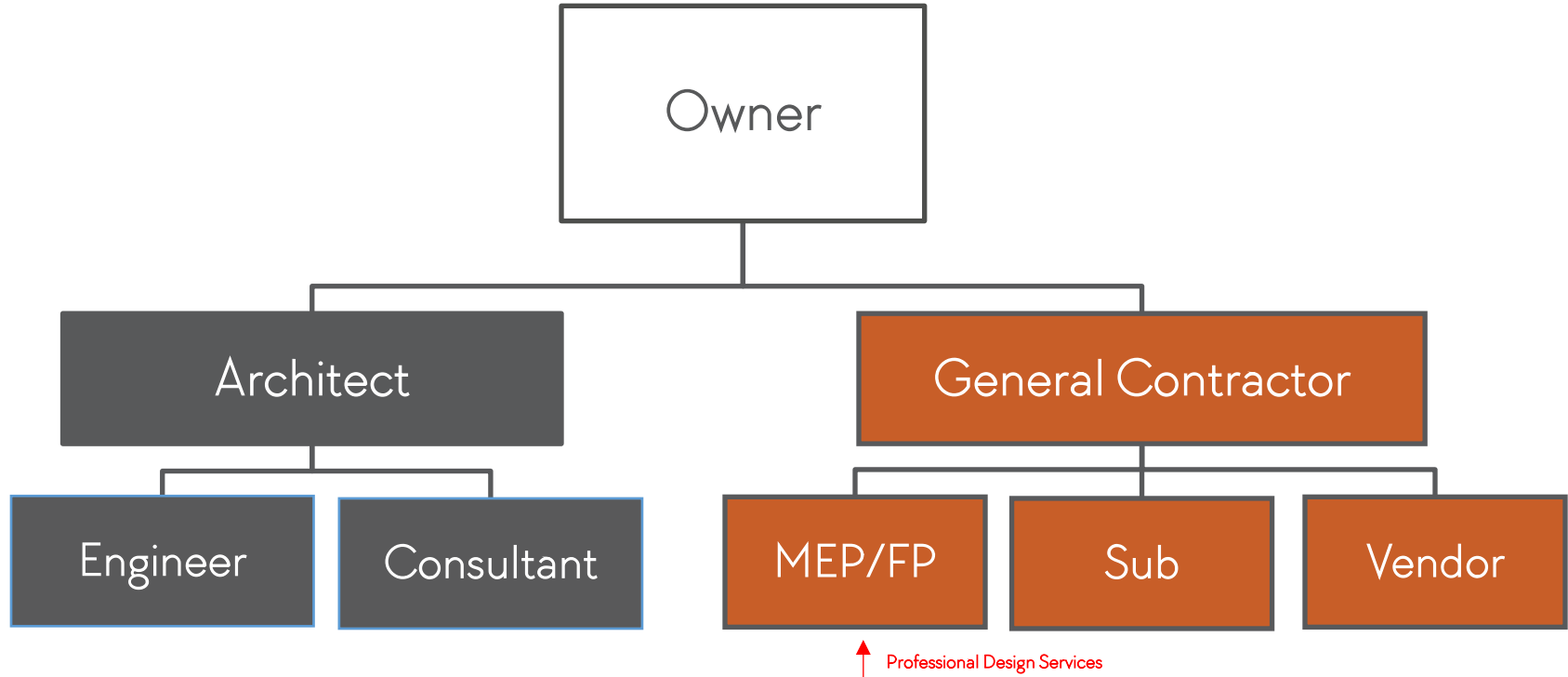


INSURANCE RAMIFICATIONS

Insurance: Interplay with Project Delivery Methods

- How Are the Chess Pieces Arranged?
 - Who Contracts with Whom?
 - For What Work or Services?
- Consider and Plan Impact on Potential Claims and Causes of Action
- Negotiate Contracts With a “Litigator’s Mind”
- Begin With the End In Mind

Project Delivery Methods: Traditional Structure



Insurance: Interplay with Contract Language

The Paradox of Contract Language

It Can Take Project Participants Outside of Insurance Coverages

- Acute Risk: Architect and Engineer Professional Liability Insurance
- Warranty, Guarantee, Defense, Prevailing Party

It Is Sometimes Required to Trigger Certain Insurance Coverages

- Contractor's Defense and Indemnity Obligation
- An Insurer's Obligations to Additional Insureds
 - Certificates of Insurance Confer No Coverage
 - Form of Additional Insured Endorsement is What Matters

Additional Insureds Endorsement

Coverage Restricted to that Required by Contract

“If Coverage provided to the Additional Insured is required by a contract... the insurance to such Additional Insured will not be broader than which you are required by the contract...”

Limit Restricted to that Required by Contract

“If Coverage provided to the Additional Insured is required by a contract...the most we will pay on behalf of the Additional Insured is the amount:

1. Required by contractor or agreement; or
2. Available under the applicable Limits of Insurance shown the Declarations; which ever is less”

POLICY NUMBER:		COMMERCIAL GENERAL LIABILITY
THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.		
ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - SCHEDULED PERSON OR ORGANIZATION		
This endorsement modifies insurance provided under the following: COMMERCIAL GENERAL LIABILITY COVERAGE PART		
SCHEDULE		
<u>Name Of Additional Insured Person(s) Or Organization(s):</u>	<u>Location(s) Of Covered Operations</u>	
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.		
<p>A. Section II - Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:</p> <ol style="list-style-type: none">1. Your acts or omissions; or2. The acts or omissions of those acting on your behalf; <p>in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.</p> <p>B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:</p>		
<p>This insurance does not apply to "bodily injury" or "property damage" occurring after:</p> <ol style="list-style-type: none">1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.		
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Setting Project Insurance Requirements

Project Owner Typically Dictates Insurance Requirements

- Owner Holds the First Tier Contracts With Key Project Participants
 - Architects and Engineers, Prime Constructor, Construction Manager
 - Owner Can Dictate Insurance Flow-Down Requirements to Lower Contract Tiers
- Heavy Reliance on Insurance Broker
 - What Insurance Does the Owner Itself Need to Carry?
 - What Insurance Should Owner Contractually Require Others to Carry?

Project Owner Ultimately Pays for Insurance In Contract Pricing

- Property Insurance: Who Will Purchase Builder's Risk?
- Liability Insurance Issues
 - Professional Liability: Duration? Limits? Project Specific?
 - Commercial General Liability: Additional Insured Coverages?
 - Other Insurance Issues

Role of Insurance in Design and Construction

- Risk of Loss is High and Frequent
- Raise Comfort Level of Project Participants
- Increase Odds of Successful Outcome
- Insurable Risks Should be Insured
- Marry Right of Recovery With Recovery Source



A close-up photograph of three gold coins stacked on top of each other, resting on a US dollar bill. The coins are in sharp focus, while the background bill is blurred. The text 'PRICING CONSTRUCTION SERVICES' is overlaid in white on the right side of the image.

PRICING CONSTRUCTION SERVICES

Pricing Construction Services

Lump Sum / Stipulated Sum / Fixed Fee

- Cost Overrun Protections

Reimbursement of the Cost of the Work Plus a Fee

- With Guaranteed Maximum Price Cap = Cost-Plus GMP or Cost-Plus GMAX
- Potential Way to Capture Savings

Cost Reimbursement Plus Fee

- Potential Protection Against Overpaying

Fixed Unit Price

- Used for Some Trade Subcontracts

Pricing Construction Services: Main Option #1

Lump Sum / Stipulated Sum / Fixed Fee

Advantages

- Price Certainty (Absent Scope Changes or Problems)
- Design Must Be Complete (or Very Close to Complete)
- Easier to Administer on a Monthly Pay Application Basis and at Project End

Disadvantages

- Typically Incompatible with Fast Tracking the Project
- Contractor Contingencies May Inflate Price To Hedge Against Unknowns
- No Potential for Owner to Realize “Savings”
- Difficult to Align Owner and Contractor Incentives

Pricing Construction Services: Main Option #2

Reimbursement of “The Cost of the Work” Plus a Fee

Guaranteed Maximum Price (GMP) Considerations

- No GMP: No Price Assurance; Contractually and Administratively Difficult
- GMP + Shared Savings: Contractually and Administratively Difficult

Advantages

- Compatible with Fast Tracking the Project
- Contractor Need Not Hedge Against “Fixed Price” Financial Risks
- Potential for Owner to Realize Savings Under the GMP
- Align Owner and Contractor Incentives Through Shared Savings

Disadvantages

- Contractor May Have Less Incentive Complete Work Quickly, Efficiently
- Much More Complex Contractually (definition of “The Cost of the Work”)
- More Difficult to Administer on a Monthly Pay Application Basis and at Project End
- Greater Complexity Invites Claims



DESIGN AND CONSTRUCTION CONTRACTS

Standard Agreements v. Custom Contracts

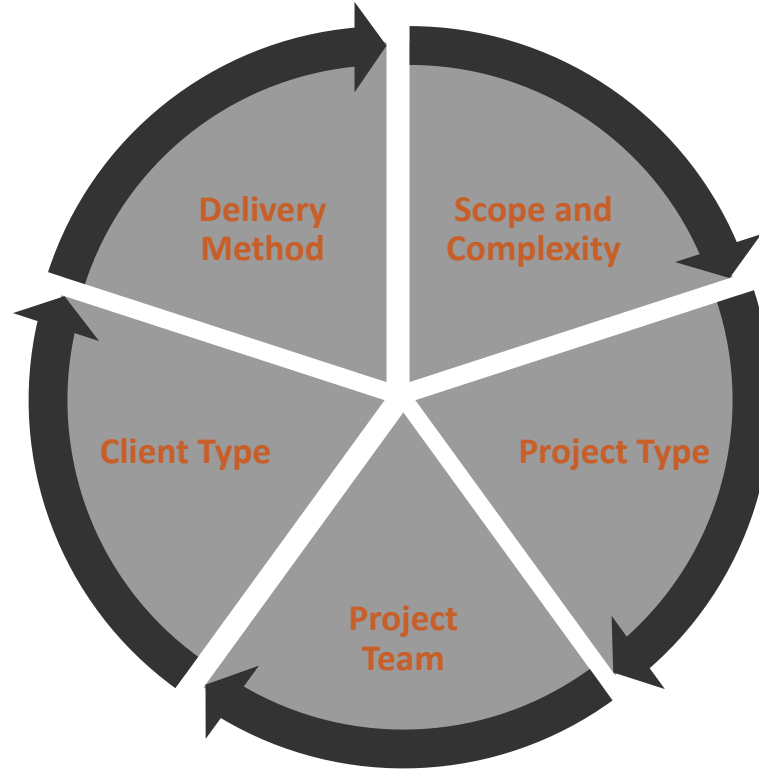
Custom Contracts

- What Terms Are Missing?
- Unknown Unknowns?

Standard Form Agreements

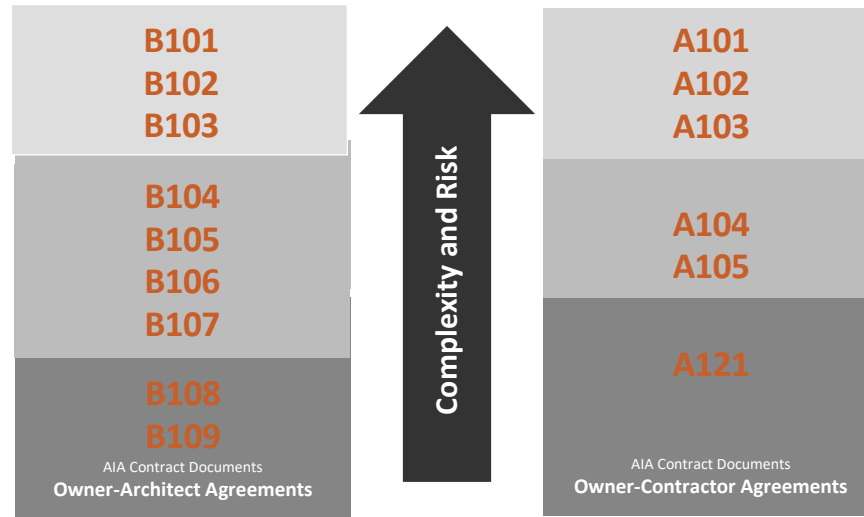
- ConsensusDOCS
- American Institute of Architects (AIA)
- Engineers Joint Contract Documents Committee (EJCDC)
- Design Build Institute of America (DBIA)
- Construction Management Association of America (CMAA)
- Any Bias to Consider?

Selecting the Agreement

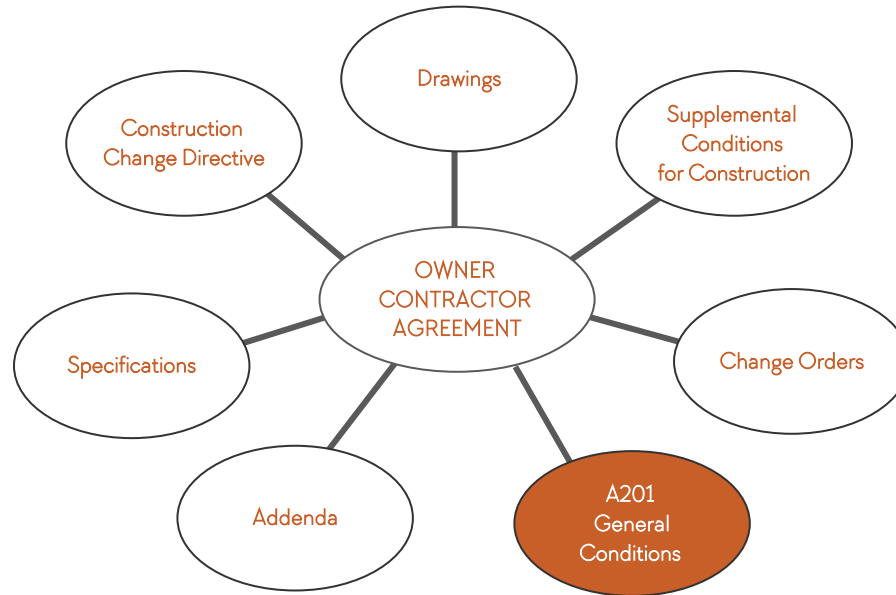


Project Risk Tolerance and Complexity

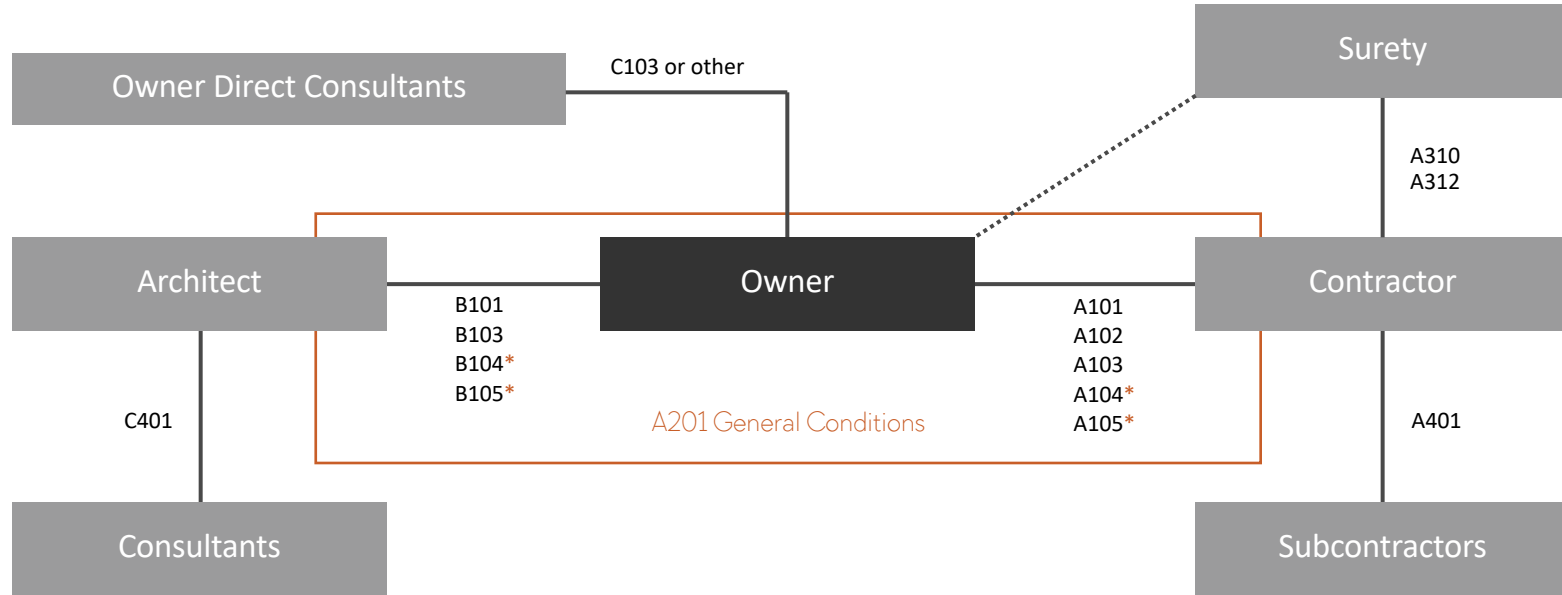
Balance Project Complexity and Need
for Contractual Protection



Contract Documents: Traditional Project



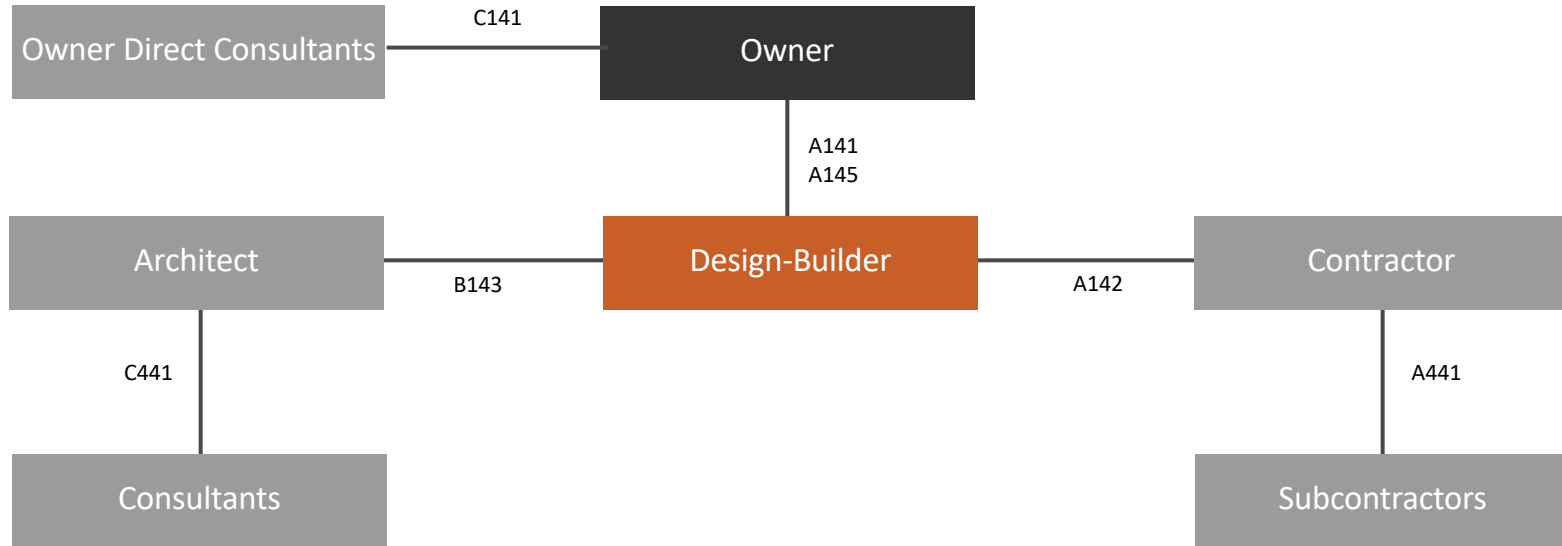
Traditional Design-Bid-Build



AIA Contract Documents: A101® Owner/Contractor Agreement—Stipulated Sum; A102™ O/C Agreement—Cost of the Work Plus a Fee, with GMP; A103™ O/C Agreement—Cost of the Work Plus a Fee, No GMP; A104™, Abbreviated O/C Agreement; A201®, General Conditions of the Contract for Construction; A310™, Bid Bond; A312™, Performance Bond/ Payment Bond; A401™, Contractor/Subcontractor Agreement; A105™, Standard Short Form of Agreement Between Owner and Contractor; B101™, Owner/Architect Agreement; B103™, O/A Agreement—Complex Project; B104™, Abbreviated O/A Agreement; B105™, Standard Short Form of Agreement Between Owner and Architect; C103™, Owner/Consultant Agreement; and C401™, Architect/Consultant Agreement.

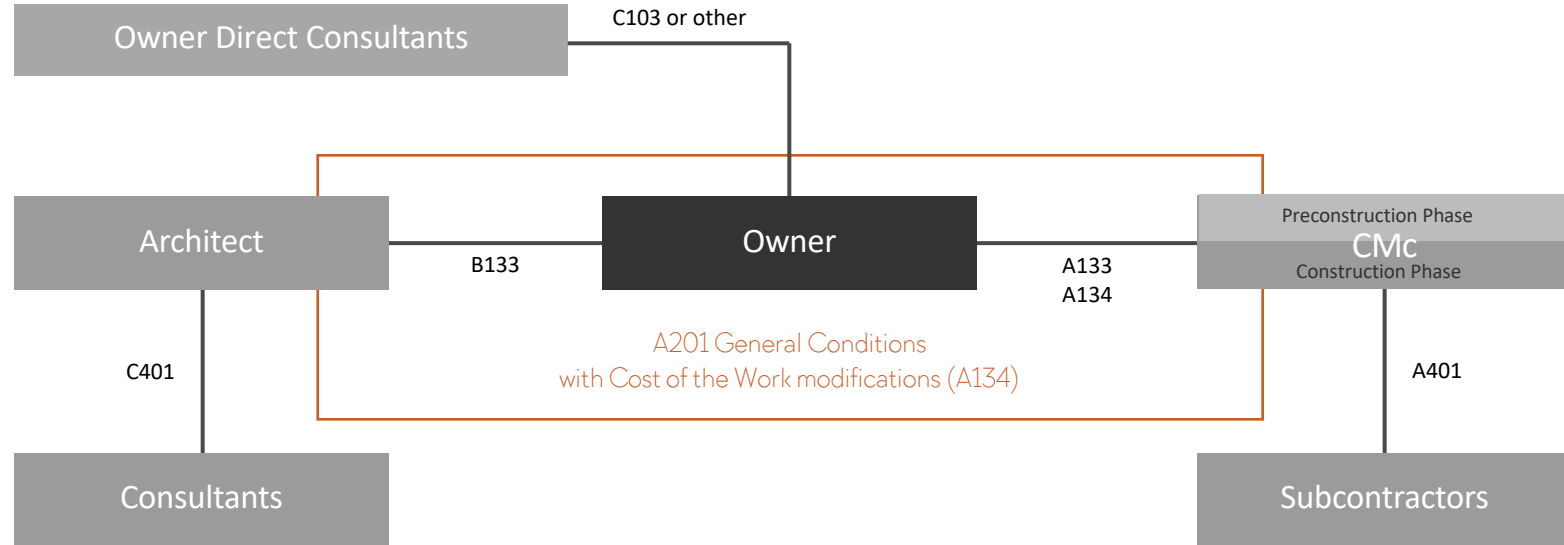
*A104/A105 and B104/B105 are intended to be used for smaller projects or projects of limited scope. * A104 and A105 combine the Owner-Contractor agreement with abbreviated General Conditions. B104 and A104 are in the A201 family because the abbreviated general conditions in A104 are based on document A201. If C401 and A401 are used with B104 and A104, appropriate modifications should be made with the assistance of insurance and legal counsel.

Design-Build



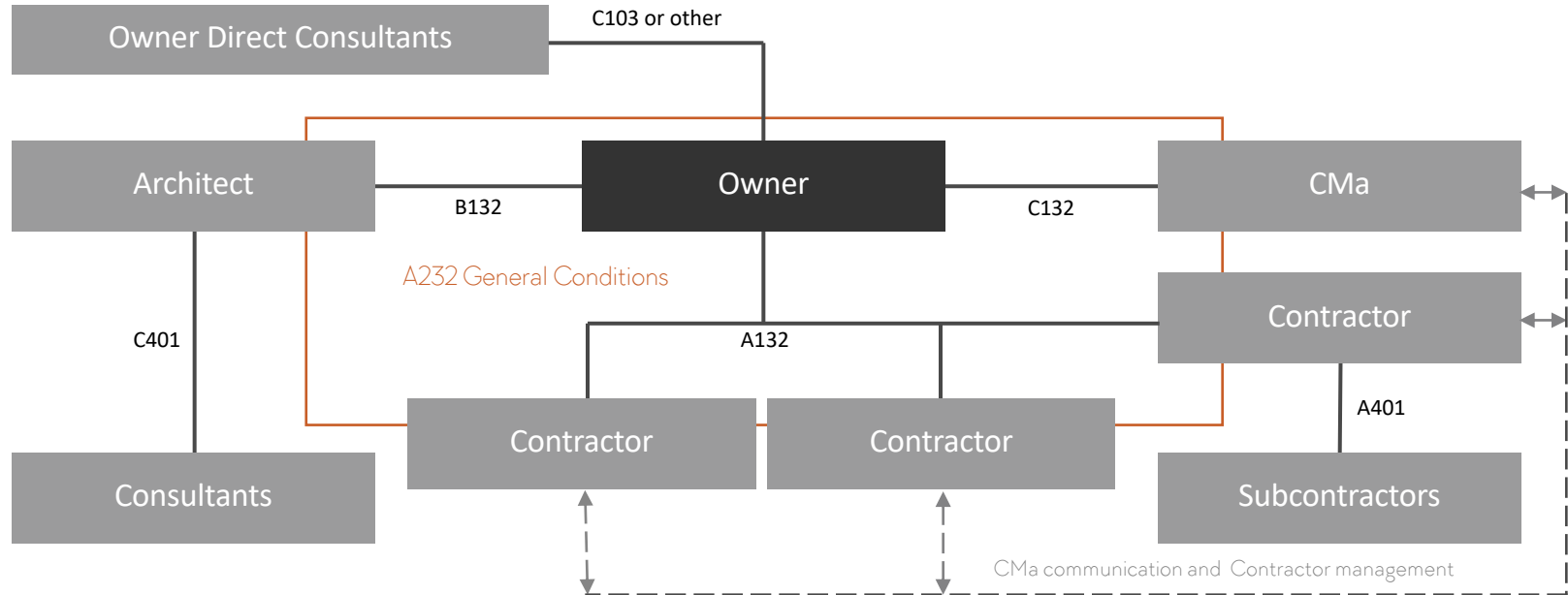
AIA Contract Documents: A141™, Owner/Design-Builder Agreement; A145™, Owner/Design-Builder Agreement for a One or Two Family Residential Project; A142™, Design-Builder/Contractor Agreement; A441™, Contractor/Subcontractor Agreement for a Design-Build Project; B143™, Design-Builder/Architect Agreement; C141™, Owner/Consultant Agreement for a Design-Build Project; and C441™, Architect/Consultant Agreement for a Design-Build Project.

Construction Manager as Constructor (CMc)



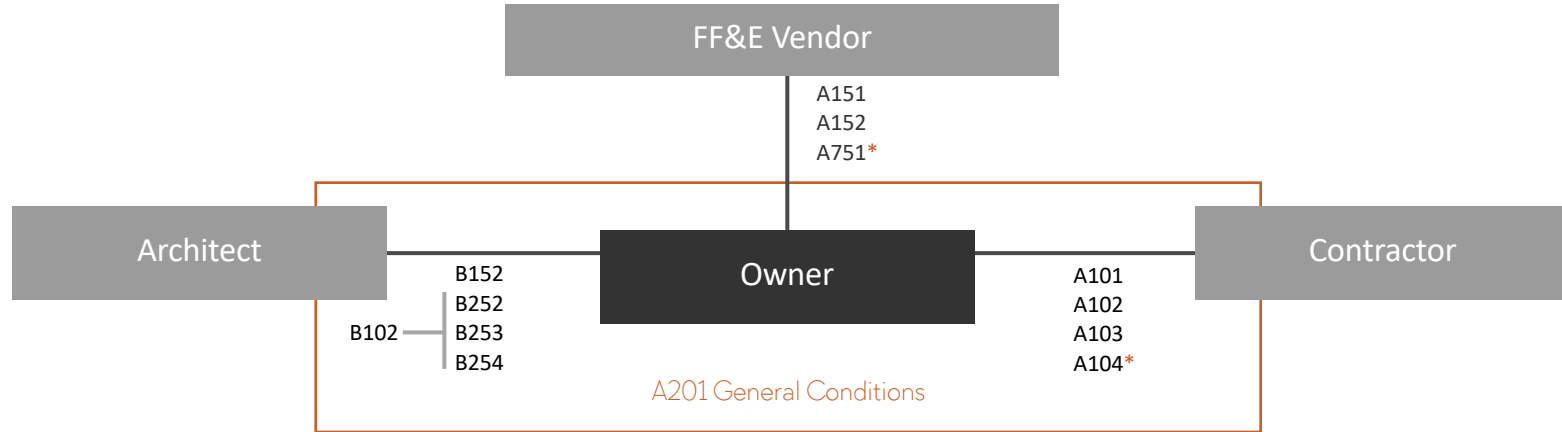
AIA Contract Documents: A133™, Owner/Construction Manager as Constructor Agreement, where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price; A134™, Owner/Construction Manager as Constructor Agreement, where the basis of payment is the Cost of the Work Plus a Fee without a Guaranteed Maximum Price; A201®, General Conditions of the Contract for Construction; A401™, Contractor/Subcontractor Agreement; B133™, Owner/Architect Agreement, Construction Manager as Constructor Edition; and C401™, Architect/Consultant Agreement.

Construction Manager as Adviser (CMa)



AIA Contract Documents: A132™, Owner/Contractor Agreement, CMa Edition; A232™, General Conditions of the Contract for Construction, CMa Edition; A401™, Contractor/Subcontractor Agreement; B132™, Owner/Architect Agreement, CMa Edition; C132™, Owner/Construction Manager as Adviser Agreement; and C401™, Architect/Consultant Agreement. While less likely, agreements with Contractors also could be GMP, pure cost of the work, limited design/build, or any other delivery option.

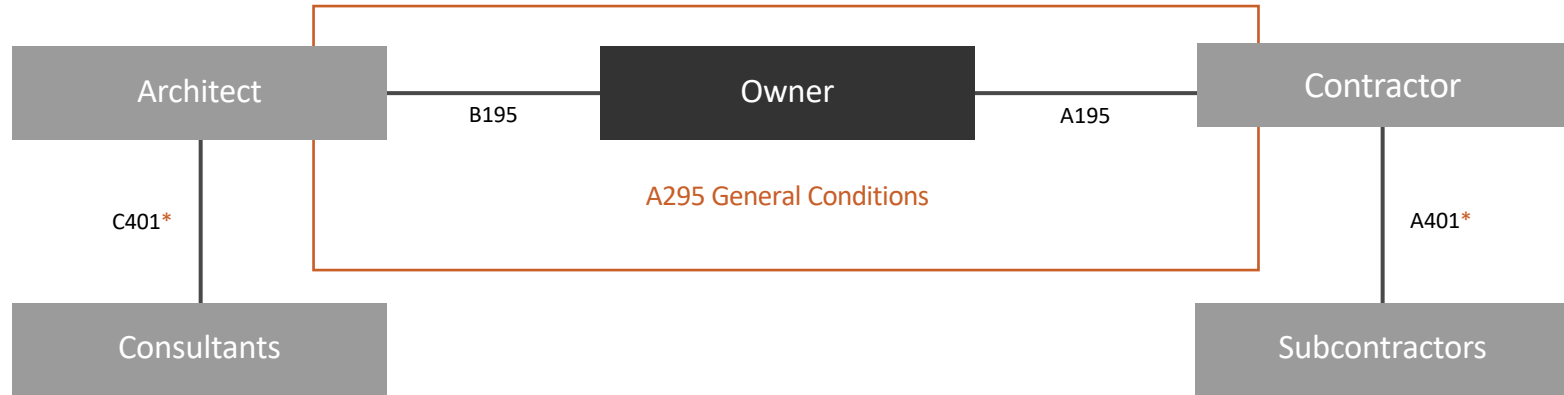
Interior Design + FF&E



AIA Contract Documents: B152™, Owner/Architect Agreement for Architectural Interior Design Services; B252™, Standard Form of Architect's Services – Architectural Interior Design; B253™, Standard Form of Architect's Services for Furniture, Furnishings and Equipment Design; B254™, Standard Form of Architect's Services for Purchasing Agent Services for Furniture, Furnishings, and Equipment (FF&E) B252, B253, B253 provide scope of services only. Must be combined with B102™, Owner/Architect Agreement without a Predefined Scope of Architect's Services or other owner/architect agreement.

* A751™, Invitation and Instructions for Quotation for Furniture, Furnishings and Equipment can be used to solicit quotes from potential vendors. * A104™, Standard Abbreviated Form of Agreement Between Owner and Contractor, is a stand-alone agreement that does not require the use of a separate general conditions document.

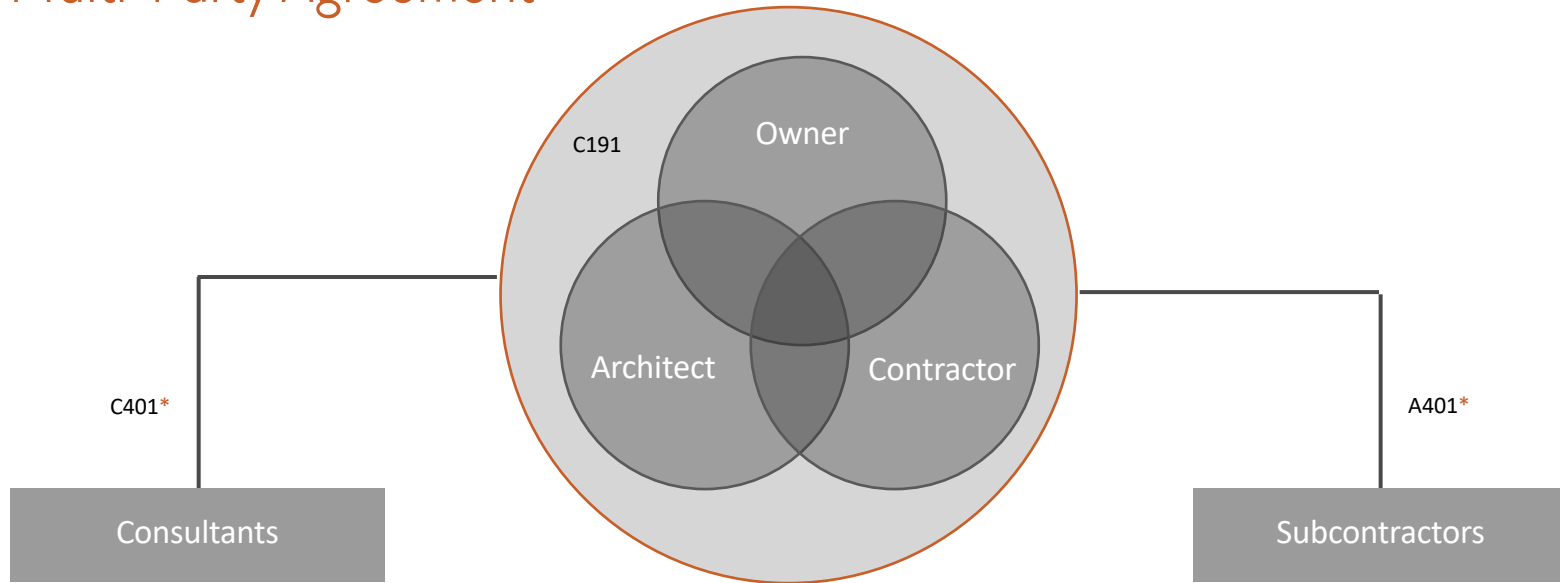
Integrated Project Delivery (IPD): Transitional Documents



AIA Contract Documents: A401™, Contractor/Subcontractor Agreement; A295™, General Conditions of the Contract for Integrated Project Delivery; and C401™, Architect/Consultant Agreement.

*If A401 or C401 is to be used on a project with the Transitional Forms, appropriate modifications should be made with the assistance of insurance and legal counsel

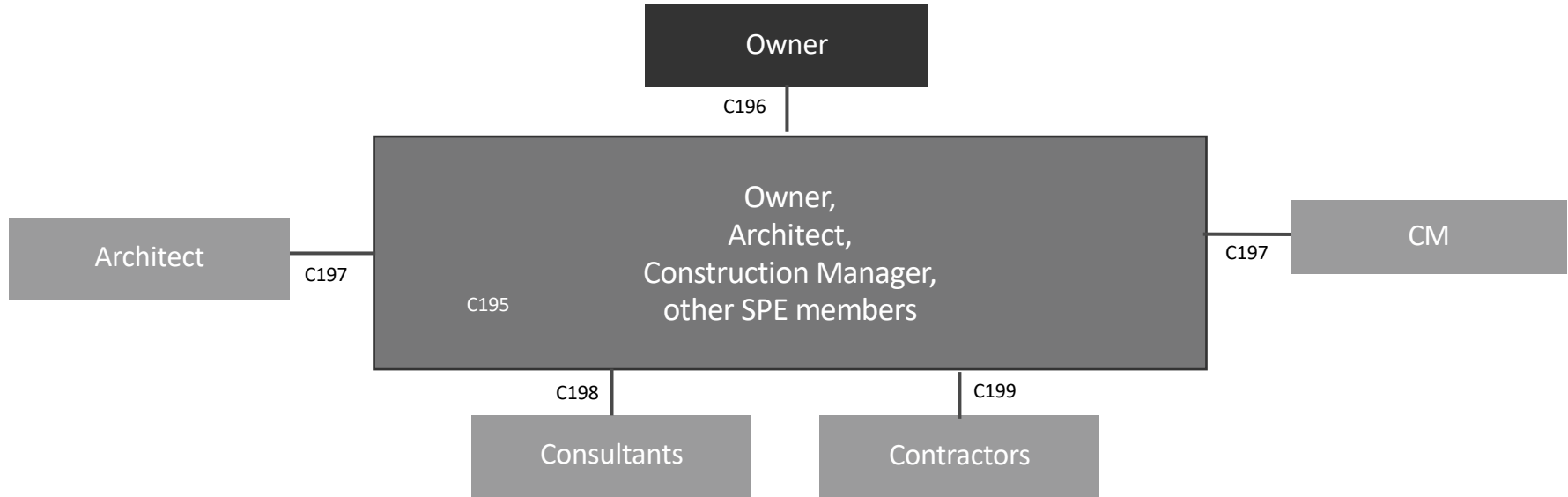
Integrated Project Delivery (IPD): Multi-Party Agreement



AIA Contract Documents A401™, Contractor/Subcontractor Agreement; C191™, Multi-Party Agreement for Integrated Project Delivery; and C401™, Architect/Consultant Agreement.

*If A401 or C401 is to be used on a project with the Multi-Party Agreement, appropriate modifications should be made with the assistance of insurance and legal counsel.

Integrated Project Delivery (IPD): Single Purpose Entity



AIA Contract Documents: C195™, SPE Agreement for Integrated Project Delivery; C196™, SPE/Owner Agreement for IPD; C197™, SPE/Non-Owner Member Agreement for IPD; C198™, SPE/Consultant Agreement for IPD; and C199™, SPE/Contractor Agreement for IPD.

AIA Contract Documents

For more about AIA Contract Documents:

<https://www.aiacontracts.org/>

Conclusion?

It Can Be Complicated!

- Project Delivery Method
- Arrange Chess Pieces
- Insurance Issues
- Pricing Considerations
- Contract Selection
- Then the Fun Continues!



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- [WHY ARE PROJECT DELIVERY METHODS SO IMPORTANT FOR CONSTRUCTION PROJECTS?](#)
- [SHOULD I START CONTRACT NEGOTIATIONS USING MY OWN CONTRACT FORM?](#)
- [WHAT MAKES GOOD CONTRACTS FOR DESIGN AND CONSTRUCTION PROJECTS?](#)
- [WHAT IS YOUR APPROACH TO NEGOTIATING DESIGN AND CONSTRUCTION CONTRACTS?](#)
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- [CAN A LAWSUIT SAVE ME FROM BAD DESIGN AND CONSTRUCTION CONTRACTS?](#)
- [ARE SHORT CONTRACTS BETTER THAN LONG CONTRACTS?](#)
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- [BEWARE THE "ONE YEAR" WARRANTY: CONTRACTOR CALLBACK PERIODS V. WARRANTIES OF QUALITY WORK](#)
- [AIA'S NEW 2019 CMC AND CMA CONTRACT DOCUMENTS](#)
- [THE B152-2019 INTERIOR DESIGN AGREEMENT: IMPORTANT FF&E CHANGES](#)
- [NEGOTIATING DISPUTE RESOLUTION CLAUSES IN CONSTRUCTION CONTRACTS](#)
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Attorney Responsible for Content: Jeremy S. Baker

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