

BAKER LAW

design and construction counsel



CONSTRUCTION LAW 101: A PRIMER FOR REAL ESTATE LITIGATION ATTORNEYS

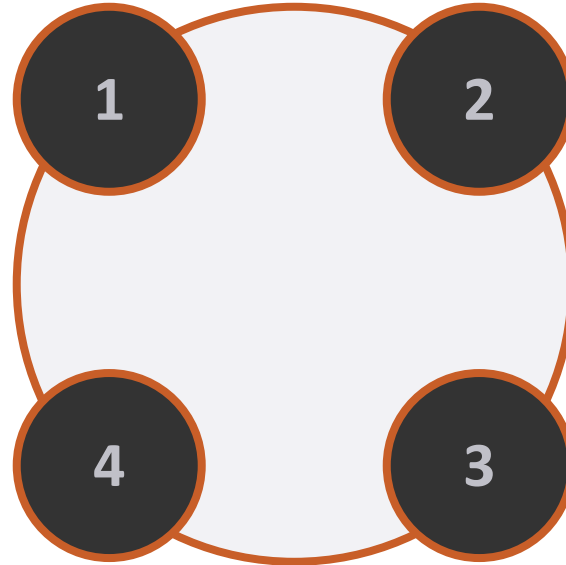
American Bar Association – Litigation Section
December 15, 2021

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Today's Agenda

Project Delivery
Methods and
Contracts

ADR in Design and
Construction
Disputes



Interplay of
Insurance and
Indemnity

Unique Construction
Law Issues and
Doctrines

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.

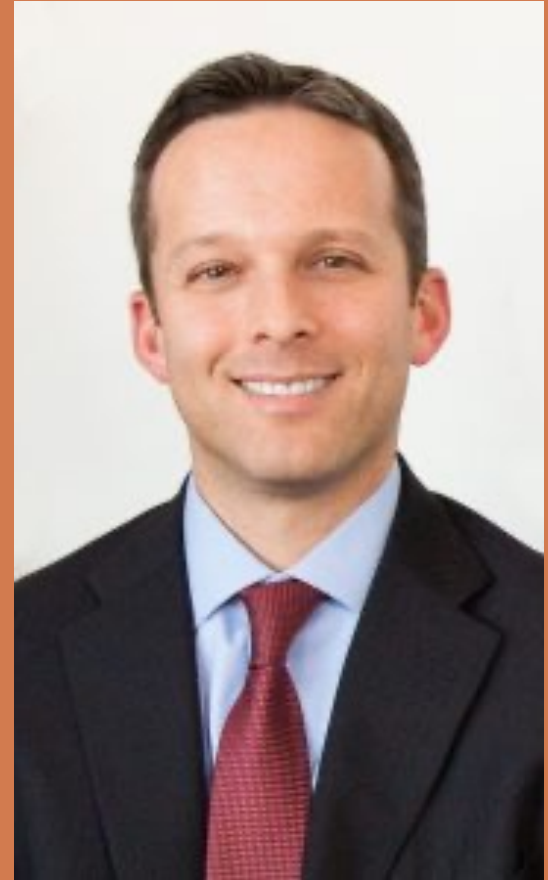
Liaison to AIA Contract Documents Committee

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)

Baker Law Group LLC (October 2019–Present)



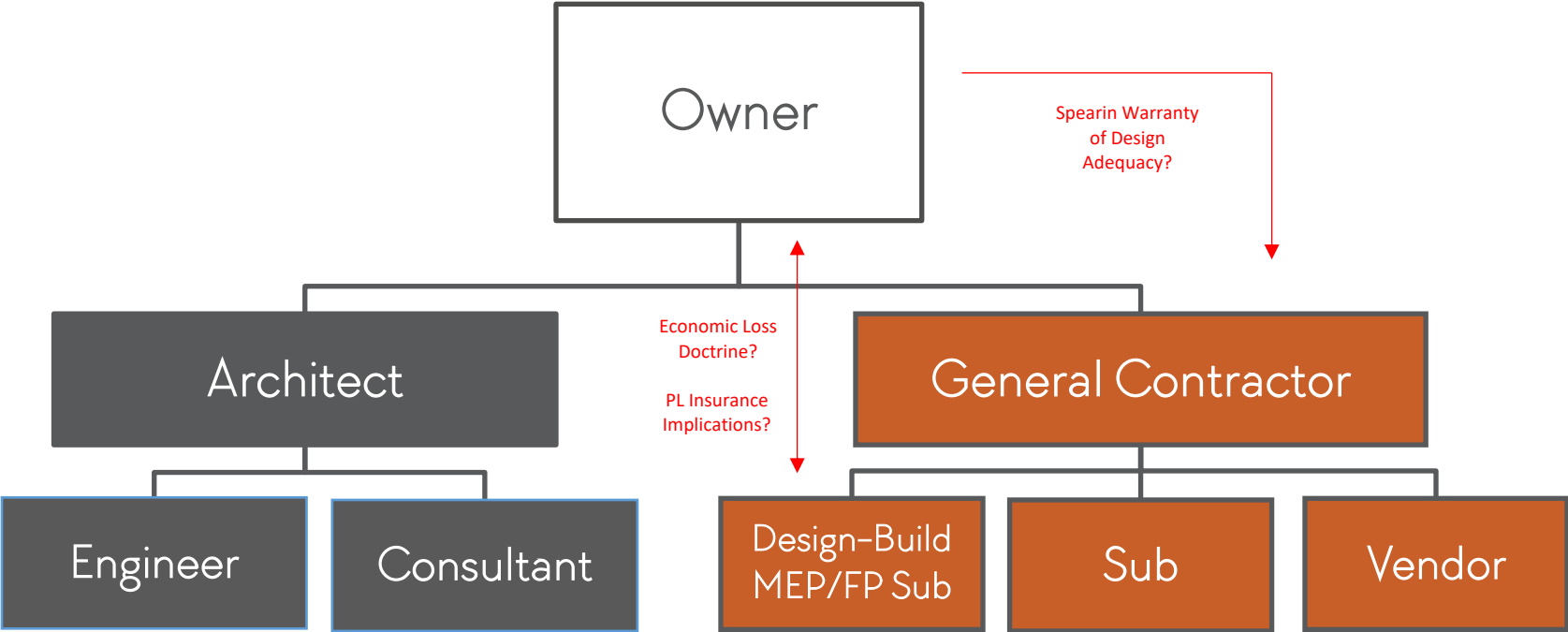


PROJECT DELIVERY METHODS

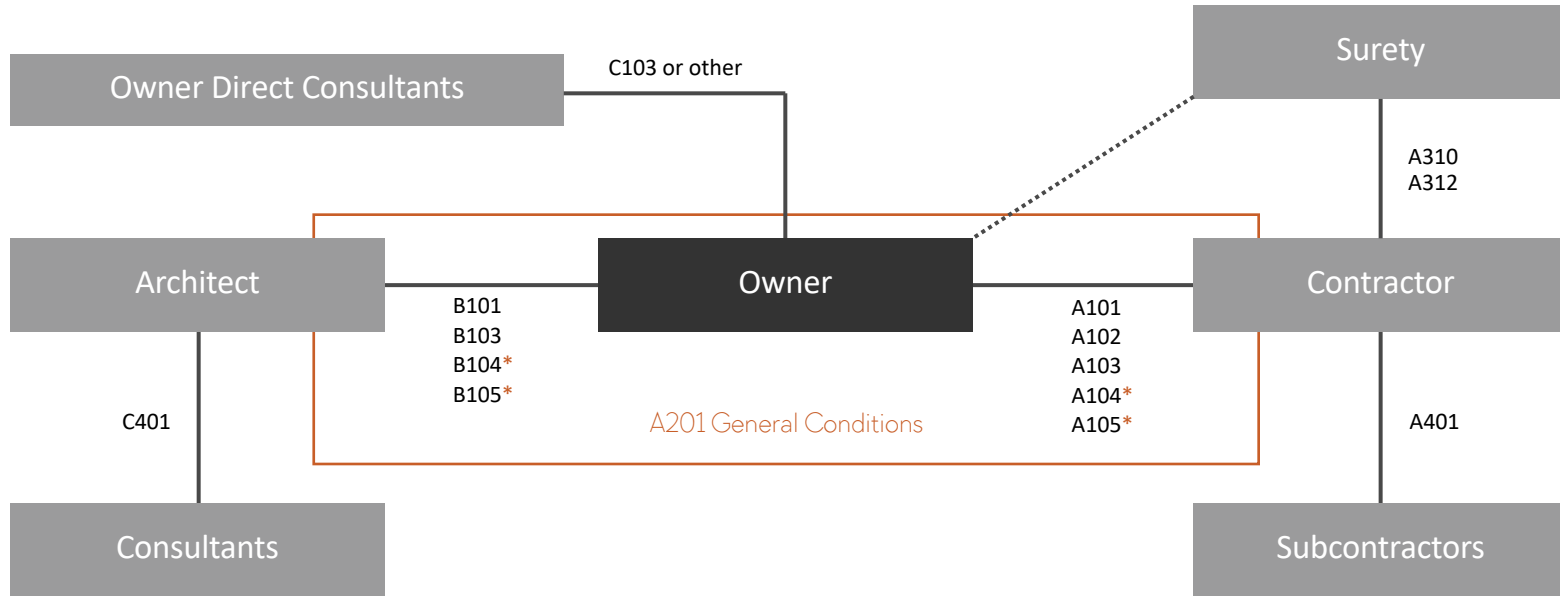
Common Project Delivery Method Variations

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

Project Delivery Methods: Traditional Structure



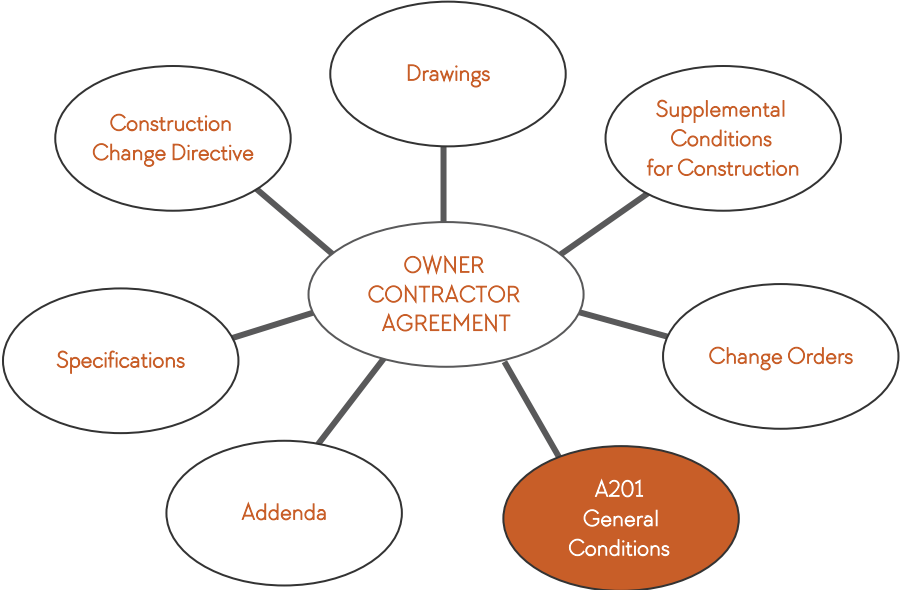
Traditional Design-Bid-Build



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.

Contract Documents: Traditional Project



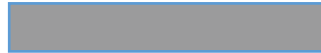
Traditional v. Fast Track

Traditional

Design



Pricing



Construction



Fast-Track

Design



Pricing

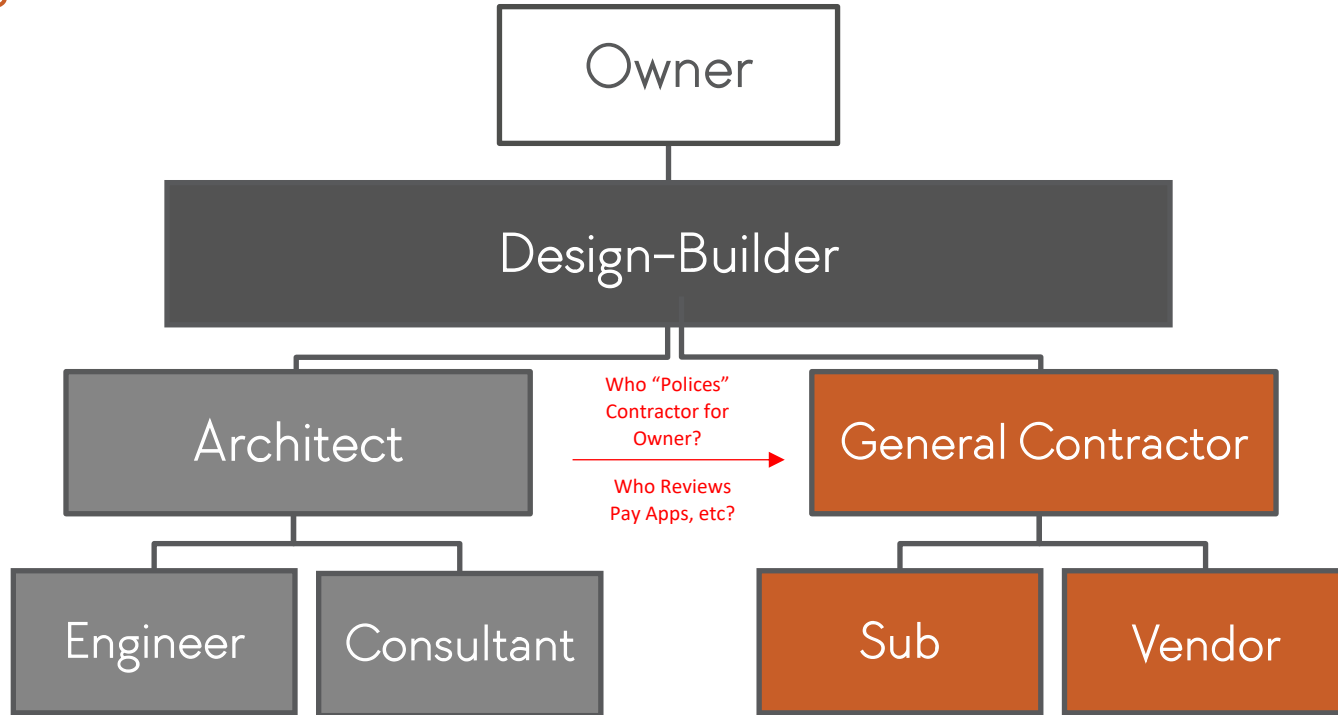


Construction

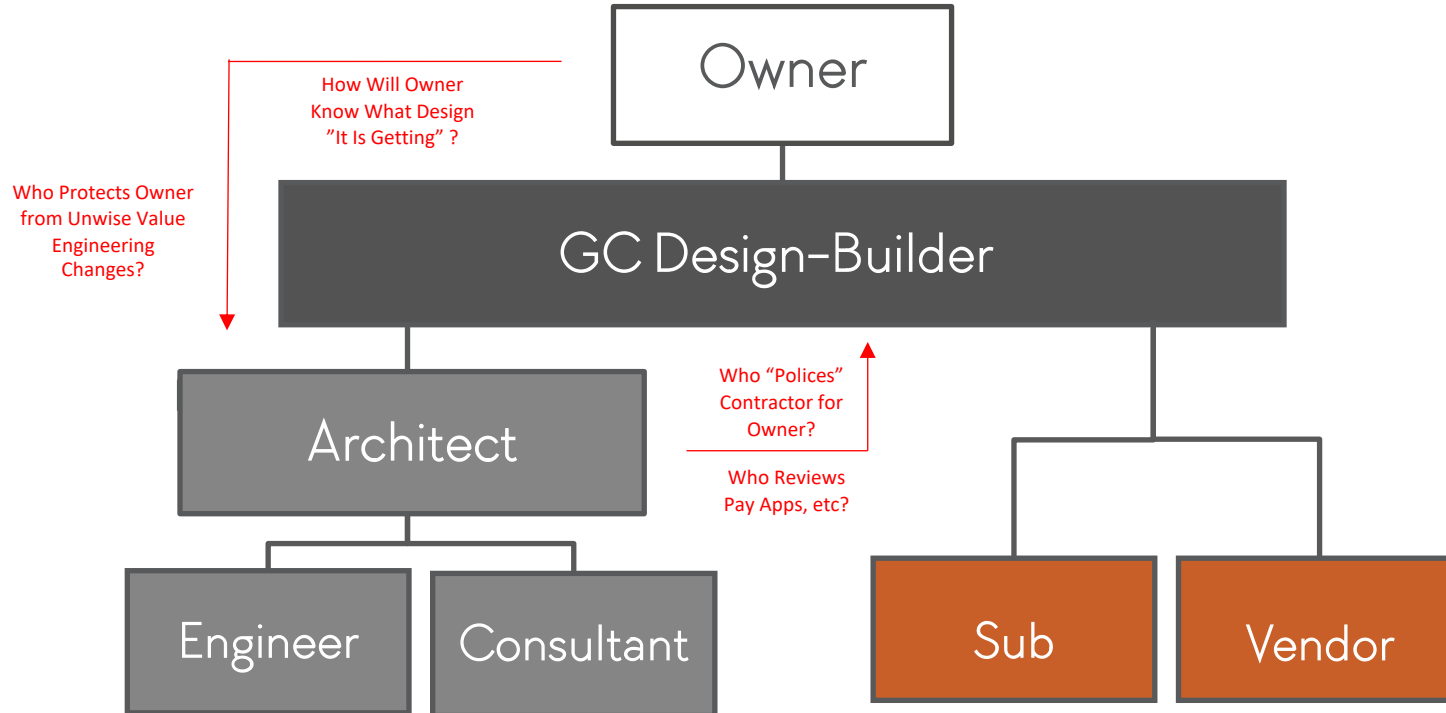
Advantage: Delivery Speed

Disadvantage: Loss of Cost Control

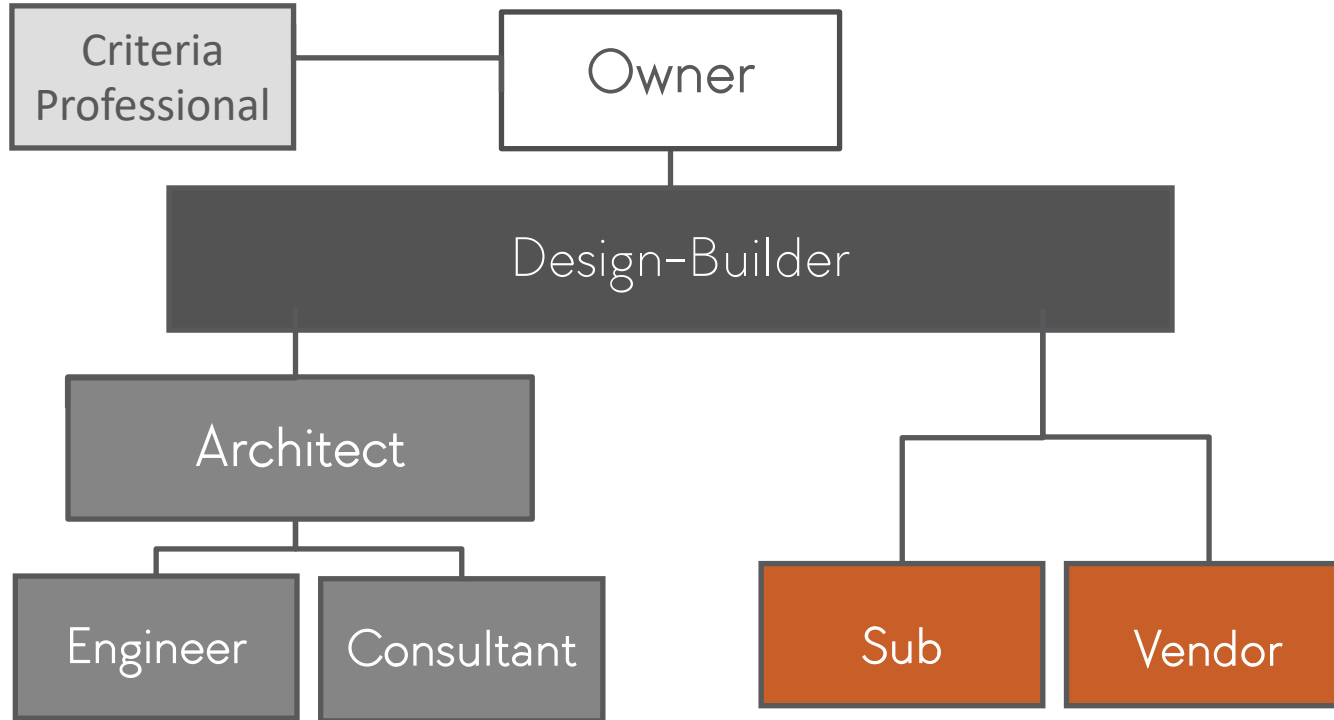
Project Delivery Methods: Design-Build



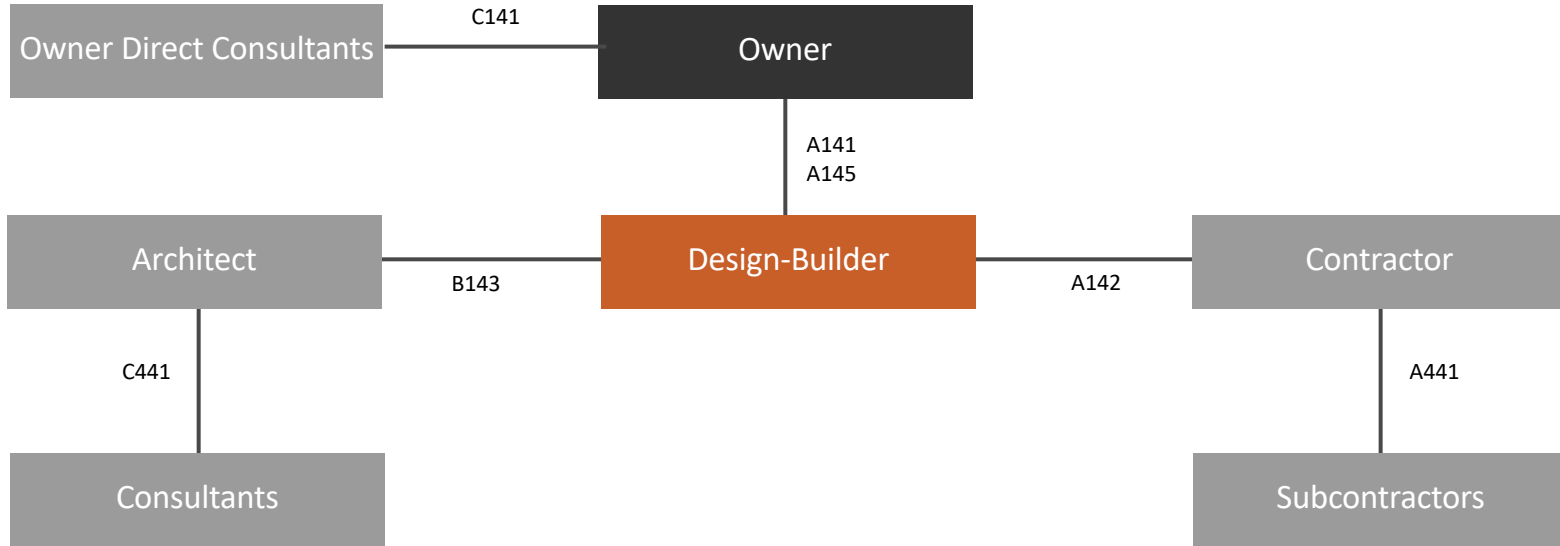
Project Delivery Methods: Contractor-Led Design Build



Project Delivery Methods: Design Build w/ Criteria Professional

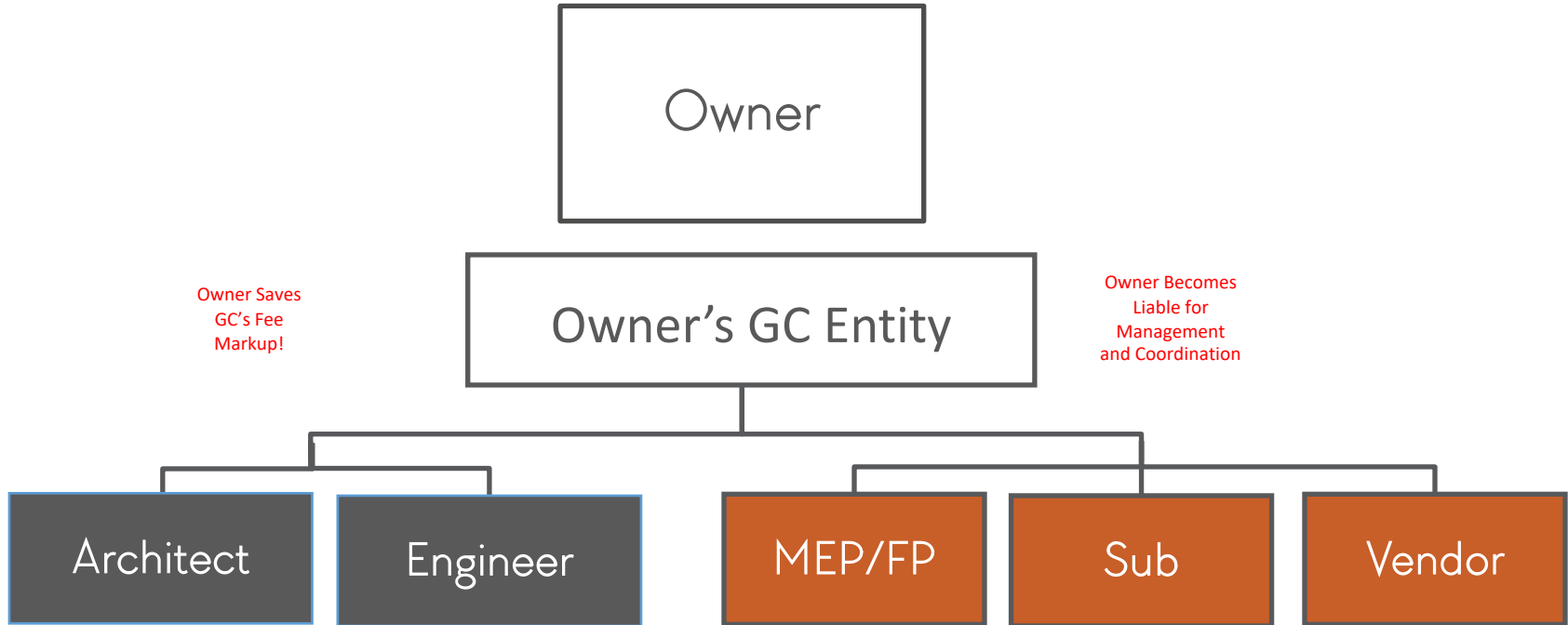


Design-Build

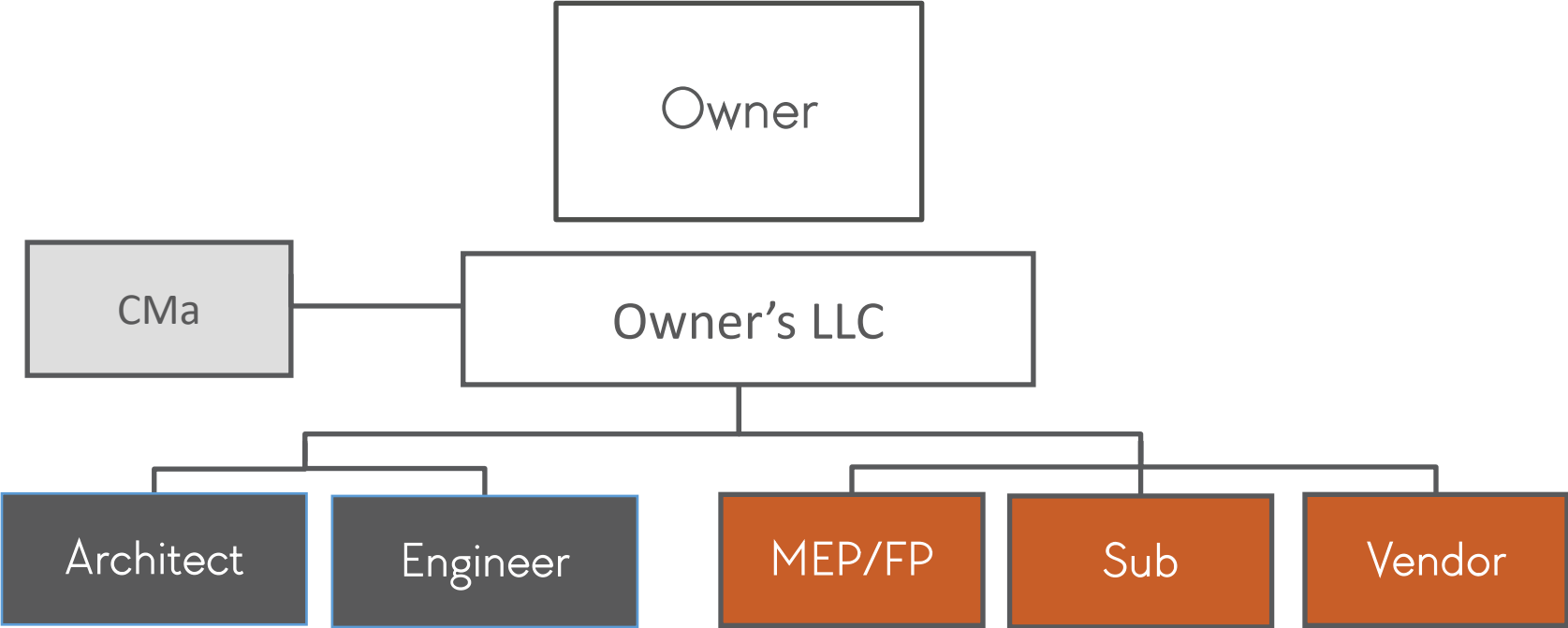


AIA Contract Documents: A141™, Owner/Design-Builder Agreement; A145™, Owner/Design-Builder Agreement for a One or Two Family Residential Project; A142™, Design-Builder/Contractor Agreement; A441™, Contractor/Subcontractor Agreement for a Design-Build Project; B143™, Design-Builder/Architect Agreement;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

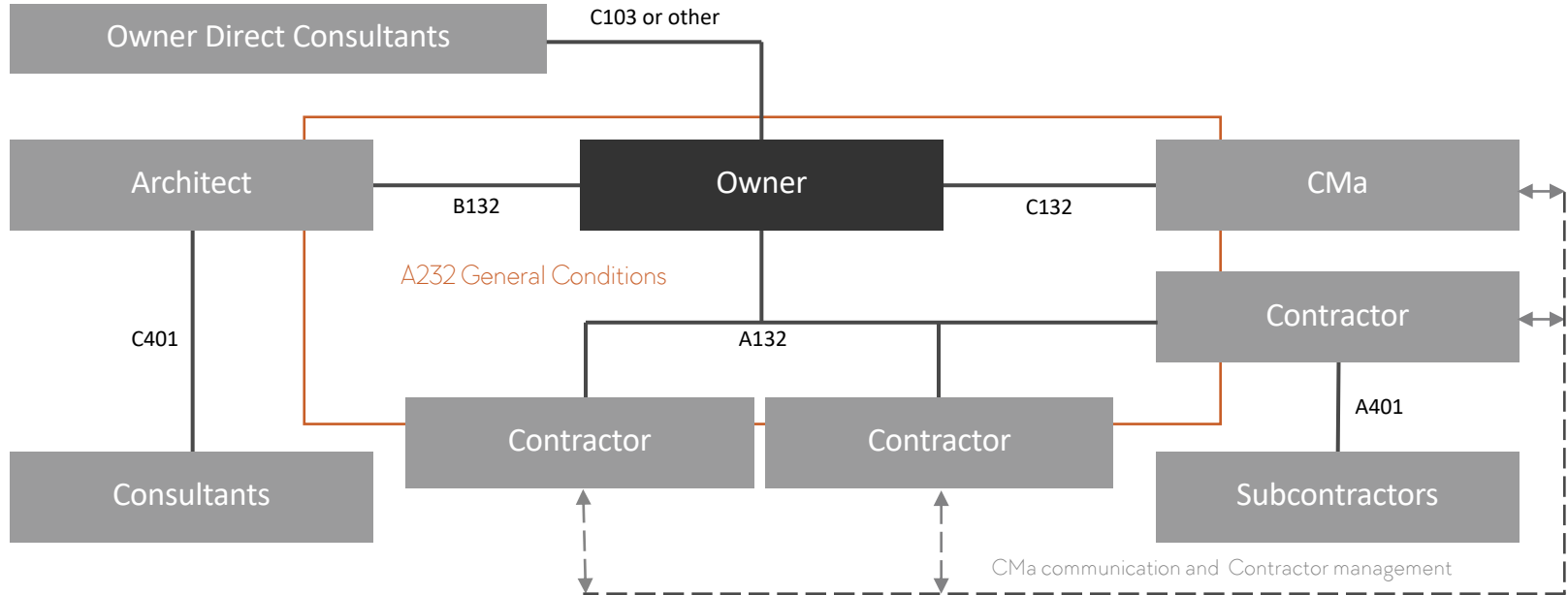
Project Delivery Methods: Multiple Prime Contractors



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

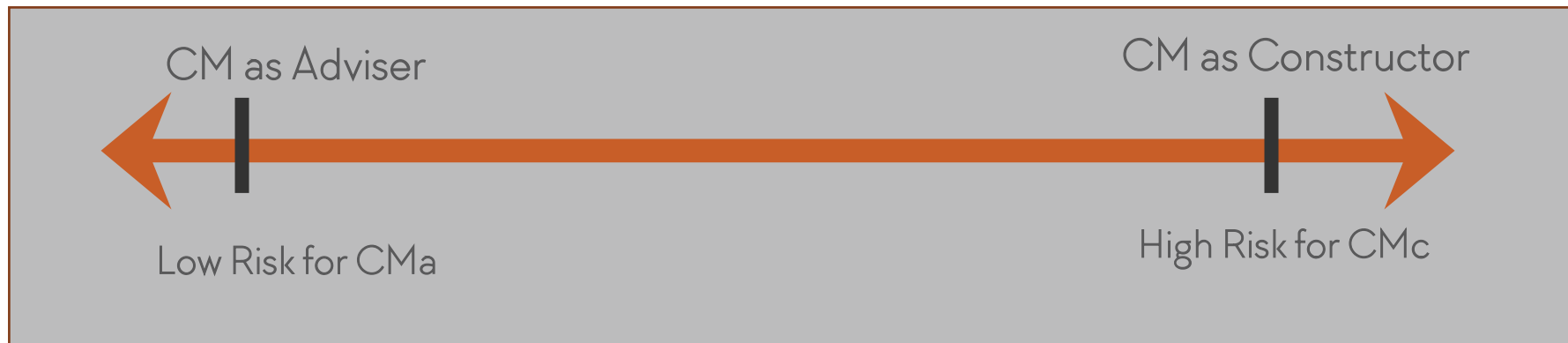


Construction Manager as Adviser (CMa)



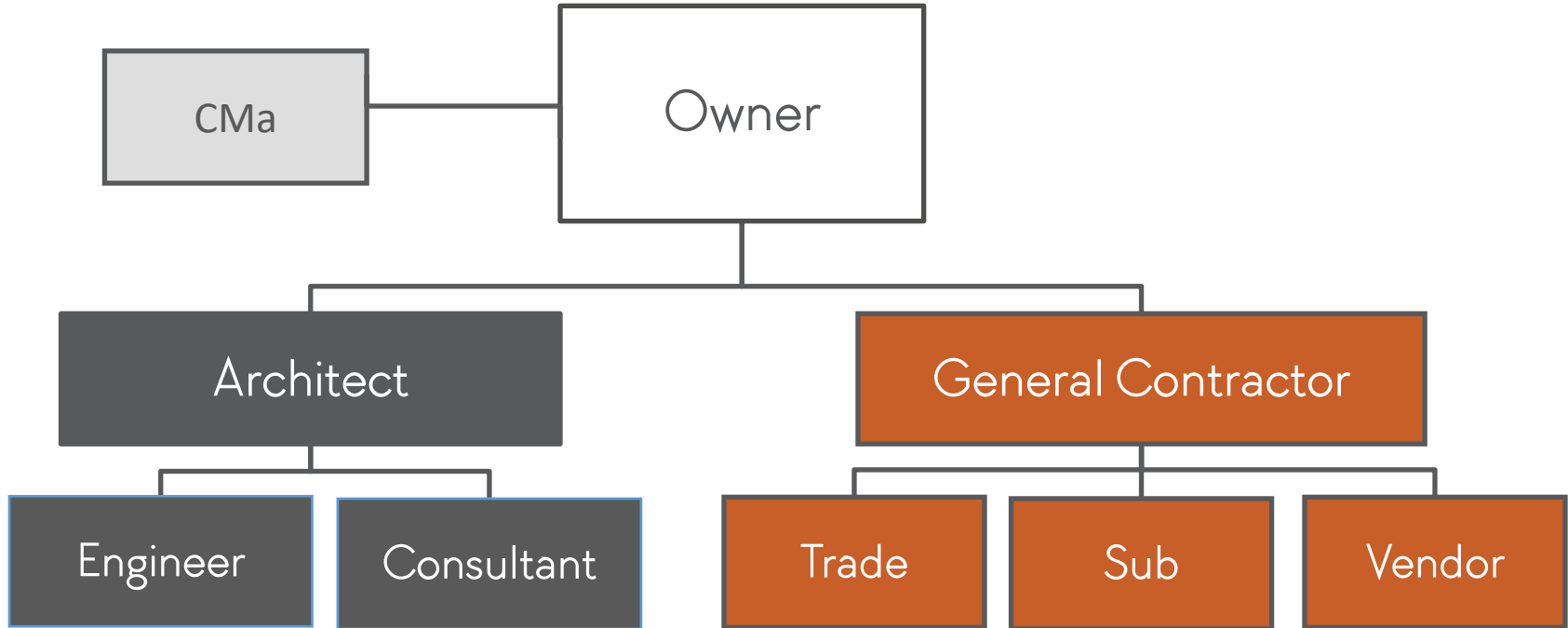
AIA Contract Documents: A132™, Owner/Contractor Agreement, CMa Edition; A232™, General Conditions of the Contract for Construction, CMa Edition; A401™, Contractor/Subcontractor Agreement; B132™, Owner/Architect Agreement, CMa Edition; C132™, Owner/Construction Manager as Adviser Agreement; and C401™, 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.

Project Delivery Methods: Construction Management

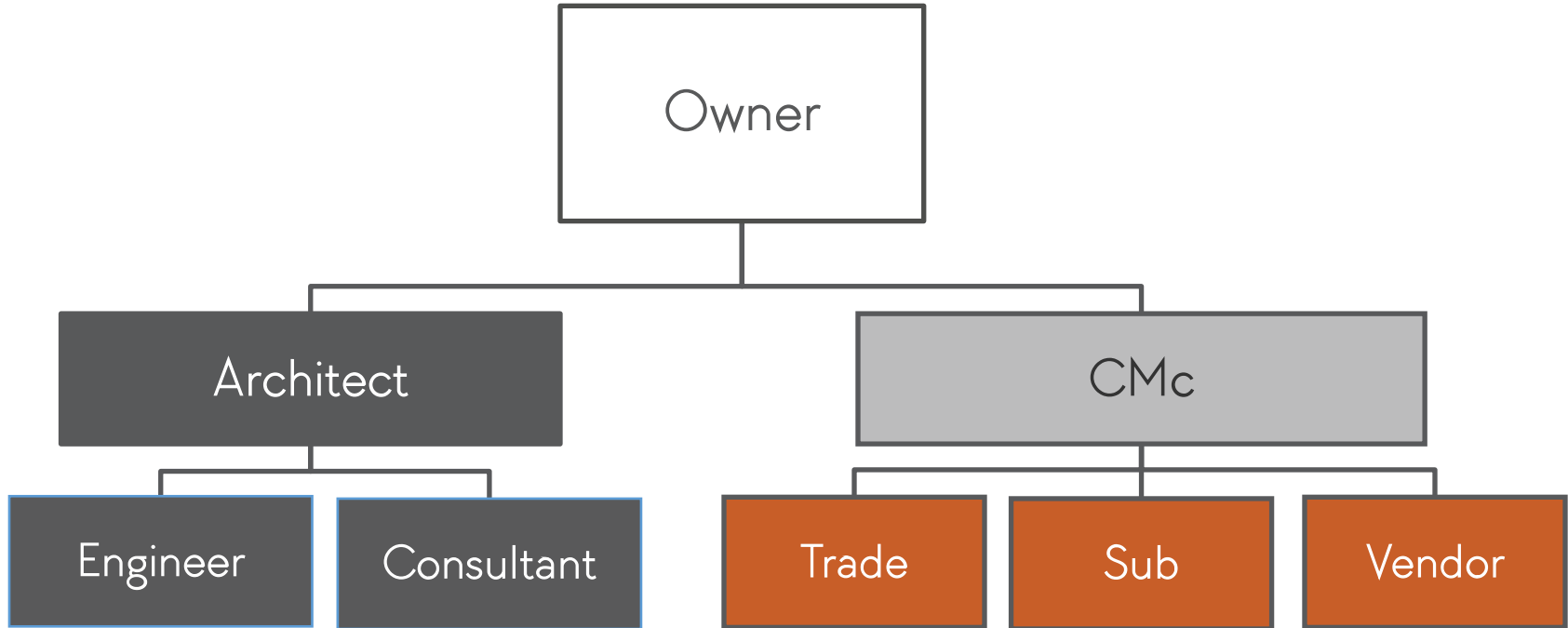


- Construction Management = Wide Spectrum of Possible Options
 - CMa: Layer of Consulting, Coordination, and Management For a Fee
 - CMc: Like General Contracting (CM Holds Trade Contracts) w/ Preconstruction Services
 - Hybrid: Agency CM Where the CM Signs Trade Contracts As the Owner's Agent
- All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

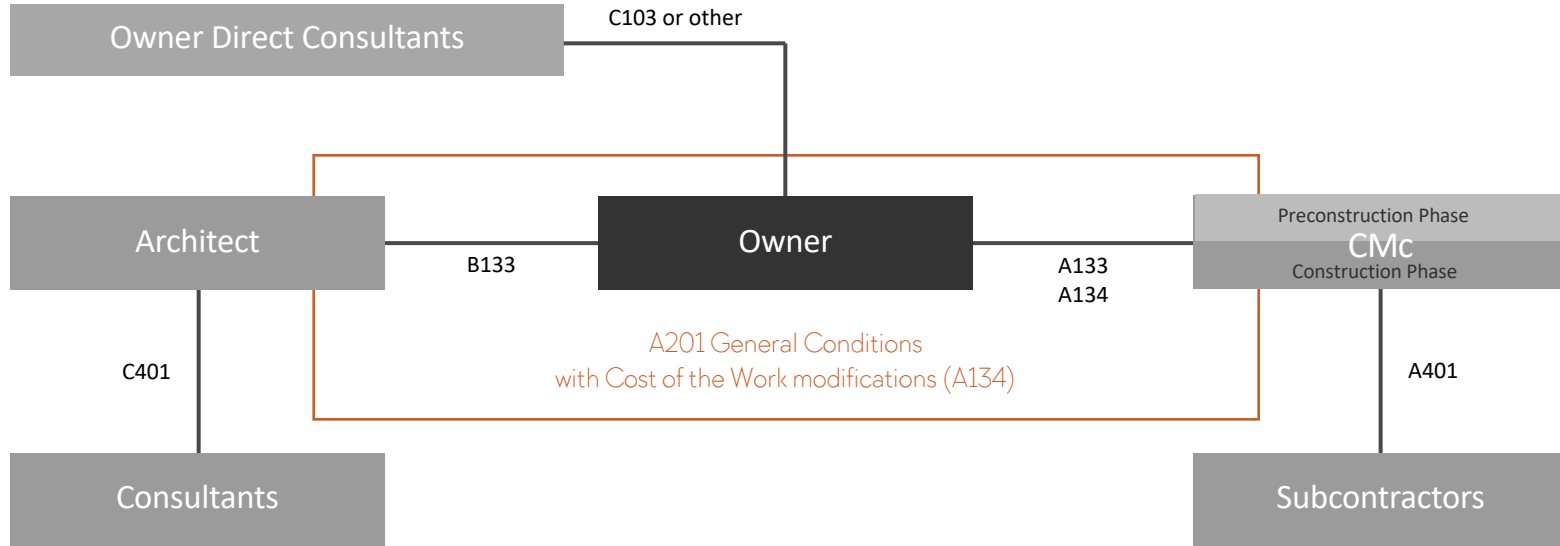
Project Delivery Methods: CMa



Project Delivery Methods: CMc



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.

Project Delivery Method Conclusion...

Determine the Legal and Contractual Consequences of the Trade-Offs the Project Owner and Participants Previously Made!

How Do they Dictate Dispute Resolution Strategy?





INSURANCE AND INDEMNITY INTERPLAY

Insurance: Interplay with Project Delivery Methods

How Are the Chess Pieces Arranged?

Who Contracts with Whom?

For What Work or Services?

Which Insurance Policies Are in Play?

What Insurance *Should Be* Available?

What Insurance *Is Actually* Available?

Insurance Procurement or Claim Reporting Errors – Is Someone Liable?

Consider and Plan Impact on Potential Claims and Causes of Action

Begin With the End In Mind (who is the target payor?)

Insurance: Interplay with Contract Language ...and How It Impacts Your Claim Phraseology

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 + Contract Language is What Matters

Contract Terms Which Impair Insurance Coverage: Defense Obligations

To the fullest extent permitted by law, Architect shall ~~defend~~ ~~and~~ indemnify Owner from and against claims, damages, losses, costs or expenses, including reasonable attorney's fees and costs, that Owner may suffer as a result of a third party's claim against Owner, but only to the extent caused by the negligent acts or omissions of Architect which rise to the level of a violation of the Standard of Care in Architect's performance of professional services under this Agreement.

*****caveat: sometimes a defense obligation is appropriate in a design professional agreement*****

Contract Terms Which Impair Insurance Coverage: Warranties and Guarantees (and Prevailing Party)

The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances (hereinafter, the “Standard of Care”). The Architect shall **abide by the Standard of Care and produce a design to comply with applicable laws** ~~and warrants that the Owner will be satisfied with the Project’s outcome.~~

Contract Terms Which Trigger Insurance Coverage

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 coverage 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	
Name Of Additional Insured Person(s) Or Organization(s):	Location(s) Of Covered Operations
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>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.
B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:	
<small>© 2010 GENERAL, INC. 2006</small>	<small>CG 20 10 07 04</small>



UNIQUE
CONSTRUCTION
LAW ISSUES AND
DOCTRINES

Pricing Construction Work: Two Main Options

Lump Sum / Stipulated Sum / Fixed Fee

- Cost Overrun Protection for Owner
- Simpler to Administer Contract Payment Process
- Payments Often Based on Percent of Work Complete

Reimbursement of the Cost of the Work Plus a Fee

- Guaranteed Maximum Price Cap (Cost-Plus GMP/GMAX)
- Potential Way to Capture “Savings” Under Price Cap
- Difficult to Administer (Shared Savings, Contingency Use, Audit)
- Misunderstandings Tend to Breed Disputes

The “Spearin” Warranty of Design Adequacy

United States v. Spearin, 248 U.S. 132 (1918):

“...if contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications.”

“[T]he insertion of the articles prescribing the character, dimensions and location of the sewer imported a **warranty** that if the specifications were complied with, the sewer would be adequate.”

*And thus the *complicated* Spearin Warranty was born...
giving rise to fights over defects, time and money, etc.*

The “Betterment” Defense ...a/k/a the “No Free Lunch Rule”

St. Joseph Hospital v. Corbetta Construction Company,
21 Ill. App. 3d 925 (Ill. App. 1st Dist. 1974):

- Costs incurred by an owner in addressing design omissions cannot be recovered if they would have been incurred absent the omission
- Awarding such costs would unjustly enrich the owner by providing a better project than the owner has paid to receive
- If the “Owner always needed it” the “Owner always needed to pay for it”
- Caution: tremendous factual and legal nuance


Cardinal Change Doctrine

...a/k/a the “let’s throw out the contract” gambit

- Basic Concept: a change of such large magnitude that it materially changes the nature of the project, resulting in the Owner materially breaching the contract
- Often used – and misused – in large, complex construction claims
- Potentially Legitimate Examples:
 - A change order requiring the contractor to construct a shopping mall where the contract calls for a high-rise building to be built
 - Many small changes which cumulatively constitute a material change in the project
- The Contractor’s options:
 - Terminate the contract and sue to recover the reasonable value of services provided
 - Declare the contract breached, but complete the project, and seek extra compensation

Complex Construction Issues (get some help)

- Mechanics Liens
- Accessibility Issues (ADA/FHA)
- Delay / Critical Path Scheduling
- Construction Cost Audit / Accounting



WHY ADR WORKS IN DESIGN AND CONSTRUCTION DISPUTES

Advantages of ADR in Design/Construction Disputes

- Experienced Construction Attorneys
 - Can be effective as mediators...
 - Can reach "the right" result as arbitrators...
 - Can "fast-forward-the-tape-to-the-end" early in the dispute...
- Complex Issues: will a judge or jury understand?
- ADR is very common in design and construction
- Typically, not the type of cases which require a verdict
- Controversial opinion: mediation, done right, is great

Conclusion for Litigators? It Can Be Complicated!

- Project Delivery Methods
- Contract Form Selection
- How the Chess Pieces Are Arranged
- Insurance and Indemnity Issues
- Pricing Considerations
- Unique Issues and Doctrines

...should all serve to inform your litigation,
arbitration and mediation strategy



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- [WHAT MAKES GOOD CONTRACTS FOR DESIGN AND CONSTRUCTION PROJECTS?](#)
- [WHAT IS YOUR APPROACH TO NEGOTIATING DESIGN AND CONSTRUCTION CONTRACTS?](#)
- [WHY IS INSURANCE SO IMPORTANT IN DESIGN AND CONSTRUCTION CONTRACTS?](#)
- [SHOULD DESIGN AND CONSTRUCTION CONTRACTS ALLOW 'PREVAILING PARTIES' TO RECOVER ATTORNEYS' FEES?](#)
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- [WHAT CONTRACT TERMS PROMOTE EARLY, COST-EFFICIENT DISPUTE RESOLUTION?](#)

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AIA Contract Documents

For more about AIA Contract Documents:

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

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Attorney Responsible for Content: Jeremy S. Baker

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