

Managing Risk on Campus Capital Projects

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Pepper Hamilton Higher Education “In Brief” Series
September 5, 2019

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- ▶ Provides litigation, counseling and investigative services to colleges, universities and schools across the country, leveraging her broad higher education experience to provide practical advice in the myriad complex matters facing institutions of higher education
- ▶ Has provided extensive advice to colleges, universities and K-12 schools in areas such as Title IX and the Clery Act, employee and student misconduct, fundraising and major gift agreements, federal and state regulatory compliance, governing board activities and shared governance
- ▶ Before joining Pepper, Ms. Foerster was general counsel and chief of staff at Bucknell University.



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- ▶ Focuses his practice on construction-related matters. He represents clients in each phase of the construction process, including contract negotiation and formation, project counselling and dispute avoidance, and formal dispute resolution.
- ▶ Practice involves public and private construction and both domestic and international projects
- ▶ Before receiving his law degree, Mr. Spang held various roles in the construction industry, working for a general contractor, a construction manager and for a consulting firm. He holds a professional engineering license in the State of New Jersey and is a U.S. Green Building Council LEED® Accredited Professional.



Audio

The screenshot displays the Cisco Webex Events interface. At the top, the title bar reads "Cisco Webex Events" with standard window controls. Below the title bar is a menu with "File", "Edit", "View", "Communicate", "Participant", "Event", and "Help". The main content area shows a video player with a red text overlay: "Audio should stream automatically on entry through your computer speakers". Below this, a banner for "Pepper Hamilton Webinar" is visible. At the bottom of the video player, an "Audio Broadcast" control panel is shown, displaying "24.7 Kbps" and buttons for "Pause" and "Stop". The "Pepper Hamilton LLP Attorneys at Law" logo is also present. On the right side, a "Participants" panel lists "Panelist 1" (Brian Dolan (Host)) and "Attendee" (Brian Dolan (me)). The bottom of the interface features a toolbar with icons for mute, video, chat, and other functions.

File Edit View Communicate Participant Event Help

Cisco Webex Events

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Pepper Hamilton Webinar

Audio Broadcast

24.7 Kbps

Pause Stop

Pepper Hamilton LLP
Attorneys at Law

Participants

Panelist 1

Brian Dol... (Host)

Attendee:

Brian Dolan (me)

Q&A

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File Edit View Communicate Participant Event Help

Cisco Webex Events

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Pepper Hamilton Webinar

Audio Broadcast

24.7 Kbps

Pause Stop

Pepper Hamilton LLP
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Panelist 1

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Q&A

Q&A

Cisco Webex Events

File Edit View Communicate Participant Event Help

BD
Brian Dolan (Host)

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Pepper Hamilton Webinar

Audio Broadcast
24.7 Kbps
Pause Stop

Pepper Hamilton LLP
Attorneys at Law

Participants

- Panelist: 1
 - BD Brian Dol... (Host)
- Attendee:
 - BD Brian Dolan (me)

Q&A

**The webinar will be starting at approx. 12:00pm ET.
There is currently no audio until we start.**

We are on mute and will be starting in a few minutes.

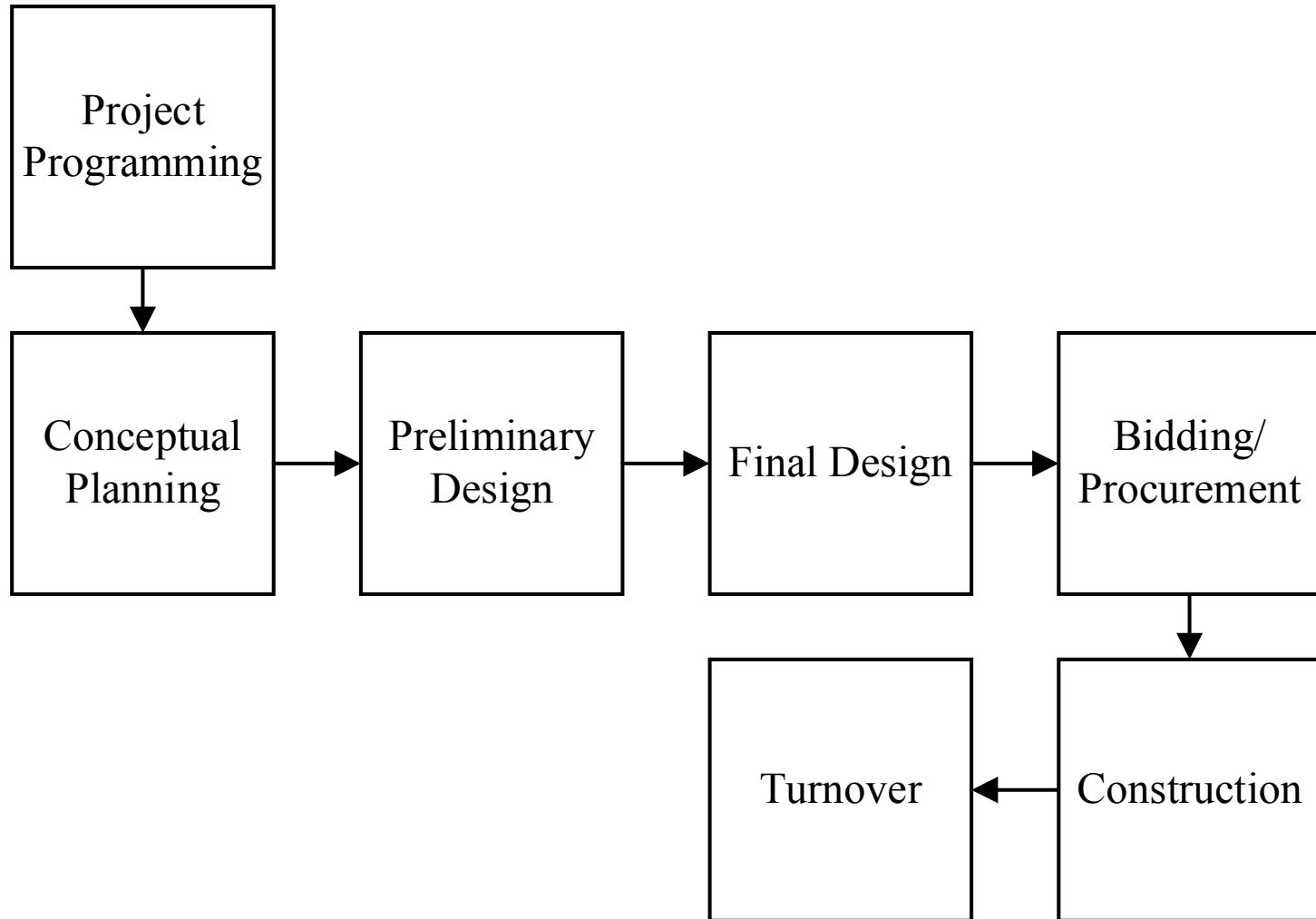
Today's Agenda: Capital Projects

- ▶ **Overview of Project Delivery Methods**
- ▶ Overview of Construction Contracts
- ▶ Risk Mitigation

Project Delivery



Project Delivery - Typical Project Life Cycle



Project Delivery Methods

▶ Design-Bid-Build

- Design complete before bidding – scope and cost certainty
- Contractor not involved in design process
- Extended project schedule

▶ Construction Manager (CM)

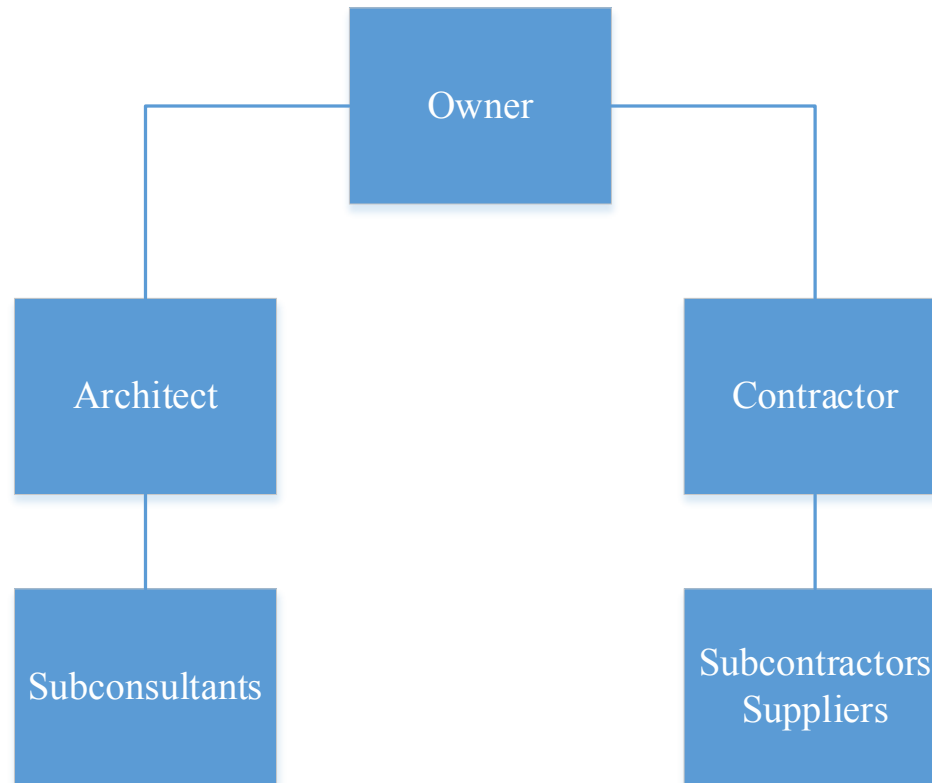
- Preconstruction Services – constructability input into design
- Early bidding / procurement – less scope and cost certainty
- Shorter overall project schedule
- Either “CM at risk” or “CM as agent”

▶ Design-Build

- Requires specific Owner requirements to determine scope and cost
- Contractor input into design – less Owner control of design details
- Generally, shortest overall project schedule

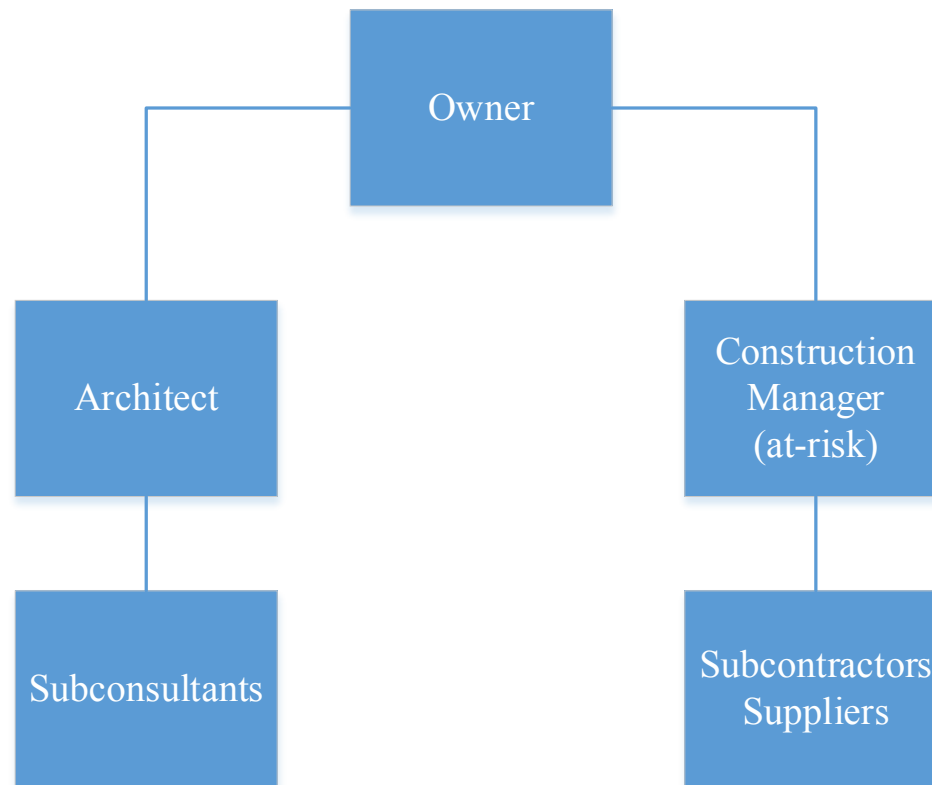
Project Delivery Methods

► Design-Bid-Build



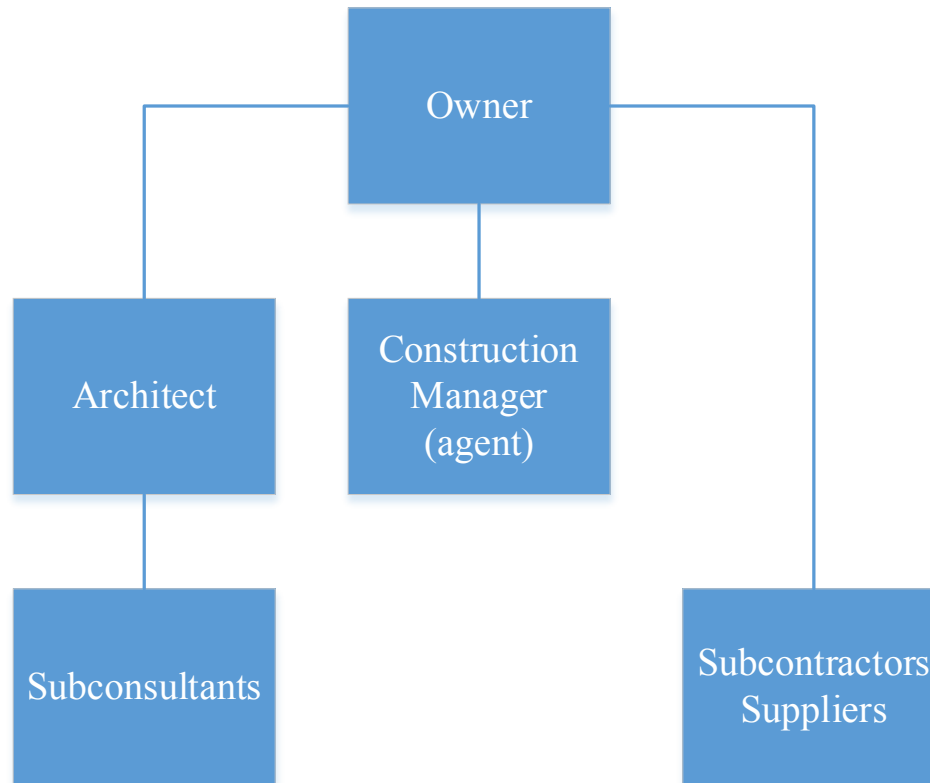
Project Delivery Methods

- ▶ Construction Manager (at-risk)



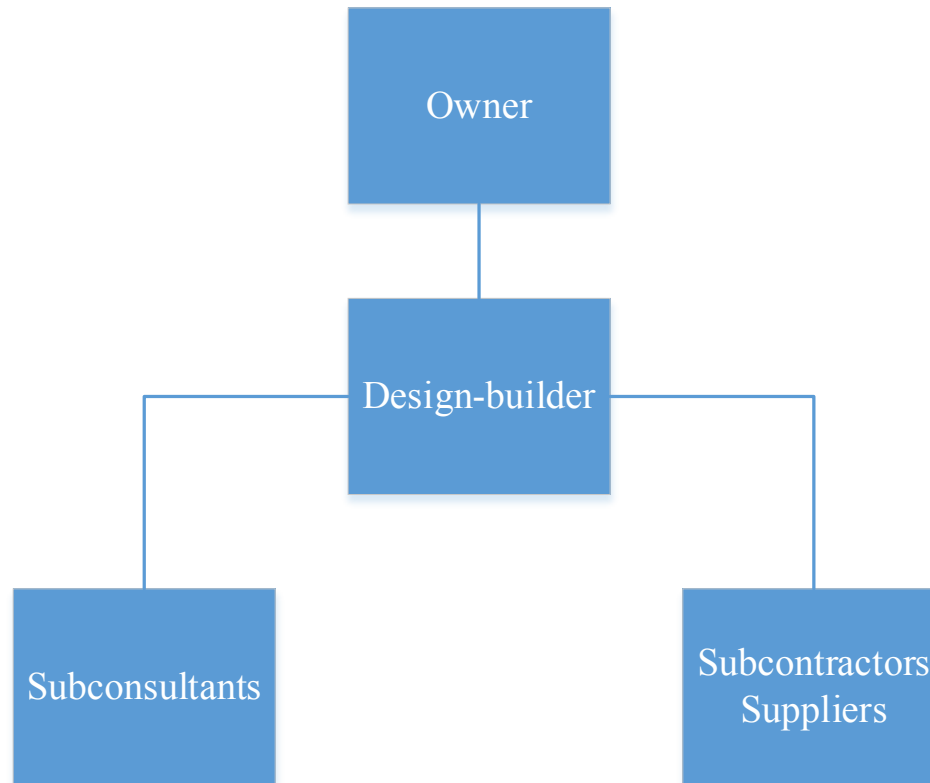
Project Delivery Methods

- ▶ Construction Manager (as agent)

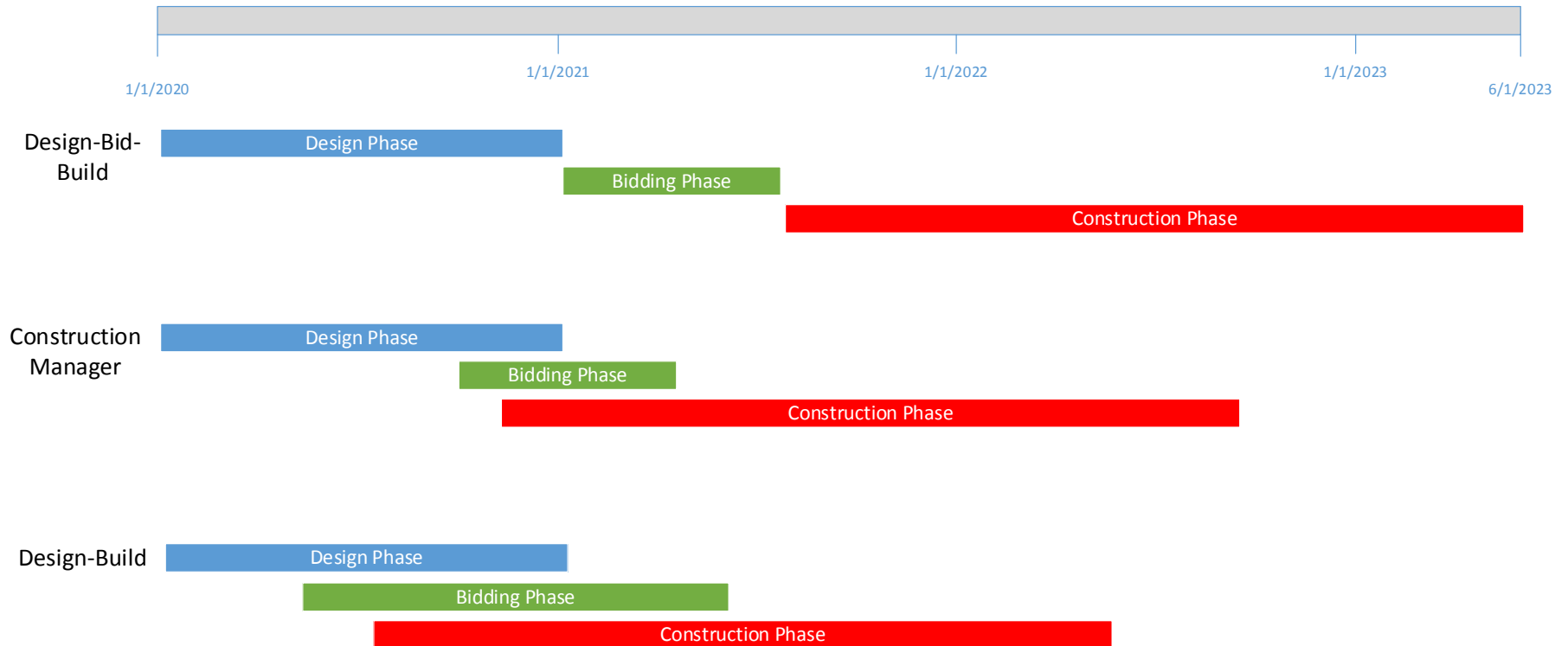


Project Delivery Methods

► Design-Build



Project Delivery Methods – Typical Schedules



Capital Projects

- ▶ Overview of Project Delivery Methods
- ▶ **Overview of Construction Contracts**
- ▶ Risk Mitigation

Construction Contracts - Compensation

▶ Lump Sum

- Typical for a design-bid-build delivery
- Fixed price for the scope in construction documents
- Change Order adjust the lump sum

▶ Cost of the Work plus Fee

- Typical for Construction Manager (CM)
- Pricing is set before design is complete – greater contingency
- Owner pays CM's cost (project management, subcontractors, etc.)
- Fee is a percentage of costs (higher the CM's cost, more CM fee)

Construction Contracts - Compensation

▶ Cost of the Work plus Fee (variations)

- Guaranteed Maximum Price (“GMP”)
 - Owner pays cost plus fee, but liability capped at GMP
 - GMP is set before design is complete – higher contingency
 - CM responsible to pay costs above the GMP
 - Change Orders adjust the GMP
- Shared Savings
 - If the Cost and Fee are less than GMP, Owner shares savings with CM
 - Provides incentive for CM to minimize costs (and fee)

Construction Contracts - Compensation

▶ Unit Price

- Contract identifies price for units of work
 - \$/ton steel, \$/yard³ concrete, \$/ft² drywall, etc.
- Costs are based on actual units installed

▶ Target Price

- Similar to cost plus fee without a GMP
 - Owner pays all costs plus the fee – without a limit
- Some shared risk
 - Shared savings below target
 - Some shared cost above target

Construction Contracts – Compensation

Compensation Structure	Cost Risk Owner	Cost Risk Contractor
Lump Sum	Low	High
Cost Plus Fee (GMP)	Medium	Medium
Cost Plus Fee (no GMP)	High	Low
Unit Price (without cap)	High	Low
Target Price (without cap)	High	Low

Construction Contracts - Forms

▶ Industry Forms

- Familiar to project participants
- Generally require editing to suit the needs of an individual project
- American Institute of Architects (“AIA”)
 - Projects where architect is involved in all phases
 - Architect Agreements (B Series Forms)
 - Construction Agreement (A Series Forms)
- ConsensusDocs
 - Primarily Construction Agreements
- Engineering Joint Contracts Documents Committee (EJCDC)
 - Projects designed primarily by engineers (e.g., process facilities)

Construction Contracts - Forms

▶ Custom Forms

- Forms prepared by Owner to utilize on all projects
- Minor revisions needed for each project
- Include all elements of Industry Forms
- May result in higher negotiation costs due to lack of familiarity

Construction Contracts - Forms

▶ Selecting a Form for a Project

- Either Industry or Custom Form – finalize proposed contract before issuing the request for proposal (“RFP”)
- Recommend including form of contract in the RFP and requiring proposals to identify proposed revisions
- Project participants more amenable to “non-standard” terms before selected for the project

Capital Projects

- ▶ Overview of Project Delivery Methods
- ▶ Overview of Construction Contracts
- ▶ **Risk Mitigation**

Risk Mitigation

▶ Primary Risks

- **Cost and Schedule**

- Despite the best planning, every project will experience events that will impact the project, resulting in cost increases and schedule delays
 - E.g., Owner/end user changes, architect-driven changes, value-engineering opportunities, contractor performance

▶ Risk Mitigation in General

- Develop the contractual processes for identifying and addressing the primary risks: cost increases and project delays.
- Administer the contracts pursuant to the agreed-to processes (e.g., notices, monthly schedule updates, lien and claim waivers)

Risk Mitigation – Design Professionals

▶ Delegated Design

- Without limits, design professionals will delegate design to the contractor

▶ Interim Design Deliveries and Modifications

- Schematic, Design Development, Construction Documents

▶ Construction Phase Services

- Frequency of site visits / meetings, submittal reviews, observation reports

▶ Design to Owner's Budget

- Remedies to Owner for bids exceeding Owner's budget

Risk Mitigation – Design Professionals

▶ Design Schedule

- Schedule to support the Owner's desired construction schedule
- Owner's right to accelerate performance

▶ Indemnity

- Protects the Owner from claims made arising out of or relating to the design professional's services
- Typically limited to personal injury and property damage
- Expanding the scope of the indemnity may affect insurability

▶ Standard of Care

- Care exercised by professionals on similar projects
- A higher standard of care (e.g., "first class") may affect insurability

Risk Mitigation – Design Professionals

▶ Insurance

- Architect's liability generally limited to insurance proceeds
- Professional Liability Policies are generally claims made and have eroding limits
 - Claims made – Architect must carry insurance for years after Project completion
 - Eroding limits – claims on other projects may limit recovery
 - Project specific rider – provides a policy limit specific to the project
 - Owner's Protective Professional Indemnity – owner's policy providing protection from design professional negligence

▶ Ownership of Design Documents

- Design professionals own the right to the design documents
- Owners need a license or transfer of ownership to use the documents
 - Ownership will allow the Owner to continue to use the documents in the event the design professional does not complete the design

Risk Mitigation – Contractors

▶ Changes to Contractor's Scope

- Specific process for identifying and pricing changes to Contractor's scope of work
 - Notice within a specified period
 - Identifying basis of change, cost and schedule impacts
 - Limitations on contractor and subcontractor mark-ups
 - Failure to follow process waives claims for cost and schedule increases
- Change Orders
 - Owner and Contractor agree on cost and schedule impact of a change
 - Executed Change Order should reflect that it is the final agreement on a change and waives additional claims (e.g., cumulative impact)
- Construction Change Directive
 - No complete agreement on cost and/or schedule impacts
 - Contractor performs the work and keeps detailed records of costs

Risk Mitigation – Contractors

▶ Schedule Delays – Defining Contractor Remedies

- Schedules prepared on the Critical Path Method (“CPM”), identifying the critical path – the activities that, if delayed, will delay completion
- Monthly schedule updates and reports describing schedule
- Process to identify and quantify schedule impacts
 - Notice to Owner of potential schedule delays
 - Delay period quantified by a CPM schedule analysis
 - Extensions of time net of concurrent contractor delay
- Identify the extent of potential contractor delay damages (e.g., field personnel, temporary offices)

Risk Mitigation – Contractors

▶ Schedule Delays – Defining Owner’s Remedies

- Liquidated Damages (“LD’s”)
 - Reasonable estimate of the Owner’s damages for contractor’s delay
 - Some states also require the LD’s to bear a reasonable relation to the Owner’s *actual* damages
 - LD’s can be applied to individual phases of the project and increasing for length of delay
- Waiver of Consequential Damages
 - Construction contracts typically include a mutual waiver of consequential damages
 - In the absence of LD’s, Owner may not be able to recover most delay damages

Risk Mitigation – Contractors

▶ Lien and Claim Waivers

- Prospective Lien Waivers

- Enforceable in some states in limited situations

- Periodic Conditional Lien and Claim Waiver

- Conditioned upon payment, contractor waives the right to pursue liens and claims arising before date of execution unless specifically identified
 - From contractor, subcontractors, sub-subcontractors, suppliers
- Some states prescribe the specific language that can be included in periodic waivers
 - Generally limiting the waiver to only lien rights (not other rights)
- Final waivers close-out the contract and waive all contractor claims

Risk Mitigation – Contractors

▶ Indemnity

- Protects the Owner from claims arising out of or relating to the Contractor's work
- Most contracts attempt to limit scope of obligation to third-party claims for personal injury and property damage
- Owner's typically negotiate expanded scope – to include all claims
 - For example, claims for payment made by subcontractors directly against the Owner
- Must include waiver of worker's compensation protections
 - Prevents contractor from asserting worker's compensation immunity to Owner's indemnity claim when claim is made by a contractor employee

Risk Mitigation – Contractors

▶ Insurance and Bonds

- Insurance

- Typically, contractor and subcontractors provide their own policies
 - Requires administrative costs to ensure insurance before work starts
- Wrap Insurance Programs
 - Project-wide policies covering contractor and all subcontractors
 - Subcontractor pricing excludes insurance costs
 - **OCIP** – Owner Controlled Insurance Program
 - **CCIP** – Contractor Controlled Insurance Program

- Performance and Payment Bonds

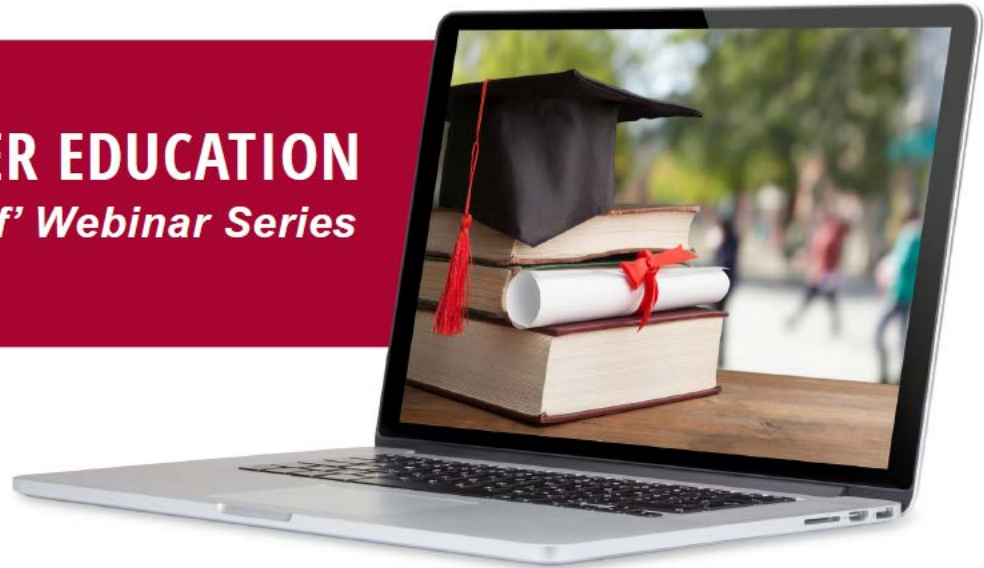
- Surety guarantees contractor will pay and perform its obligations
- Contractor will require performance bonds from subcontractors
- Some contractors replace subcontractor performance bonds with insurance (SubGuard[®]), potentially at a savings to the Owner

Questions & Answers

Save the Dates!

- ▶ Oct. 16
Renewable Energy
Trends and Opportunities
for Colleges and
Universities
- ▶ Nov. 5
Intellectual Property
Basics: What Every
Higher Education
Administrator Needs to
Know

HIGHER EDUCATION *'In Brief' Webinar Series*



Save the dates! More detailed invitations to follow. All recordings from 'In Brief' webinars can be found on Pepper's Insight Center.

Email Brian Dolan at dolanb@pepperlaw.com to join the invite mailing list.

For more information, visit

www.pepperlaw.com

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