



Building Better Projects: Hot Topics in Construction Law

December 13, 2023

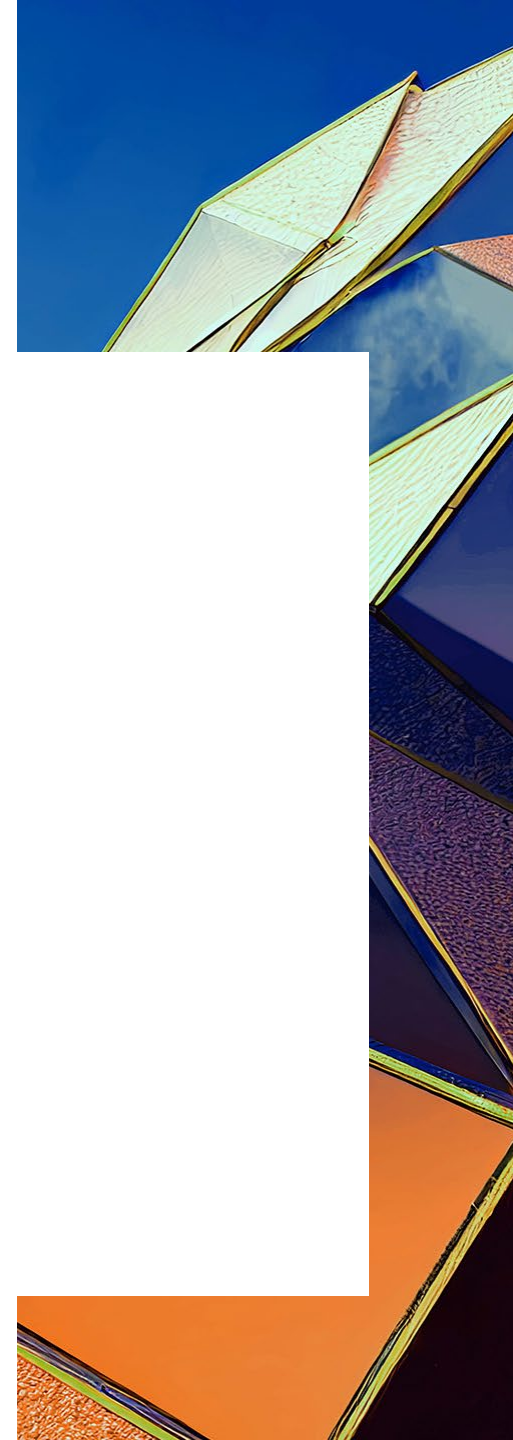
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Presenter



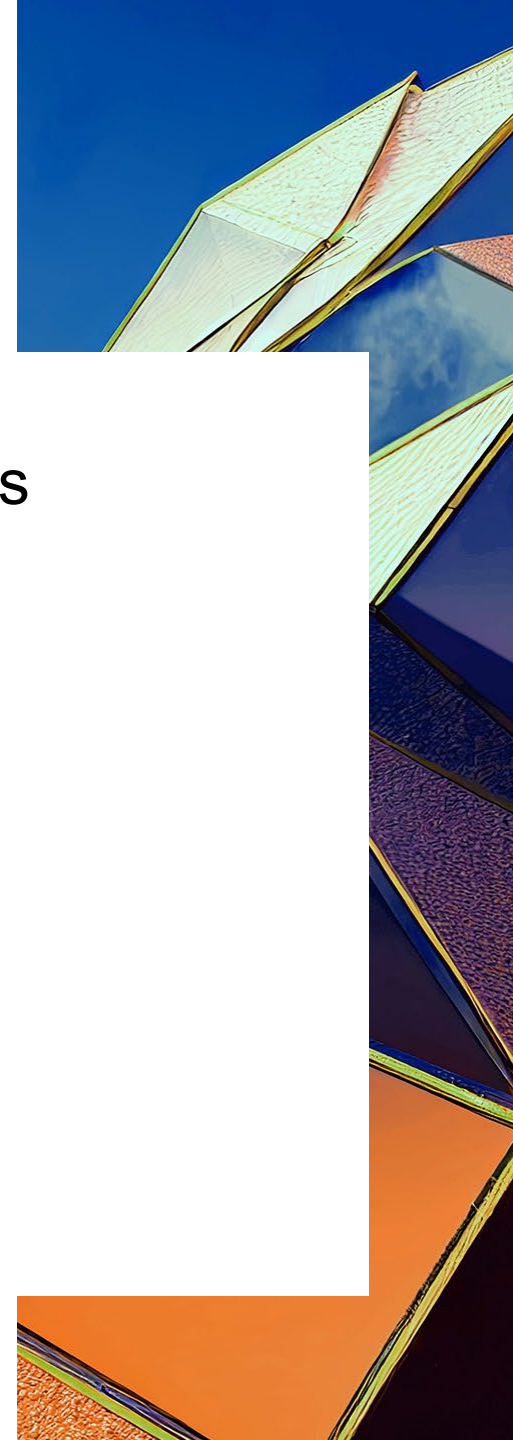
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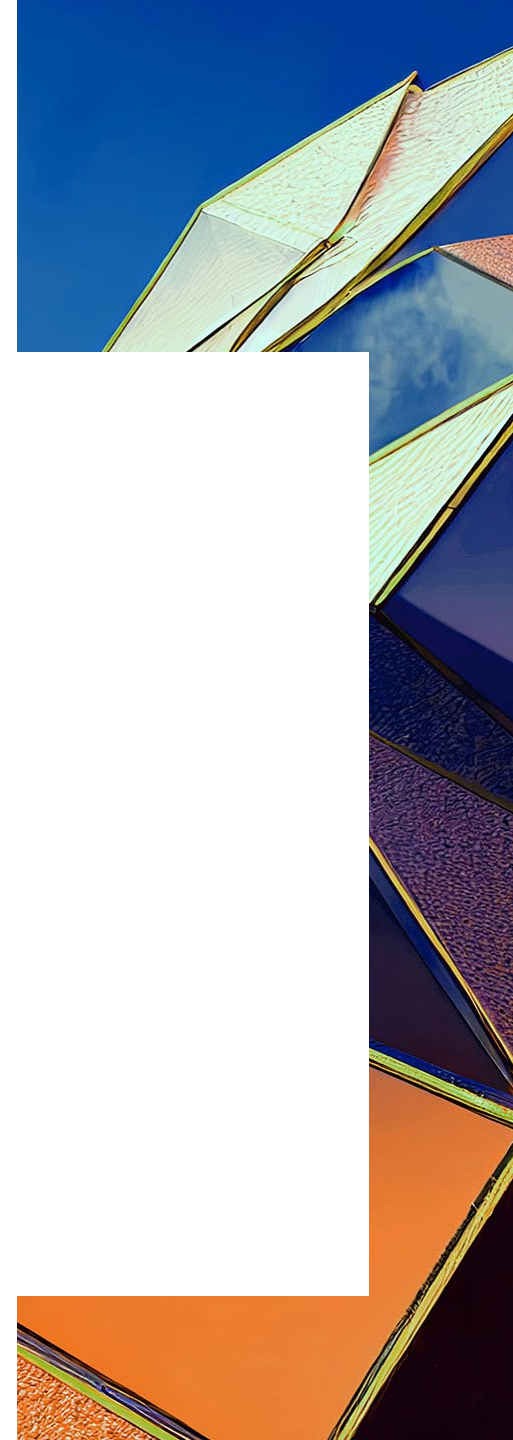
Agenda

1. Understanding Project Delivery, Pricing, and Contracting Methods
2. Talking the Talk: Key Terms
3. Identifying and Mitigating Risk

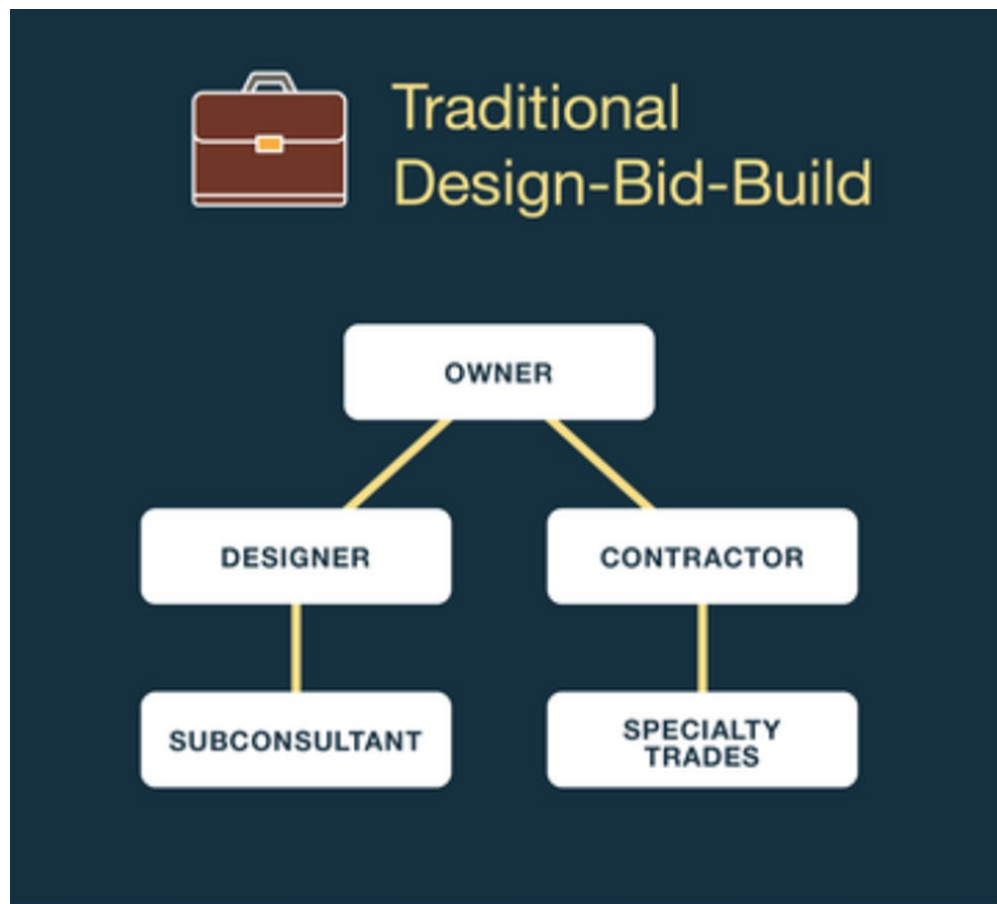


Understanding Project Delivery

1. Are there different project delivery methods?
2. What types of contracts are used for design and construction?
3. What are the pricing models that drive contract form?

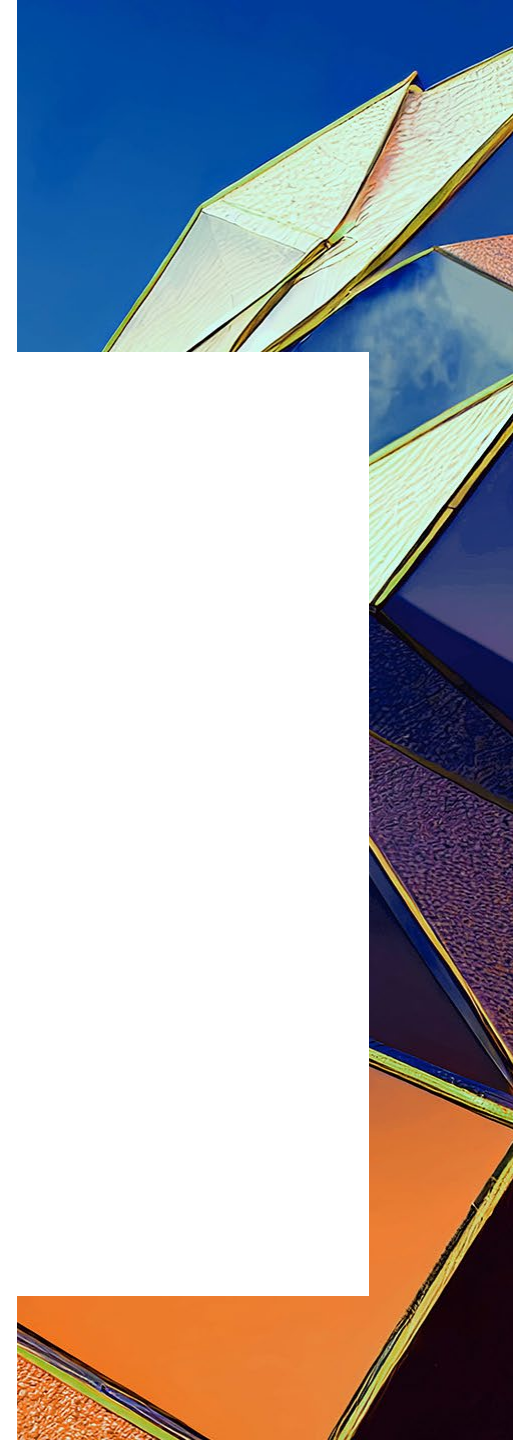
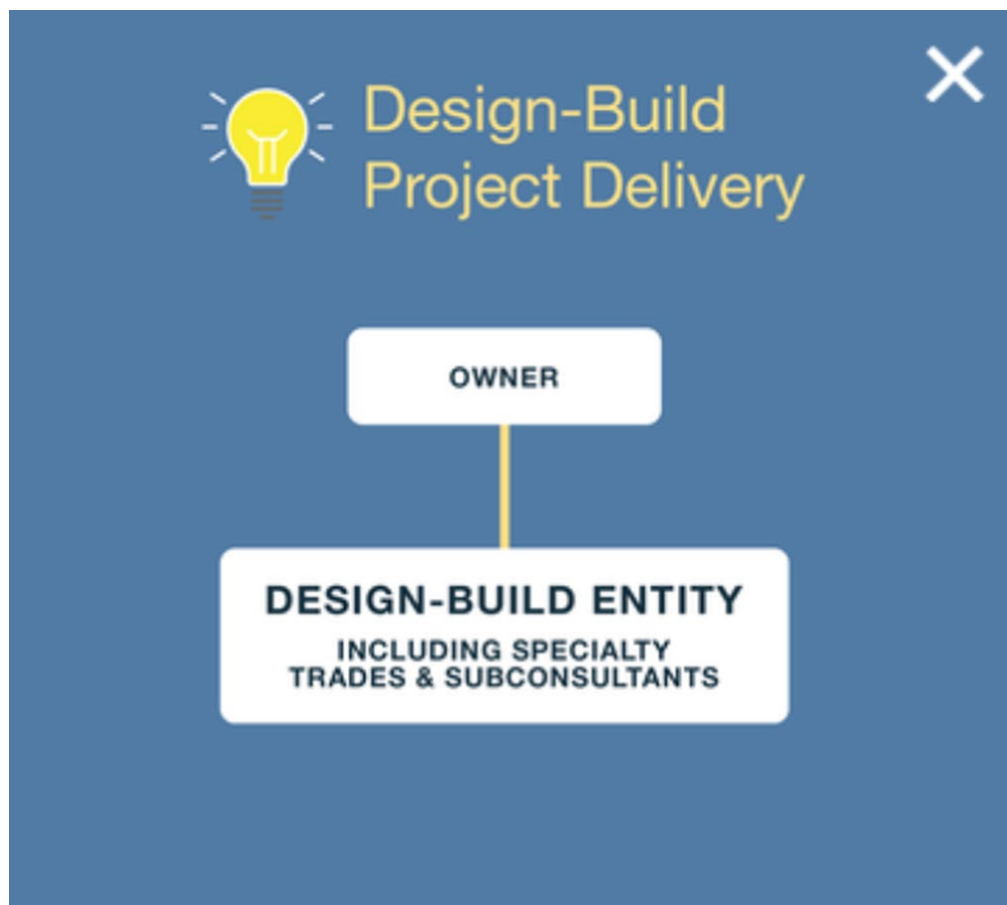


Methods of Contract Delivery: Traditional



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Methods of Contract Delivery: Design-Build



Methods of Contract Delivery: Construction Manager at Risk (CMr)



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Standard Contract Forms

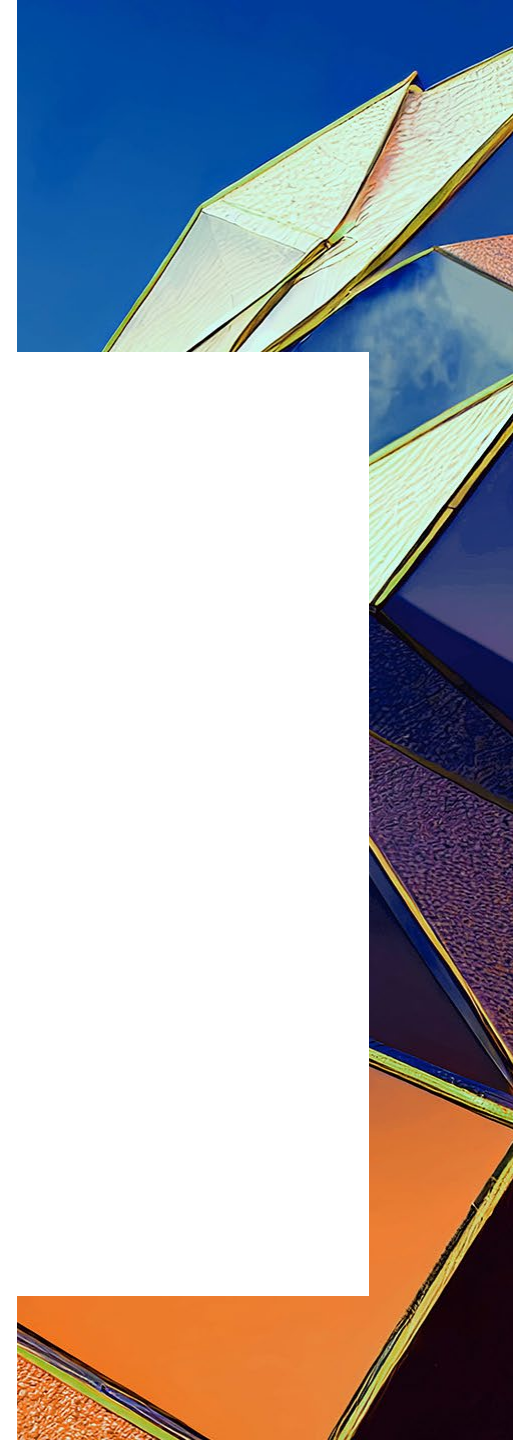
A Series (Construction)

- A104: Short Form
- A101: Base Stipulated Sum Form
- A102: Base GMP Form
- A133: Base CM @ Risk Form
- A201: Standard General Conditions
- A141: Design-Build Form
- A401: Standard Subcontract

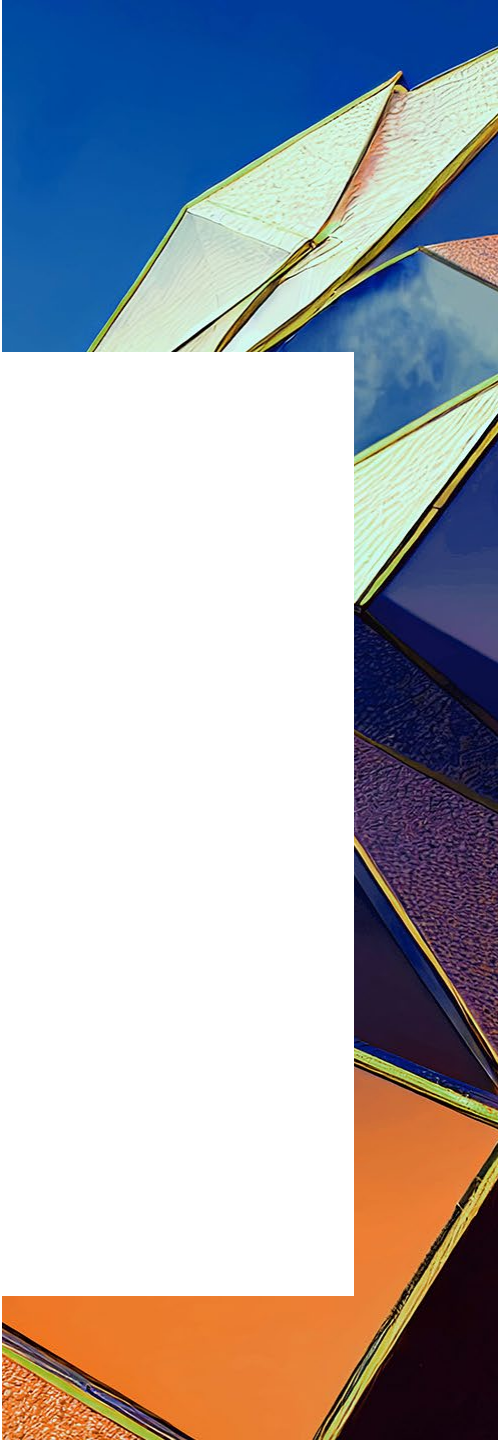


B Series (Design)

- B101: Owner/Architect
- B111: Owner/Architect of Record
- B112: Owner/Design Architect
- B133: Owner/Architect (w/ CMr)



Pricing Models

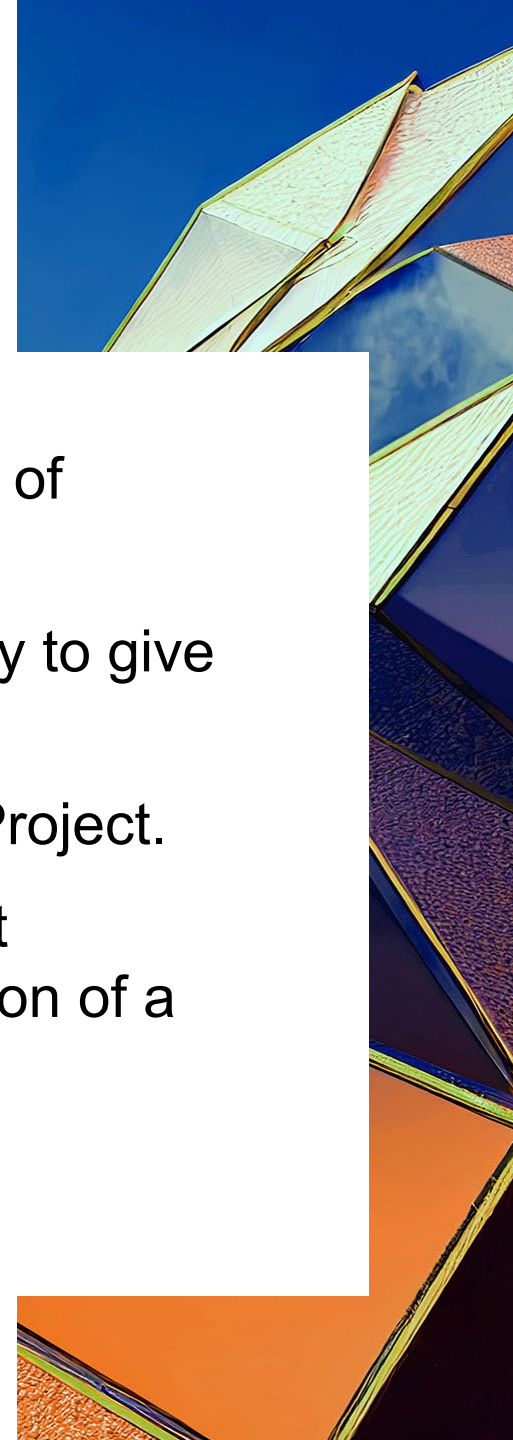




Talking the Talk: Understanding Key Terms

Key Terms

- “**Allowance**” is an estimated cost for a known expense that at the time of contracting cannot be precisely quantified.
- “**Alternates**” are defined portions of the Work that are priced separately to give the Owner an option in determining the Project’s final scope.
- “**As-Builts**” are record drawings showing the final construction of the Project.
- “**BIM (Building Information Modeling)**” is a cloud-based platform that integrates data from different disciplines to create a digital representation of a project during its construction lifecycle.



Key Terms (cont'd.)

- **“Change Order”** means a written order signed by the Contractor and Owner authorizing a change in the Work, which also may adjust the Contract Sum and/or the Schedule.
- **“Contingency”** is a defined amount within the contract sum that is reserved to fund certain unexpected costs. Typically, Owners seek the right to approve contingency use above a threshold value and disallow the Contractor from using contingency to cover repair or correction of work caused by the Contractor’s negligence or willful misconduct.
- **“Corrective Work Period”** means the **one-year** period after the date of Substantial Completion when the Contractor is required to fix or repair upon notice.

Key Terms (cont'd.)

- “**CPM**” means a critical path method schedule in the form of precedents, networks, and time sequences **using Primavera**.
- “**Excusable Delay**” is an event not caused by the Contractor that results in an actual delay in Substantial Completion.
- “**Fee**” means the fee payable to the Contractor for the Work as a component of the GMP.

Key Terms (cont'd.)

- **“Force Majeure”** means an event or circumstance that (a) is beyond the control of Contractor, (b) occurs without Contractor’s fault or negligence, (c) Contractor could not reasonably have been expected to have foreseen the impacts to the critical path of the Schedule at the time that contractor entered into the Agreement, and (d) Contractor was unable to prevent or avoid by exercise of reasonable diligence without expenditure of additional costs that would increase the Contract Sum.

Any extension of the Contract Time or Construction Schedule for a Force Majeure Event, including any milestone dates therein, shall be the Contractor’s **sole remedy** for any impact resulting from a Force Majeure Event and shall be **net of any contingency or “float” time** included in the Construction Schedule.

Key Terms (cont'd.)

- **“Final Completion”** means that all Work — including all Punch List Work — is complete and all final deliverables have been submitted by the Contractor to the Owner.
- **“GMP (Guaranteed Maximum Price)”** is a cost-plus contract where the Owner pays the Contractor costs for labor and materials, and an additional negotiated margin to cover profits (Fee), up to a maximum amount.
- **“Liens” or “Mechanic’s Liens”** are statutory remedies available to contractors, subcontractors, suppliers, and sometimes designers to secure a debt owed for work performed. Liens are legal claims against the property.

Key Terms (cont'd.)

- **“Liquidated Damages”** provide for the payment of a set amount (usually on a per diem basis) from Contractor to Owner in the event of an unexcused delay. “LDs” are commonly structured with a grace, a cap, or a lockstep.
- **“Notice to Proceed** is a writing from the Owner to the Contractor stating that the site is available to the Contractor and directing the Contractor to commence the Work.
- **“Pay-if-Paid Clause”** is a contingent payment term meaning that if the Owner does not pay the Contractor, then the Contractor is not obligated to pay the subcontractor.

Key Terms (cont'd.)

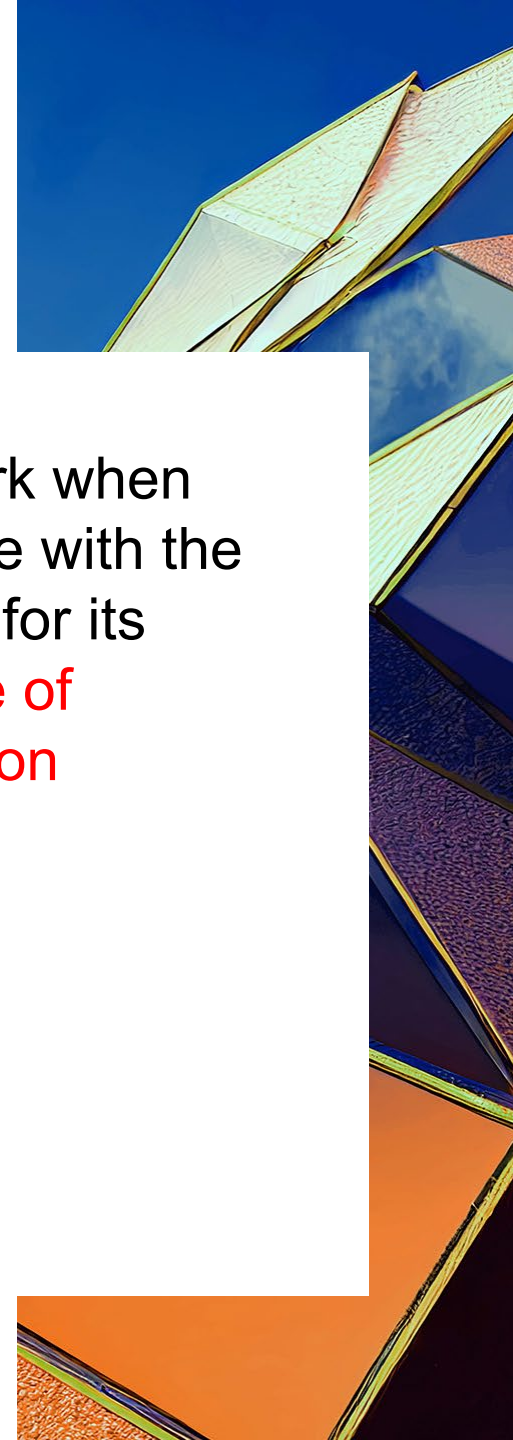
- **“Pay-when-Paid Clause”** is a timing mechanism that delays the time required for the Contractor to pay its subcontractor until a set period after the Contractor is paid.
- **“Pencil Requisition”** is a draft pay application that is submitted by the Contractor to the Owner in advance of the formal submission of the pay application.
- **“Punchlist Items”** means items of Work that are non-structural, minor portions of the Work that do not, except in a de minimis manner, prevent the Project from being used for the purpose for which it is intended that will not prevent the issuance of a certificate of occupancy, **and that will not cost in the aggregate more than one half percent (0.5%) of the GMP to complete.**

Key Terms (cont'd.)

- “**Retainage**” means the amount withheld from the progress payments from the Owner to the Contractor. All retainage is usually released at Substantial Completion except for 150% of the value of the punch list, which gets held back until Final Completion.
- “**Schedule of Values**” is a document prepared and submitted by the Contractor allocating the Contract Sum to the various portions of the Work. Essentially, it is a complete list of work items broken down into their component parts with their corresponding values.

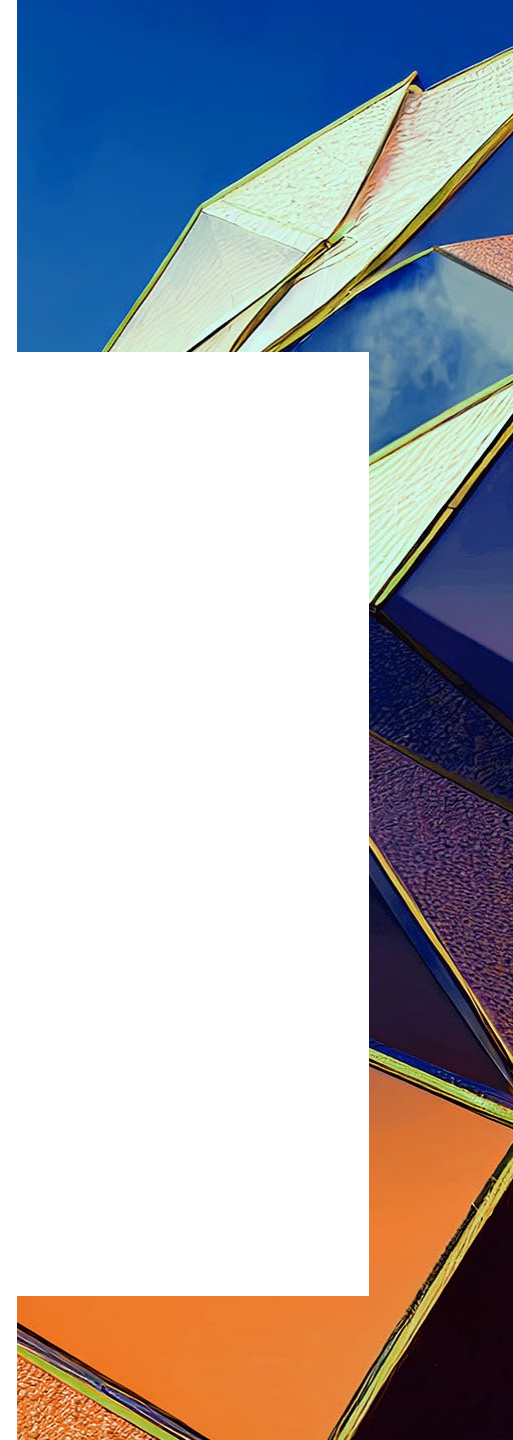
Key Terms (cont'd.)

- **“Substantial Completion”** means the stage in the progress of the Work when the Work (or a designated portion) is sufficiently complete in accordance with the contract Documents so that the Owner may occupy or utilize the Work for its intended use (**which typically requires Contractor obtaining a certificate of occupancy or temporary certificate of occupancy for work or such portion thereof**).



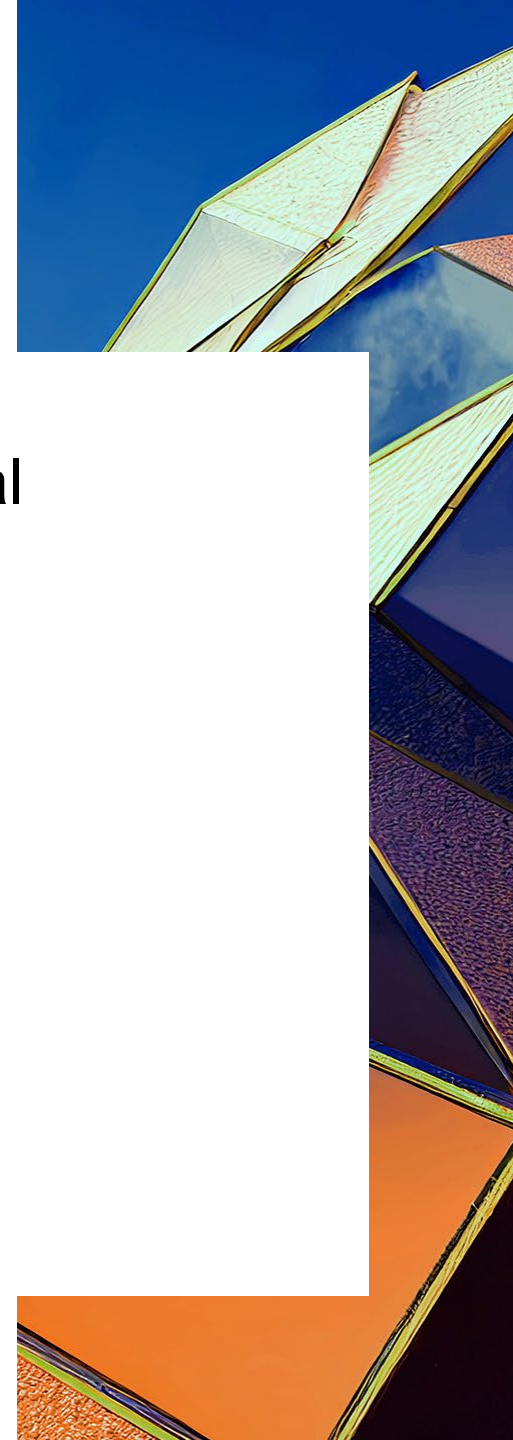
Mitigating Risk: Things to Watch For

- Time
- Liens
- Retainage
- Warranty
- Indemnification



Time Considerations

- Is there an LD provision for late delivery (make sure to get mutual waiver)?
- Is there a mandatory acceleration clause?
- What is required for scheduling?
- What does the Force Majeure provision cover?

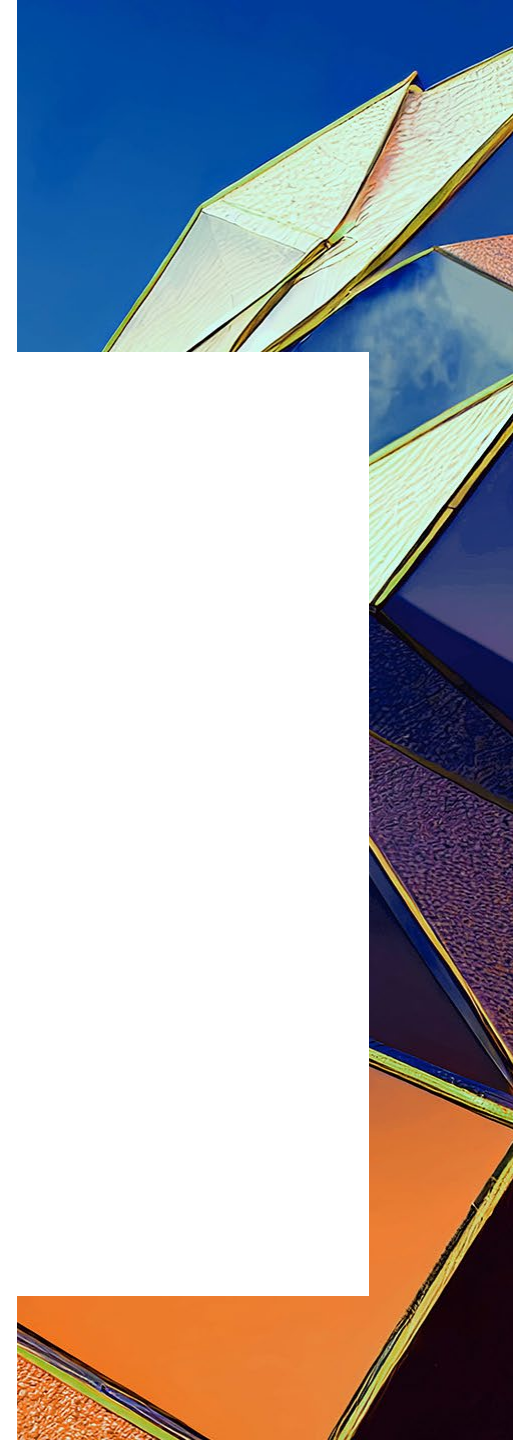


Lien Considerations

- Does the agreement prohibit a contractor's right to lien?
- Does the agreement require the immediate discharge of liens by the contractor? Any caveats?
- Are waivers required and by whom?
- What are the steps to perfecting a lien in your project's jurisdiction?

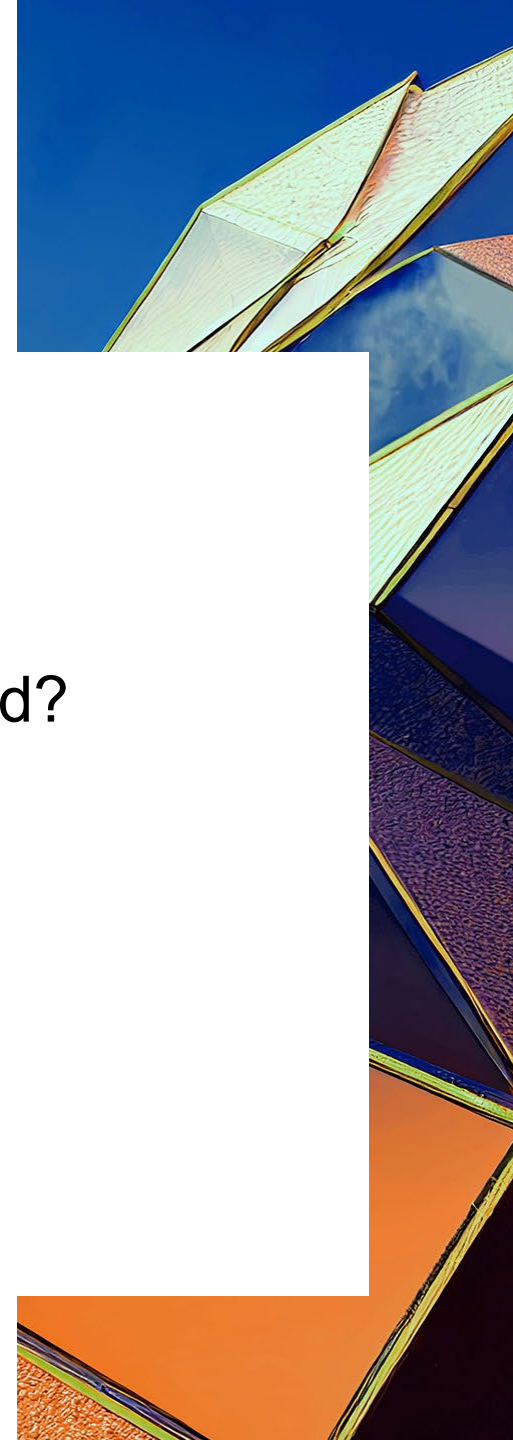
Retainage Considerations

- Does governing law dictate the amount the Owner can hold?
- When is retainage released?
- What can be held back from the release of retainage?



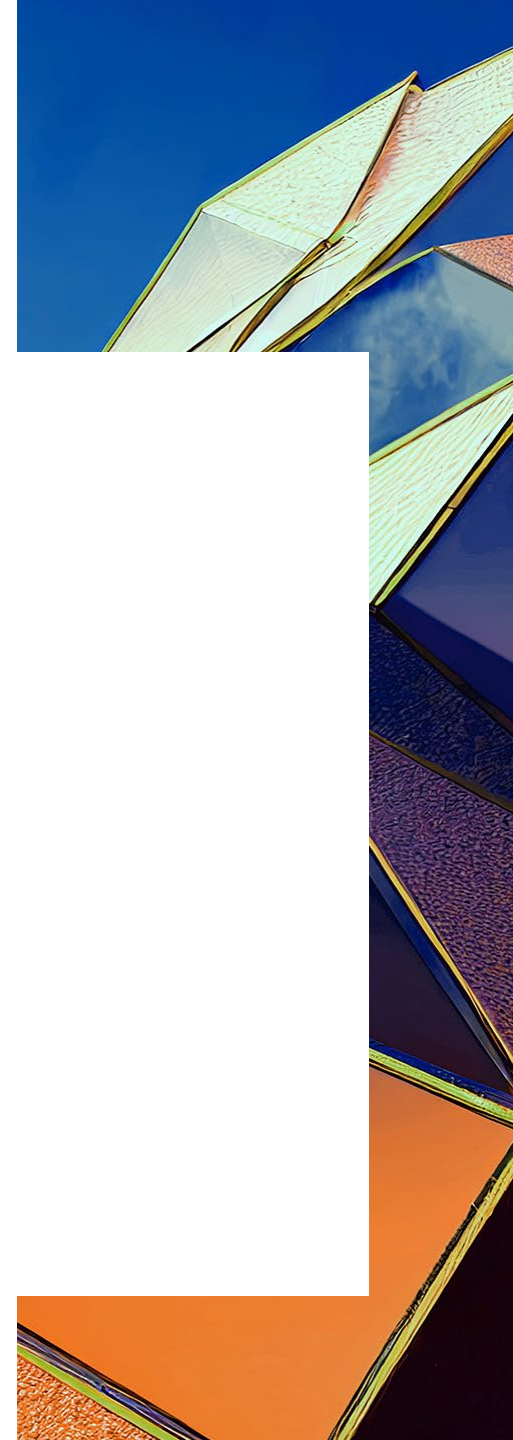
Warranty Considerations

- What do the warranties cover?
- Have additional warranties been added (H2O)?
- Are warranties limited to the duration of the corrective work period?



Indemnification Considerations

- Is upfront defense required?
- Who is included in the litany of indemnitees?
- Does the indemnitee fault reduce the liability of the contractor?



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