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Legalities and Realities of School Construction

Competitive Bidding, Professional Services Agreements, and Construction & Post-Construction Issues

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School Bidding Overview

- Threshold is \$25,000
- State prevailing wage law does not apply to school construction
- School bidding statute is limited to permanent improvements to a school building
- Minimum 2-week bid period
- 2 legal notices in the local newspaper; may reduce this to 1 if the notice is posted on the District's website and the notice includes information about the posting
- Professional services are not procured through "bidding"

Procurement

1. Goods and Equipment
2. Services
 - Design Professional
 - Construction Management
 - Other Consultants
 - Maintenance/Service Contracts
3. Construction and Permanent Improvements

Competitive Bidding

Required by the following statutes:

- ORC 3313.46 – “board determines to **build, repair, enlarge, improve, or demolish any school building**, the cost of which will exceed twenty-five thousand dollars” (emphasis added)
- ORC 3327.08 – “The purchase of school buses shall be made only after competitive bidding in accordance with section 3313.46 of the Revised Code.”

Check the Board’s purchasing policy for bidding requirements – it may require bidding for more types of purchases and may include services.

Selection of Professionals

- Design Professionals – qualification-based selection process (QBS) outlined in the ORC
 - architects, engineers, landscape architects, surveyors
 - QBS required for these services unless the District maintains a file with current qualifications (no more than 1 year old) and the cost of services < \$50,000
 - ORC Sections 153.65, et seq.; no time period defined for notice; requires public announcement requesting qualifications for available contract; publish notice in local newspaper
 - Design-Builder selection process is included in ORC Chap. 153. and OAC 153:1-2-02 thru 153:1-7-01.

Selection of Professionals

- Construction Managers – qualification-based selection process (QBS) outlined in ORC Section 9.33, et seq.
 - Construction Managers as agents (CMa):
 - RFQ must be issued describing services and qualifications
 - Legal notice must be placed in the newspaper
 - 30 day period required between placement of the legal notice and the opening of submittals from interested firms
 - Review, Rank, Select, Negotiate Agreement

Focus on Construction

- Exceptions to competitive bidding:
 1. ORC 3313.46(A) – “cases of urgent necessity or security and protection of school property”
 2. ORC 3313.46(B)(3) – HB 264 projects (energy conservation measures)
 3. ORC 3313.46(B)(2) – sole source (an item is available and can be acquired only from a single source)

Focus on Construction (cont.)

Exceptions (continued):

4. ORC 9.48(B) -- Joint Purchasing Programs (includes national and state associations of political subdivisions in which the purchasing subdivision is eligible for membership)
 - TIPS/TAPS
 - Local purchasing consortium (e.g., MEC in central Ohio)
5. ORC 125.04 – Ohio Cooperative Purchasing Program (requires annual membership fee)
6. For design professionals, there is also an exception for an emergency.

Construction

- Prior to HB 153, ORC 153.50 required separate prime contracts for construction projects over \$50,000 (electrical, HVAC, plumbing, at a minimum)
 - HB 153 eliminated this threshold
- ORC 153.50 now requires these separate prime contracts for any project that includes these trades, UNLESS the GC, CMAR, or DB model is used
 - There is no dollar threshold for using one of the 3 new project delivery models
 - **NOTE:** The State bidding threshold is \$200,000; the threshold for most other political subdivisions is \$50,000.

Other Options for Construction

Construction Reform added new project delivery methods for construction projects:

1. General Contract – traditional design-bid build approach using a design professional; but only one contract is awarded for all of the work (compared to multiple prime contracts); statutory competitive bidding process is used; only other statutory requirement is that the State subcontract form be used for all subcontracted work

Other Options (cont.)

2. Construction Manager at Risk – CMR is selected following the selection process outlined in the ORC and OAC. Still need a design professional to design the project (selected following the QBS process).
 - 2 phases – (1) qualifications solicited to prepare a short list of firms; and (2) technical and pricing proposals solicited from the short-listed firms, followed by evaluation and determination of firm that will provide the best value to the District for the project. Subcontractors are pre-qualified and approved by the District.

Other Options (cont.)

CMR (cont.)

- GMP (Guaranteed Maximum Price). A GMP is negotiated and added to the contract when the design is nearly complete.
- Subcontractors. Criteria for subcontractors must be approved by the Board; prequalified subcontractors must be approved for each subcontract; Board must approve the subcontractors proposed by the CMR.

Other Options (cont.)

3. Design-Build (DB) – DB is selected following the qualification-based selection process outlined in the ORC and OAC.
 - Criteria Architect/Engineer (CA/CE) – public owner must select a CA/CE following the QBS process outlined in ORC 153.65, et seq., to prepare the scope for the project.
 - 2 phases to select the DB – (1) qualifications solicited to prepare a short list of firms; and (2) technical and pricing proposals solicited from the short-listed firms, followed by evaluation and determination of firm that will provide the best value to the District for the project.

Other Options (cont.)

DB (cont.)

- GMP (Guaranteed Maximum Price). A GMP is negotiated and added to the contract when the design is nearly complete (or when the parties agree to engage in this step).
- Subcontractors. Criteria for subcontractors must be approved by the Board; prequalified subcontractors must be approved for each subcontract; Board must approve the subcontractors proposed by the DB.

Other Options (cont.)

Other Requirements for CMR and DB

- Contract Forms

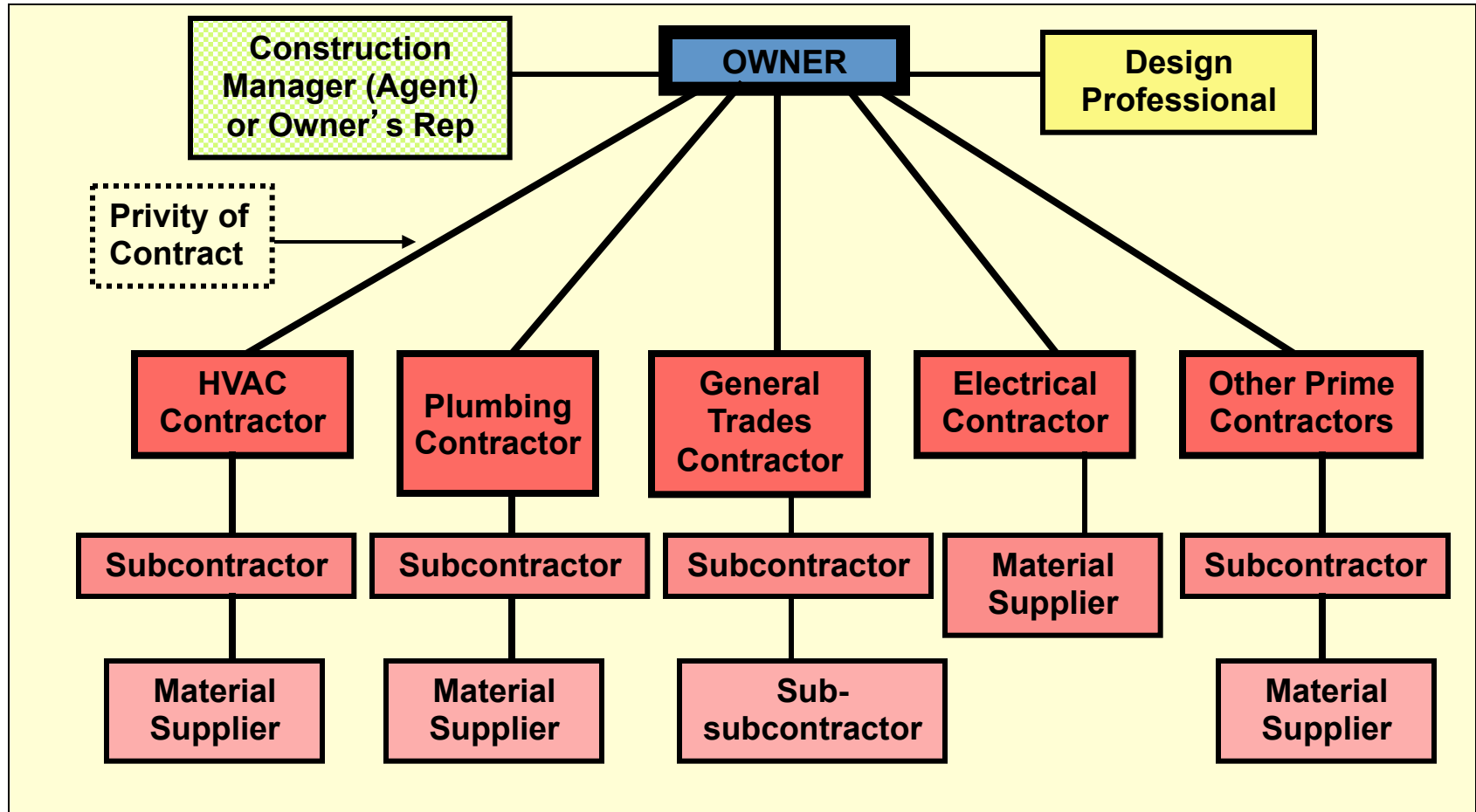
- State Forms on <http://ofcc.ohio.gov/Documents.aspx>

Don't recommend for school projects because the forms refer to the State and other State requirements that do not apply to a school district

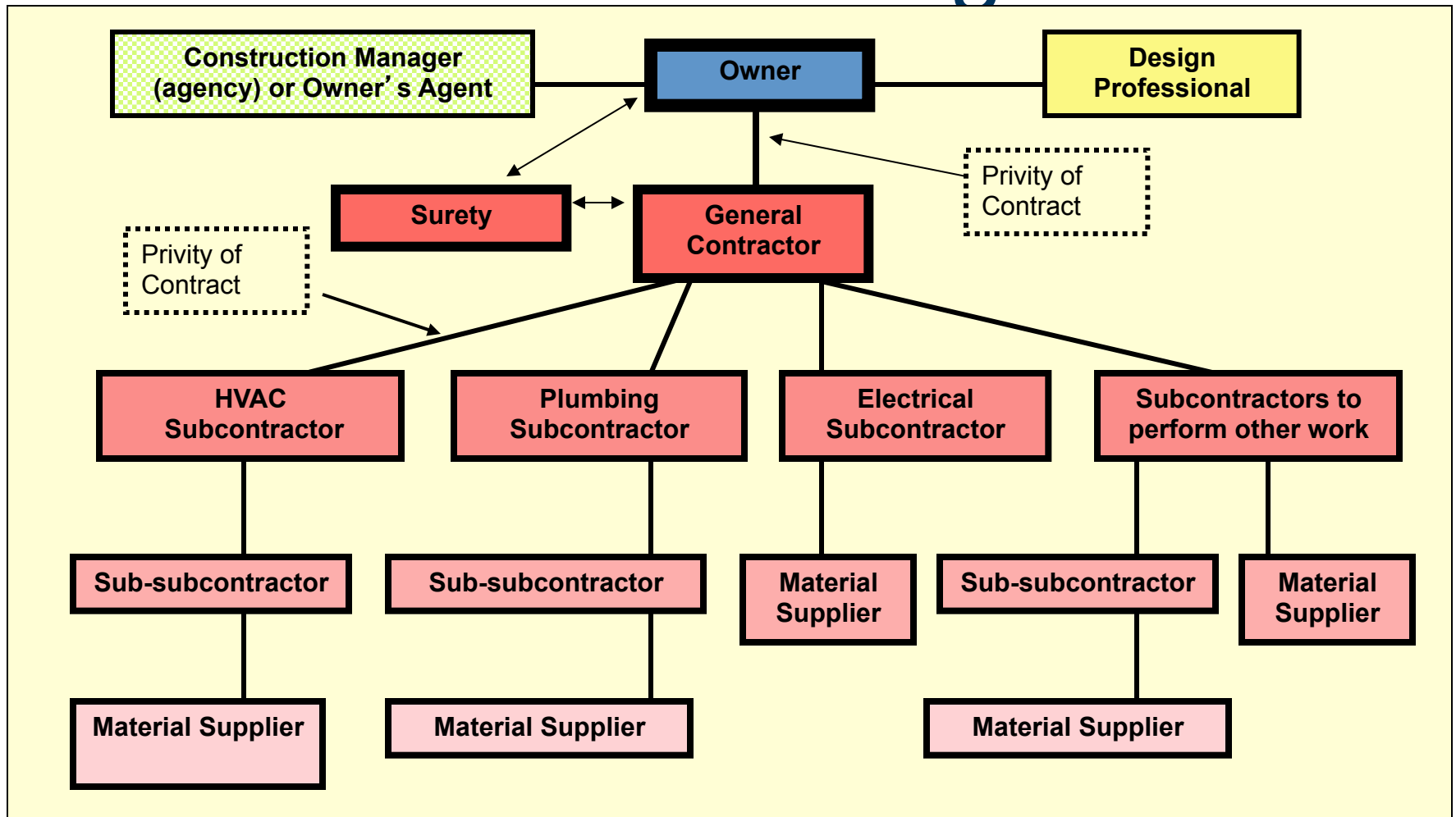
- AIA documents with appropriate modifications

- Payment and Performance Bonds (must use the State forms)

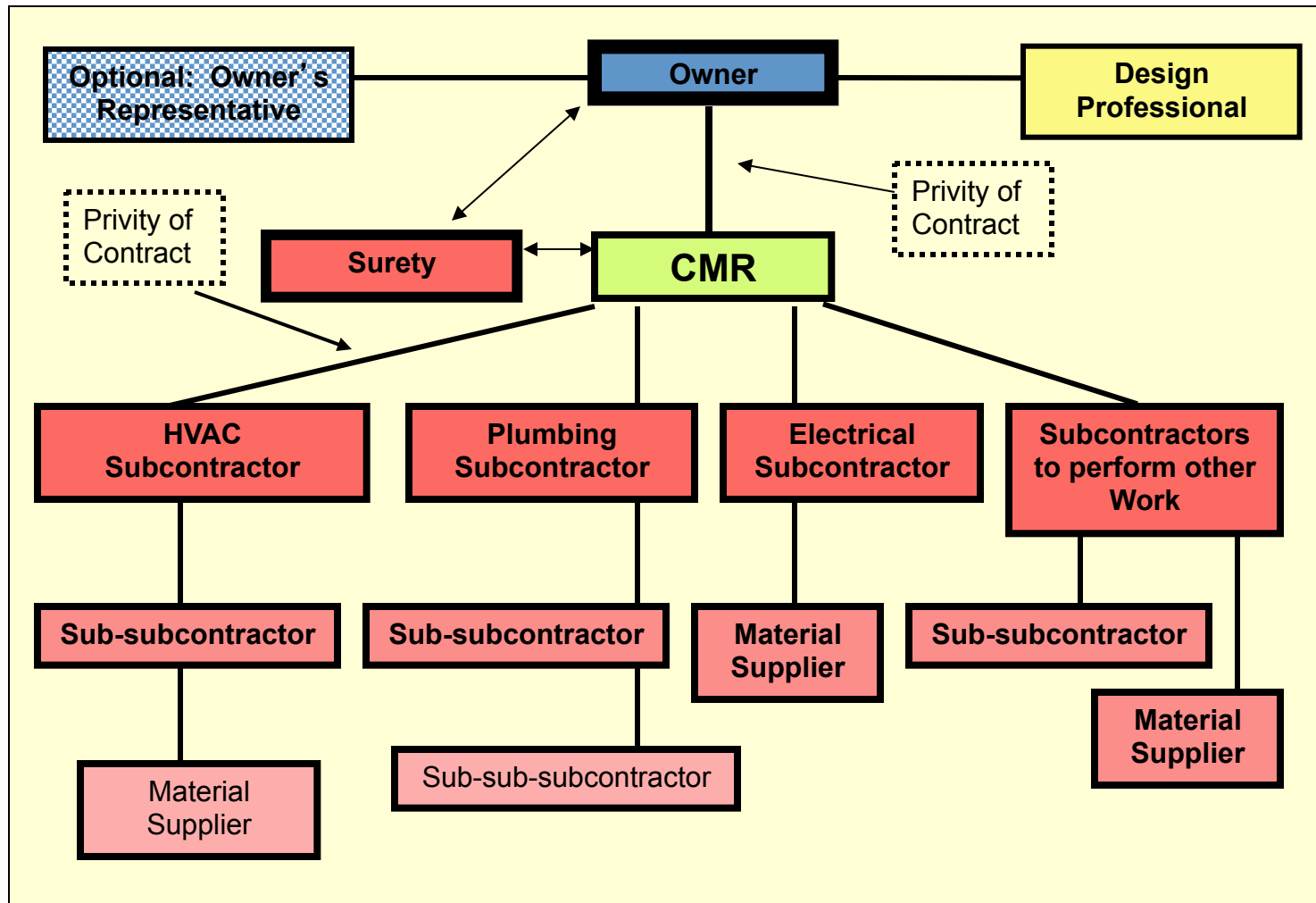
Multiple Prime Model



General Contracting Model

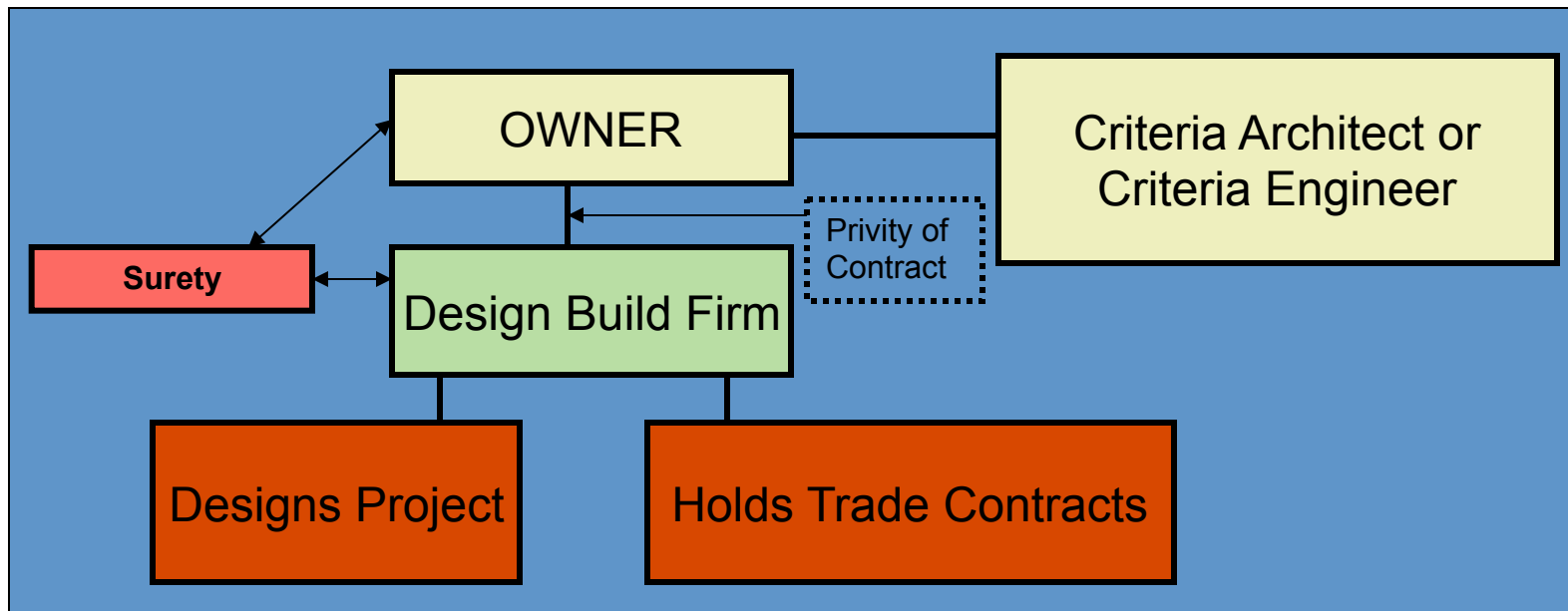


CMR Model



Design Build

Public authority contracts with a single entity for both design services and construction of the project.



DB firm is responsible for design of the project, construction of the project, and performance of the project when completed.

Preparing the Project

- Understand the role of construction counsel and the Board's architect
 - Who prepares and guides negotiations of the professional services agreements?
 - Design Professional
 - Construction Manager
 - Other Consultants – commissioning, abatement, testing, geotechnical, surveying
 - What form of agreement will be used?
 - AIA documents modified for Ohio public owners
 - Amendments to agreements – who prepares?
Form?

Preparing the Project (cont.)

- Who prepares the contract documents included in the Project Manual issued to bidders?
 - Be sure documents match applicable ORC requirements for public school construction, including, but not limited to:
 - Estimated construction cost
 - Liquidated damages
 - Retainage
 - Schedule for completion
 - Contractor's Personal Property Tax Affidavit
 - Non-discrimination language
 - Bond requirements
 - Correct bond forms
 - Check State Auditor's website for findings for recovery

Preparing the Project (cont.)

- Don't forget the Notice of Commencement and Notices to the surety and surety agent after contract award (both are required by the ORC)
- Be consistent in terminology; avoid using “bid” or any variation on “bid” when a proposal or quote process is used
- Define the process in the Instructions issued with the project information – including the standard for award and criteria used to determine the award of the contract

Change Orders

- What is a Change Order?
 - AIA Document A201-2007 (General Conditions):
 - A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect stating their agreement upon all of the following:
 - .1 The change in the Work;
 - .2 The amount of the adjustment, if any, in the Contract Sum; and
 - .3 The extent of the adjustment, if any, in the Contract Time.

Change Orders

- Change Orders --
 - Add to the scope of work in the Contract
 - Construction Change Directive (CCD)—Owner-requested changes
 - Design errors or omissions
 - Unforeseen site conditions
 - Deduct from the scope of work in the Contract
 - Owner-requested reduced scope
 - Back charges to contractor (defective/deficient/nonconforming work)

Change Orders

- What do you do when a contractor submits a proposed Change Order?
 - Obtain contractor's change order file
 - **Detailed** Scope of work
 - **Detailed** Pricing—a price quote breakdown showing unit prices, extended prices, fees, and markups.
 - Architect/Construction Manager should comment in detail on the reasons for approval/denial

Change Orders

- Practical Tips
 - Don't worry
 - Understand the contract
 - Notice provision
 - Make sure contract requires Change Order before work is performed
 - Substantiation requirements
 - Unless expressly required, only Owner may authorize changes

Claims

What is a Claim?

- Adjustment to the Contract Sum
- Adjustment to the Contract Time
- Interpretation of the Contract

Claims involve Money – Time – Rights

Claims

Why do Claims arise?

- It's not a perfect world
 - Defective work of others
 - Unforeseen circumstances
- Lack of communication
 - Disregard for protocols or contract process
 - Procrastination
- Poor management
 - Coordination issues
 - Lack of follow-through
 - Lack of leadership
 - Unskilled negotiations

Claims

- More reasons for why claims arise:
 - Bad chemistry (difficult to overcome)
 - Lack of trust
 - Disagreement
 - Unrealistic expectations
 - By the Owner
 - By the Architect or Construction Manager
 - By the Contractor
 - Incompetence
 - Lacks understanding of the Contract Documents
 - Lacks understanding of Claims process

Claims

- Who makes Claims?
 - Owner
 - Defective & nonconforming work
 - During construction & after
 - Contractors
 - Additional time
 - Additional money
 - Both
- Types of Claim for Additional Time
 - Stand by
 - Weather
 - Labor
 - Late materials

Claims

- Types of Claims for Additional Money
 - Delays
 - Excusable
 - Compensable
 - Concurrent
 - Inexcusable
 - Design warranty
 - *Spearin* Doctrine
 - Changes
 - Scope disputes
 - Patent ambiguity
 - Unresolved CCDs

Claims

- Why are Claims on the rise?

Lower fees (design, management & construction)

+ Tighter schedules

+ Higher expectation of performance

= More Claims

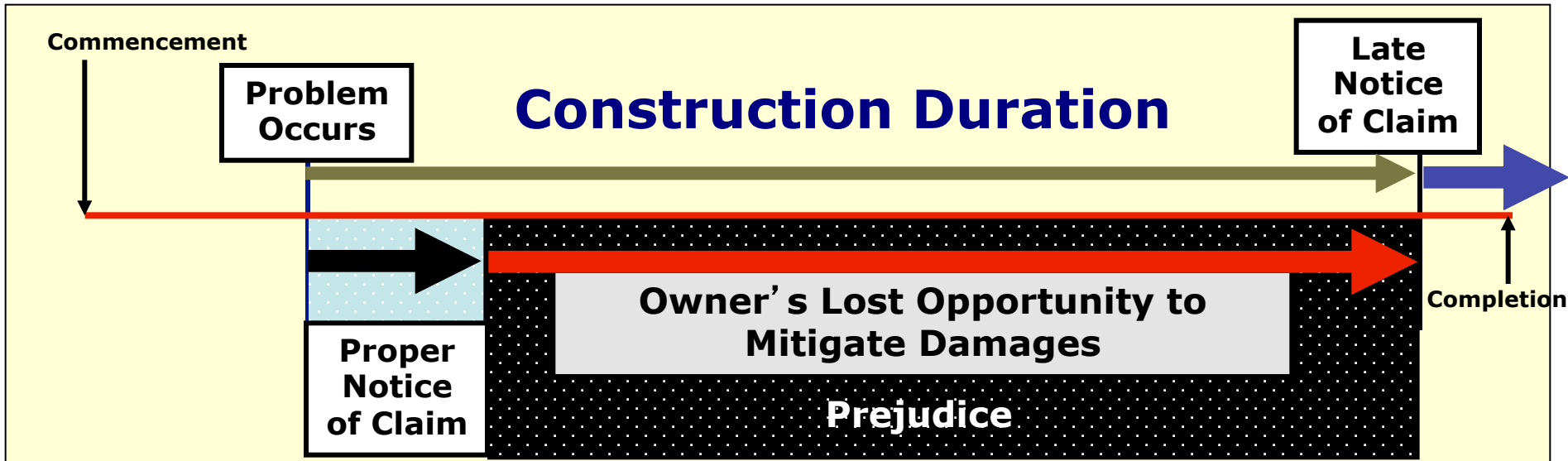
- A claim is received, what happens next?

READ THE CONTRACT!

Claims

- All standard industry contracts provide for claims, but the notice provisions and the process will vary. It is critical to preserve a party's legal rights to follow the contract provisions and process.
- Notice Requirements
 - Misunderstood
 - Often ignored
 - Can be fatal to an otherwise valid Claim
 - Protect:
 - the budget
 - the schedule
 - Eliminate unpleasant surprises

No timely notice = lost opportunities



- **Opportunity to:**

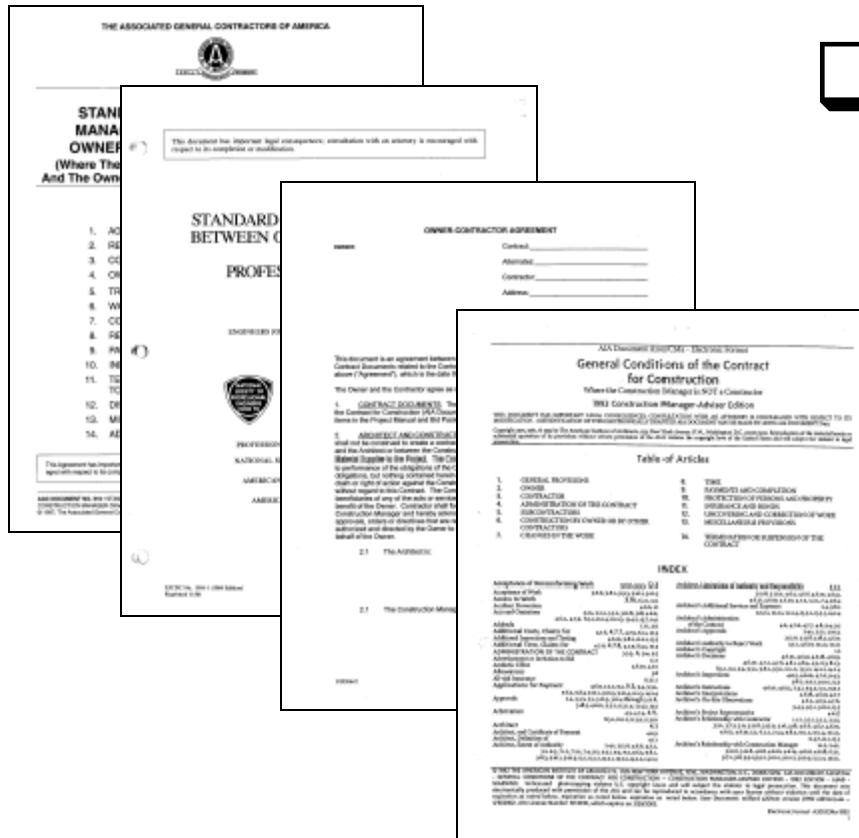
- Investigate & evaluate the claim
- Direct change in the drawings/specs
- Adjust schedules
- Value engineer
- Control discretionary spending
- Terminate for convenience

- **Lost opportunity to:**

- Investigate & evaluate the claim
- Direct change in the drawings/specs
- Adjust schedules
- Value engineer
- Control discretionary spending
- Terminate for convenience

The Basics – An Overview of Construction Claims

- How to submit a Claim



□ Read the Contract and

- give written notice ---
- at the proper time ---
- to the proper person ---
- at the proper place ---
- in the proper manner

Claims

- How to submit a Claim
 - Provide supporting documentation
 - Provide all that is available
 - Contemporaneous job records
 - Cost accounting (bid estimate if total cost method is used)
 - Photos
 - Explanation
 - Cooperate to provide additional information as requested
 - Be proactive!

Mechanic' s Lien Claims

- Process governed by Ohio Revised Code
- RC §§ 1311.25 - 1311.32
- Claim against Funds – Not Real Estate
- Claimant' s right is to recover funds due under the construction contract, not to foreclose on real estate
 - Different from private construction
- Funds are those allocated for, AND earned by, the Prime Contractor

Mechanic's Lien Claims

Notice of Commencement

The Notice of Commencement (NOC):

- Provides information about the Project
- Prepared by the School District
- Prepared prior to beginning construction
- Must be made available upon request
- Serves as notice to the world as to who the principal contractors are on the project and provides the surety information for each contractor
- NOTE:
 - The NOC is not a notice to proceed.

Mechanic's Lien Claims

Notice of Commencement

- Differences from the private world:
 - Not required to be recorded with the County Recorder
 - Not required to be posted at the Project site
 - Not required to be served on the Principal Contractors
- **NO PENALTY PROVISION** for failure to prepare and provide NOC

Mechanic's Lien Claims

Affidavit of Claim

- Notice to the Owner of a Claim against funds by a subcontractor or material supplier
- Lien claim must be in affidavit form
- Filed with Owner within 120 days after date of last work
- Typically recorded with County Recorder for priority sake, but not required

Mechanic's Lien Claims Affidavit of Claim

The Claim Affidavit must include:

- Name and address of claimant
- Name and address of party that contracted with claimant
- Name of Principal Contractor
- Name of Owner and Project
- Date of last work
- Amount due

Mechanic's Lien Claims Response to Claim

- Owner must provide notice to the Principal Contractor within FIVE days of receipt
 - Notice must state that Principal Contractor has TWENTY days to dispute the lien
- “Detain” the claim amount (if this amount has been earned and is due) from the Principal Contractor’s next pay application (RC 1311.28)
 - Place detained funds in an escrow account governed by an escrow agreement negotiated between the Owner and Principal Contractor (RC 153.63)
 - 8% annual penalty for failing to deposit funds in escrow account

Mechanic's Lien Claims Claim Process

After Contractor receives notice of the claim from the Owner

- The Principal Contractor has 20 days to dispute the claim in writing
- Failure to do so results in the claim being “assented to” (ORC 1311.31)
- If there are no priority issues, Owner must then pay the detained funds directly to the claimant

Mechanic's Lien Claims Claim Process

- If the claim is disputed by the Contractor within the 20-day period, the detained funds stay in the escrow account until
 - the parties agree to resolve the claim, or
 - a court orders the release of the funds, or
 - claimant fails to commence suit after being served with the notice.

Mechanic's Lien Claims Claim Process

- If the claim is disputed, the Owner or the Principal Contractor may send the claimant a notice to commence suit.
- Claimant must then file suit within SIXTY days or the claim is void, and the funds must be released to the Principal Contractor

Mechanic's Lien Claims Claim Process

- If a lawsuit is filed by the claimant
 - The Owner typically is named as a party to the lawsuit as a stake holder
 - File a motion to deposit funds with court in exchange for dismissal
 - Contractor can always bond the claim off
 - Bonding company is now the stakeholder

Mechanic's Lien Claims

Practical Tips

- Indemnification provision in contracts can give Owner an avenue to recover legal fees
- Payment provision in contract can give Owner avenue to withhold additional funds for legal fees
- Marshall the process along quickly so that contract funds are available to pay legal fees
- Avoid recommendations from project representatives to “wait before responding to the lien” to give additional time for parties to “work the dispute out”; impact can be:
 - Statutory penalties
 - Contract funds dissipate

Post-Construction Issues

- Do not assume that post-construction issues are warranty items; the problem may be non-conforming work covered by the contract.
- The Contractor has an obligation to provide work that conforms with the specifications for the work.
 - This obligation is not tied to the 1-year period for correction of the work.
 - This obligation is not limited by any warranty given by the contractor (be careful that the warranty language included in the contract does not void this obligation).

Post-Construction Issues

- Provide notice of the issue:
 - following the contract provisions for notice to both the contractor and its surety; many times the work was performed by a subcontractor – do not contact the subcontractor directly! The contractor is responsible for the work.
 - Be careful not to avoid a warranty on the materials or system/equipment
- **REMEMBER** that the contract bond is effective as long as the contractor has an obligation under the contract.

QUESTIONS

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